ANNOTATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS

VOL. 107

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1890

REPORTED BY

THEODORE F. DAVIDSON

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2 ANNO. ED.

BY

WALTER CLARK

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1890

ISAAC HOBBS v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Negligence of Fellow-servants—Railroads—Relation of Fireman and Engineer.

1. A railroad company is not liable for injury to its servants resulting from the negligence of a fellow-servant. This case is governed by *Hagins v. R. R.*, 106 N. C., 537.
2. The relation between a fireman and locomotive engineer is that of fellow-servants.
3. The fact that a servant is a foreman over other hands, or is of superior authority, whose orders other servants are bound to obey, does not necessarily render the company liable for his negligence resulting in injury to them.
4. In order to render the company liable to an employee for injuries caused by the negligence of a fellow-servant, it must appear that it exposed the servant to unnecessary risks, or retained the negligent or incompetent servant in their employment, knowing him to be such.
5. Discussion and review of liability for the injury of fellow-servants by *Clark, J.*

APPEAL at Spring Term, 1890, of CRAVEN, from *Armfield, J.* (2)

The complaint alleged that the plaintiff, a fireman, was injured by the negligence of the engineer, under whose direction and control he was placed in defendant's service; that the engineer negligently ordered him to go out upon the engine and oil certain machinery while the engine was in swift motion; that thereafter the engineer, while the plaintiff was out on the engine, negligently stopped it, so that the plaintiff was injured thereby.

The defendant demurred, on the ground that the complaint did not state a sufficient cause of action.

The court gave judgment overruling demurrer. Appeal by defendant.

H. R. Bryan and C. R. Thomas (by brief) for plaintiff.
W. W. Clark for defendant.

CLARK, J. In this case, as in *Hagins v. R. R.*, 106 N. C., 537, it is set out in the complaint that the injury to the plaintiff, who was a fireman, as in that case a brakeman, was caused by the negligence of the engineer. This case must be governed by that. While it is not always easy to draw the line between what constitutes a fellow-servant and what a superior employee or vice principal, the relation between a brakeman or fireman and the locomotive engineer is well settled to be that of fellow-servants. It was so held in the first case on the subject, *Murray v. R. R.*, 1 McMillan (S. C.), 385, and has been repeatedly and uniformly so ruled since. *Jordan v. Wells*, 3 Woods (C. C.), 527; *Bull v. R. R.*, 67 Ala., 206; *R. R. v. Henderson*, 15 Lea (Tenn.), 423; *Henry v. R. R.*, 49 Mich., 495; *Pauline v. R. R.*, 34 N. J. L., 151; *R. R. v. Elliott*, 1 Col., 611; *Jones v. Yeager*, 2 Dill., 64; *Caldwell v. Brown*, 53 Pa. St., 453; *R. R. v. Rush*, 15 Lea (Tenn.), 145; *R. R. v. Waller*, 48 Ala., 459; *Howard v. R. R.*, 26 Fed., 837; *R. R. v. Blohn*, 73 Tex., 637 (1889), and (3) there are many others.

In *Dobbin v. R. R.*, 81 N. C., 446, it is held that to make the company liable, the negligent employee must be something more than a mere foreman over other hands, and in *Kirk v. R. R.*, 94 N. C., 625, *Smith, C. J.*, says: "The operation of the principle (of nonliability of master for negligence of fellow-servant) is not altered by the fact that the servant chargeable with negligence is a servant of superior authority, whose lawful directions the other is bound to obey." The same view is held in *Webb v. R. R.*, 97 N. C., 387, by the present *Chief Justice*, although in the latter case the negligent servant had authority to employ and dismiss the injured employee. The principle above quoted from *Kirk v. R. R.* is fully sustained by Whart. Neg., sec. 229; Wood's Master and Servant, sec. 437; Cooley on Torts, pp. 543-4; Shear. and Red. Neg., sec. 100; Pierce on Railroad, 366; *Wright v. R. R.*, 25 N. Y., 564, and cases cited.

There is no allegation here that the company exposed the plaintiff to unusual and unnecessary risks, or that, knowing that the engineer was unfit or incapable, they retained him in their service. Indeed, the services appear to have been those incident to the scope of plaintiff's employment as fireman, and the injury was caused by negligence of the engineer, his fellow-servant. The allegations in the complaint that, "as such fire-

man, the plaintiff was under the direction and control of the locomotive engineer," and that "engine with train of freight cars attached was managed, controlled and conducted by said engineer and *other agents* and servants of defendant company," in no wise distinguish the case from the ordinary one of fireman and engineer.

The doctrine that a master is not liable to an employee for the negligence of a coemployee rests upon the principle that a man, as a rule, is no more liable for the wrongs done by another man than he is for his debts. There are some exceptions to the rule; among them, for instance, that passengers injured by the negligence of servants of a common carrier can recover damages of the carrier because of the breach (4) of the contract of safe carriage, and so where a stranger is injured by the acts of a servant within the scope of his employment. This last is upon the ground of public policy, and also because, as to the stranger, the servant is the agent of the master. An effort to create a further exception so as to make the common master liable to a servant for an injury done him by the negligence of a fellow-servant first came before the courts of England in 1837 in *Priestly v. Fowler,* 3 Mees. & W., 1, in which *Lord Abinger (Sir James Scarlett),* in a very able opinion pointed out the inconveniences and often the great injustice which would be produced if the master were held responsible. The principle laid down was that a servant on entering upon his employment contracted with a view to the ordinary risks of such employment; and, further, it was public policy that it should be so, since, if for injury to a servant by his fellow, he could not hold the master liable, servants would be prompted by their own interests to observe want of skill or care on the part of their fellows and promptly report the same. This principle was also laid down (without any knowledge of the Westminster decision) by the Supreme Court of South Carolina in *Murray v. R. R.,* 1 McMillan, 385 (1841), and applied to railroad corporations (the case was that of a fireman injured by the negligence of an engineer), and was followed by the able opinion of *Shaw, C. J.,* in *Farwell v. R. R.,* 4 Metc., 49. It was applied to railroads in England in 1851, in *Hutchinson v. R. R.,* 5 Exch., 343. Since then the same ruling has been made in a long line of decisions; so that, *Gray, J.,* in *Randall v. R. R.,* 109 U. S., 478, well says that "the rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of his employ- (5) ment."

There are modifications, as where the fellow-servant is acting as vice principal, or *alter ego;* also where the master furnishes machinery which he knows or, with care, ought to have known to be defective, or retains an unfit or incompetent servant who does the injury or exposes the

servant to unusual risks not contemplated by the scope of his employment. But the present case, as we have seen, does not come within any of these. It is still frequently urged that, as to railroads, there should be an exception made to the general rule of nonliability of the master. But, whatever may be argued in favor of or against the propriety of such exception, the rule is so well settled that the courts have not felt authorized to make it. The change, wherever it has been made, has come by legislative enactment.

In Georgia the common-law rule has been repealed by sections 2083 and 3036 of The Code, which provide that when an employee of any railroad company is injured by another employee without any default or negligence on his own part, the company is liable for damages as to passengers for injuries caused by want of due care and diligence.

Similar provisions have been adopted in several other States (McKinney on Fellow-Servants, secs. 100-9), and in their courts are to be found the decisions which are in conflict with ours. Wherever the common-law rule has remained, as in this State, unchanged by statute, the holdings of the courts are in substantial conformity to ours. The common-law rule has also been very much modified in England by statutory enactment—the "Employers' Liability Act" (commonly known as the Gladstone Act) of 1880—and that fact must be considered with reference to all the later English decisions.

The demurrer should have been sustained.

Per Curiam. Reversed.

Cited: Rittenhouse v. R. R., 120 N. C., 547; *Pleasants v. R. R.,* 121 N. C., 495; *Hancock v. R. R.,* 124 N. C., 226; *Harris v. Quarry Co.,* 131 N. C., 556, 558; *Nicholson v. R. R.,* 138 N. C., 517; *Clark v. Wright,* 167 N. C., 648; *Vogh v. Geer,* 171 N. C., 679.

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PETER BOOTH v. ROBERT RATCLIFFE.

Employer and Employee—Abandonment of Contract—Charge—Legal Cause for Quitting Service.

1. Where only the appellant's case on appeal is sent up, but it is further made to appear that it was served within the time allowed by law, and no exception thereto was taken or countercase served, it must be taken as the "case on appeal."

2. The defendant resisted an action of his employee for wages, on the ground that he abandoned his service before the expiration of the contract. The contract was that plaintiff should work for defendant a year for a fixed sum, and be furnished a house; nothing was said about when the money was to be paid at the time of contract, but afterwards defendant said he would pay from time to time during the year as he had it and as plaintiff might need it; that if either party became dissatisfied during the year, work was to stop. Defendant paid $1 in February; he promised more in March, but did not pay it. Defendant did not furnish a sufficient house: *Held*, (1) that the charge of the court that, upon the plaintiff's own showing, he was not entitled to recover, was error; (2) the plaintiff quit for good legal cause; (3) the contract amounted to an undertaking, which either party could put an end to at any time.

ACTION begun 25 March, 1890, before a justice of the peace, and tried on appeal before *Boykin, J.*, at May Term, 1890, of VANCE.

The plaintiff sued to recover $21.86 as wages for work on defendant's farm from 1 January to 22 March, 1890. The defendant denied plaintiff's right to recover, claiming that he owed him nothing and alleging that plaintiff had hired to him for 1890 and left 22 March, 1890, without cause. He admitted payment to defendant of $1 on his wages. Plaintiff admitted the hiring was for a year, but claimed that he left defendant's employment for cause.

Upon the trial in the Superior Court the plaintiff offered himself as a witness in his own behalf, and he testified that he contracted to work for defendant on his farm during 1890 for $100, and was to be allowed twelve holidays and be furnished a house to stay in by (7) defendant; that if either party became dissatisfied during the year with the bargain, he was to stop work; that at the time the contract was made nothing was said about when the money should be paid; that afterward defendant told him he would pay him from time to time during the year as he had it and plaintiff might need it, and asked plaintiff if he would sue him if he could not pay it all cash by the end of the year; that he (plaintiff) told defendant this would be satisfactory; that he would take portions of his wages whenever defendant desired to pay it; that defendant paid plaintiff $1 on his said wages in February; that plaintiff, in March, asked defendant for some money on his wages, when defendant said he would sell some tobacco as soon as he finished sowing oats, and pay plaintiff some; that the house in which defendant put plaintiff leaked very badly and wet plaintiff's bed frequently, and that plaintiff frequently asked defendant to repair the same, or patch the roof, or allow plaintiff to do so, but defendant would not, and that on 22 March plaintiff left defendant's employment for no other reason than that the house he was required to occupy was unfit to live in. On 24 March, when plaintiff went to defendant for a settlement, defendant

told him he would not pay him if he left, but told plaintiff he could go into another house occupied by a tenant of defendant who had rented it of defendant. This house had only one room, and the tenant had a wife who was about to be confined, and several small children. This, witness declined to do.

Upon this evidence plaintiff rested his case, and his Honor thereupon stated that he would instruct the jury that, upon the plaintiff's own showing, he was not entitled to recover, and he did so instruct them, and, upon his instructions, the jury found the issue submitted for the defendant.

Plaintiff excepted, and assigned the said ruling as error. Judgment for defendant, and plaintiff appealed.

(8) *T. T. Hicks for plaintiff.*
No counsel for defendant.

CLARK, J. The appellant's case on appeal alone is sent up, but as it is further made to appear that it was served within the time allowed by law, and no exception thereto nor countercase was served, it must be taken as the "case on appeal." *Russell v. Davis,* 99 N. C., 115; *Simmons v. Andrews,* 106 N. C., 201.

The only evidence before the court, on the trial below, was the testimony of the plaintiff. Taking that to be true, while the hiring was by the year, it was also further agreed that either party could put an end to the contract at any time. Besides, the plaintiff quitted his employment for good legal cause.

Under these circumstances, it was error to instruct the jury that, "upon plaintiff's own showing, he could not recover" upon a *quantum meruit* for services rendered.

It also appears that there was no implied or express contract that nothing was to be paid till the end of the year, but the reverse, and for that reason also the plaintiff could recover, as was held in *Chamblee v. Baker,* 95 N. C., 98.

Error.

Cited: S. v. Carlton, post, 957; *Markham v. Markham,* 110 N. C., 358; *S. v. Price, ib.,* 600; *Wilmington v. Bryan,* 141 N. C., 685.

HANCOCK BROS. & CO. v. WOOTEN ET AL.

Creditor's Bill—Lien—Parties.

1. In an action brought to set aside a fraudulent assignment, the *cestuis que trustent* are not necessary parties, and they will, in the absence of bad faith on the part of the assignee or trustee, be bound by his acts.

2. The *cestuis que trustent*, however, may be made parties by the plaintiffs, or they may be permitted to come in and unite in the defense, or the court may, upon proper cause shown by the assignee or trustee, at his instance, require their presence, but in no case will the death of all or any of the *cestuis que trustent* be a legal cause of continuance, unless the assignee or trustee is not defending in good faith, or unless the court is of the opinion that the ends of justice will be better subserved by the presence of the representatives.

3. Such an action may be brought by a single creditor, or as many as he may choose to unite with him, and is in the nature of a judgment creditor's bill, and the plaintiff or plaintiffs in such action acquire a preference by way of equitable lien upon both the legal and equitable assets of the debtor from the commencement thereof.

4. The court cannot deprive them of this preference by the joinder of new parties or the consolidation of other actions or proceedings where it is necessary, in the interest of convenience and justice, to require such joinder, but the preferences or priorities of the various parties litigant will be preserved.

5. Such actions may be now maintained without precedent judgments and executions in all cases where they could, under the former practice, have been maintained after the obtaining of such judgments or the issuing of such executions.

6. Where several creditors united in setting aside a fraudulent assignment, and in the action obtained judgments for their claims, it was properly held that a preferred creditor, who did not participate in the fraud, but who failed to join the plaintiffs in their action and united with the assignee in defense of the fraudulent assignment, and who has never obtained a judgment, should not share *pro rata* with the plaintiffs, but that he should be postponed as to them.

7. This would, perhaps, be otherwise in the case of a general creditor's bill, where it is the duty of the court to take a fund or estate in its custody and distribute it according to the respective interests of the persons entitled. In such cases it may be that a creditor who has endeavored to defeat the purposes of the action can, upon proper terms, be allowed to prove his claim and share equally with the others.

8. Such a practice has no application to a judgment creditor's bill, where each creditor is entitled to reap the reward of his diligence.

9. Discussions of creditors' bills, preferences and practice by *Shepherd, J.*

(10) APPEAL from *Connor, J.*, at Spring Term, 1889, of GREENE.

Only so much of the facts will be repeated as are necessary to a proper understanding of the points made by the counsel, and the rulings of the court thereon.

On 25 December, 1880, W. J. Wooten and wife executed a deed of assignment, conveying certain real and personal property to W. A. Darden as trustee. The personal property belonged to Wooten, and the real property belonged to Wooten and wife. The deed was made to secure the creditors of the said Wooten and his brother, Simeon J. Wooten, and the wife of the trustee was preferred as to certain alleged indebtedness, sufficient in amount, it was alleged, to exhaust the whole of the property. The plaintiffs, Hancock Bros. & Co., Leggett & Co., and certain other creditors, instituted this action in the Superior Court of Greene County, at Spring Term, 1887, against these defendants, for the purpose of recovering certain indebtedness alleged to be due them by the said W. J. Wooten. At the same term there was pending an action, brought by Beaman, administrator, and Stevenson & Slingluff, against the said Wooten and the other defendants for the purpose of recovering alleged indebtedness due them, and also for the purpose of having the said deed in trust declared void in so far as it affected them. In said action an attachment was issued, which was levied upon the personal prop-
(11) erty included in said deed, which property was replevied by the trustee, Darden. About the same time various other actions were commenced by other creditors. In some of these, attachments were issued upon the said personal property, which property was also replevied by said Darden. Other creditors obtained judgments before justices of the peace, and the judgment creditors, having indemnified the sheriff, caused him to sell a part of the said personal property. The proceeds of such sale were held by said sheriff.

All of these actions were consolidated, by order of court, made at the same term, with the case of Hancock Bros. & Co. The order is as follows: "It appearing that the above action, pending in this court, is a creditor's bill, and that there are creditors of defendant W. J. Wooten other than the plaintiffs, it is now ordered, on motion of defendant's counsel, that notice be issued by the clerk of this court to the following creditors of W. J. Wooten (naming the present parties plaintiff), to appear at the next term . . . and make themselves parties to this action. It is further ordered that publication of this notice be made for all creditors of said W. J. Wooten for six weeks successively in (a certain paper), to appear at next term of this court and make themselves parties plaintiff."

At said Spring Term, 1887, Hancock Bros. & Co. and their coplaintiffs filed a complaint in "behalf of themselves and all other creditors of

W. J. Wooten who may become parties." The action was thereafter conducted by all the creditors whose names appear in the proceedings as plaintiff creditors. The defendants (Simeon J. Wooten inclusive) joined in an answer, denying all of the material allegations of the complaint.

When the cause was called for trial at Spring Term, 1888, the defendants suggested the death of Mrs. Julia Wooten, wife of defendant W. J. Wooten, and asked that her representatives be made parties defendant. The court, being of the opinion that upon her death her interest in the real estate in controversy vested in her husband, defendant (12) W. J. Wooten, her heirs at law were not necessary parties, declined to make the order as requested, and the defendants excepted.

Without objection, the following issue was submitted to the jury:

"Was the deed of assignment of 28 December, 1886, from defendant W. J. Wooten to defendant W. A. Darden, made with intent to hinder, delay and defraud the creditors of defendant W. J. Wooten?"

The jury responded in the affirmative. Thereupon, it was ordered, by consent, that Darden, trustee, file a statement of all sums received by him by virtue of said deed of trust, and that he pay the same to W. C. Munroe, Esq., who was in said order appointed receiver. The sheriff was also directed to account to and pay to said receiver all sums received by him from the sale of property levied upon and sold under execution or under any attachment, when, under the latter, the property attached was not replevied. At the same term (Spring Term, 1888) the court made a decree adjudging the amounts due each of the plaintiffs (except in one or two instances, where claims were referred, but which do not now appear to be the subject of controversy), and also declaring the said deed void. It also appearing to the court that a reference was necessary to ascertain facts essential to a final decree, John F. Bruton, Esq., was appointed referee, to report "the debts to which said moneys should be applied, the amount of said debts, and the *pro rata* share of each debt to be paid out of said fund, and the balance due them," etc. He was also required to ascertain other facts, which are not necessary to be here stated. He was also directed to report any other facts which he might deem essential to a full adjustment of the matters in controversy. (13)

Notice of appeal was given and time allowed defendants to perfect their appeal. One of defendants' counsel thereupon notified plaintiffs that the appeal would not be perfected, and the plaintiffs' counsel, acting upon such notice, proceeded to direct the receiver to pay out the funds which had come into his hands, in the manner directed by said judgment, and to have the order of reference executed.

At the Spring Term, 1889, of Greene the defendant Simeon Wooten filed his application to be permitted to file certain claims against W. J.

Wooten. The plaintiffs filed an answer to said application. In respect to said application the court found the facts as set forth in Exhibit "E" in the record, and declined to permit the said defendant to file said claims and share in the distribution of the funds in the hands of the receiver. Defendant Simeon Wooten excepted.

The only other exception relates to the claim of Simeon J. Wooten. Only such parts of these exhibits as relate to the same will be mentioned here.

Exhibit "E."—The facts found by the court in regard to the application of Simeon Wooten to file claims set out in such application are:

That the note of $848 was given by W. J. Wooten for usurious interest on a note of $10,000, to wit, 4 per cent, in addition to the legal rate reserved in said note; also a small amount due Simeon Wooten by W. J. Wooten; that the note of $290, payable to Rountree & Co., was paid by Simeon Wooten as surety to W. J. Wooten; that the amount of $310.81 was paid Hardy & Bros. by Simeon Wooten as surety for W. J. Wooten;

(14) that the said Simeon Wooten offered to file said claims before John F. Bruton, Esq., referee, but, upon objection made by plaintiffs, was permitted to withdraw his application.

That on 3 April, 1889, he filed with D. W. Patrick, Esq., clerk of the Superior Court of Greene County, the paper-writing herein filed and marked Exhibit "A."

That the said Simeon Wooten, preferred in the assignment made by said W. J. Wooten to W. A. Darden, as now appears by the record herein, is a party defendant in this action; that he was examined as a witness for the defendants in the trial of this cause; that as appears by the judgment rendered in this cause at March Term, 1888, the said assignment was adjudged to be fraudulent and void as to the plaintiffs.

Upon the foregoing facts, it is adjudged that the said Simeon Wooten is not entitled to file his said claim, and share in the distribution of the fund in the hands of the receiver heretofore appointed in this cause. The defendant W. A. Darden and the defendant Simeon Wooten except to the said judgment, and appeal to the Supreme Court.

The defendant Simeon also excepted to the report of the referee, but, as the questions presented were not pressed on the argument, the facts need not be stated.

The defendant trustee, and other defendants, insist that the defendant trustee be allowed to apply any fund still in his hands, and such as he has paid over to the receiver under order of the court, and such as he may recover in said actions of claim and delivery on the attachment judgments referred to in this action, in which said trustee had replevied

the goods and assumed personal liability, acting in good faith, and before the validity of the assignment from said W. J. Wooten to said trustee, W. A. Darden, was determined.

This was refused, and defendants excepted.

F. A. Woodard and W. C. Munroe for plaintiffs. (15)
W. R. Allen for defendants.

SHEPHERD, J. 1. The first exception is addressed to the ruling of his Honor upon the question of parties.

The appellants (who are W. A. Darden, the trustee, and Simeon Wooten, a preferred creditor) objected to proceeding to trial because of the death of the defendant, Mrs. Julia Wooten, another preferred creditor.

Her heirs at law had no interest in the land conveyed in the assignment, because she had joined with her husband, the trustor, in the execution of the deed, and it was binding as to them; and for the further reason that upon her death her interest, if any remained in her, vested by survivorship in her husband. *Woodford v. Higly,* 60 N. C., 234. Neither did she have any interest in the personalty, as whatever interest she may have had therein passed to her husband as sole distributee.

The only interest then which she could, in any view, have asserted against the plaintiffs, was that of a preferred creditor, and her personal representative did not then apply, nor has he ever applied, to be made a party; nor does it appear that he has ever offered in any way to enforce the alleged claim of his intestate.

The appellants, therefore, were the only persons who prayed that her representatives be made parties to the action. Did they have a right to insist upon this, and thus delay the trial? As it does not appear that Simeon Wooten had any interest which conflicted with that of Mrs. Wooten, and as it was not at that stage of the proceeding that such interest, had it existed, could have been determined (the issue being confined to the validity of the deed alone), it is plain to us that he had no legal right to insist upon the objection. Such conflicting claims between *cestuis que trustent* could have been passed upon subsequent to the trial of the issue, and to that end the court could have (16) brought in the proper parties. Mitford Ch. Pl., 430, notes.

The question presented then is whether the presence of Mrs. Wooten was necessary upon the trial of the said issue, and whether the trustee could, as a matter of right, insist upon the joinder of "her representatives."

Without discussing the general subject of the joinder of trustees and *cestuis que trustent,* and leaving untouched the principles declared in the several decisions of this Court, as applied to particular cases, we will consider the single question here presented, to wit, whether in an action brought by a creditor to set aside an alleged fraudulent trust or assignment, it is *necessary,* upon the trial of an issue as to the validity of the trust or assignment, that the *cestuis que trustent* should be made parties defendant; and whether the trustee, as a matter of right can, in all cases, have them made codefendants. In *Barrett v. Brown,* 86 N. C., 556, cited by the appellants, there is a general expression favoring the affirmative of the proposition, but it will be noted that the plaintiff in that case was seeking to *enforce* the trust by having an account taken, in order that she might have her *"pro rata* share of her claim," and the court very properly decided that the trustee had a right to have each *cestui que trust* present, in order that he might contest the claims of others, and thus protect the trustee, and have a complete settlement of the whole litigation. Quite different is the case before us. "There is a broad distinction (says Pom. Remedies and Remedial Rights, 357, cited with approval by Wait on Fraudulent Conveyances and Creditors' Bills, sec. 137), between the case of an action brought in opposition to the trust to set aside the deed or other instrument by which it was created and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first
(17) case, the suit may be maintained without the presence of the beneficiaries, since the trustee represents them all, and defends for them." To the same effect is the opinion of *Chancellor Walworth* in *Rogers v. Rogers,* 3 Paige, 379. This case seems to be regarded as a leading one, and has been almost universally cited in the reports and text-books. The *Chancellor* says: "But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trust.* Such has been the uniform practice of this Court in relation to cases of this description."

Such also is the opinion of *Lord Rosedale Mitford,* Ch. Pl. (4 London Ed.), 175, and of *Justice Story* (Eq. Pl., secs. 215, 216). See also Burrell Assignments, 599; *Russell v. Lasher,* 4 Barb., 232; *Wheeler v. Wheedon,* 9 How. Pr., 293; *Tucker v. Quinnerman,* 61 Ga., 599.

The overwhelming weight of authority is in favor of the rule as above stated. "The true explanation of this doctrine (says *Story, supra,* sec. 141), is, that in cases of this sort, courts of equity proceed upon the

analogy of the common law, which treats the personal representative of the deceased debtor or testator as the regular representative of all persons interested in the personal assets and bound by his *bona fide* acts, so far as third persons are concerned." This view is also strongly sustained in *Cheatham v. Rowland,* 92 N. C., 340, in which the Court refused to join the *cestuis que trustent,* at the instance of the trustees, where a claim was asserted against the trust property. "The trustees (says the Court) are the proper persons as legal owners in charge to manage and take care of the common property, not only in its preservation, but in its defense against unjust and unreasonable demands, from what- (18) ever source they may come. When the trust is abused and they neglect or misappropriate the property, those interested may interpose to prevent the injury and enforce the execution of the trust, or even have the estate taken away and put into other hands." Many reasons, founded upon expediency as well as justice, are assigned for the rule as stated, prominent among which is the avoidance of the delay resulting from the death of *cestuis que trustent* and the time elapsing before their representatives can be made parties. Again, in the case of a general assignment (as this appears to be), great difficulty will be met in the service of process upon a large number of *cestuis que trustent,* especially where some of them are nonresidents, or whose residence is unknown. Adhering, as we do, to the principle as laid down, that the *cestuis que trustent* are not *necessary* parties in actions to set aside deeds of trust or assignments for the benefit of creditors, we think that we are authorized, under the liberal provisions of The Code, to say that a creditor *may* join the *cestuis que trustent* in such an action, and that the *cestuis que trustent* may themselves apply to be made parties defendant. But while they may thus be made parties, we do not think that the death of any, or all, of them, pending the suit, should be a cause of delaying the trial of the issue touching the validity of the deed, unless it appears that the trustee is not defending in good faith, or that the ends of justice will be better subserved by having the representatives present. This is addressed to the wise discretion of the court, to be exercised in view of the particular circumstances attending each case.

The court may also, upon proper cause shown by the trustee (such as a want of funds to conduct the defense, or for the purpose of indemnity against costs), require the joinder of the *cestuis que trustent,* but the same discretion as to compelling a trial is vested in the court, (19) in this case as in the others, in the event of the death of any such parties.

Applying these principles to the case before us, it is clear that his Honor was right in not postponing the trial because of the death of Mrs. Wooten. The issue did not in the least affect her claim, but was

confined solely to the validity of the deed. Her representative did not apply to be made a party, nor did the trustee show any proper ground why her representative should be joined. Neither did it appear to the court in any way, that the trustee was not making a *bona fide* defense. On the contrary, it seems that the case was stubbornly contested from the beginning to the end. We are, therefore, of the opinion that the first exception cannot be sustained.

2. The second exception is to the ruling of the court, declining (after the deed was found to be fraudulent) to allow Simeon Wooten to prorate with the plaintiff creditors in the proceeds of the property conveyed therein. It does not appear that the said Wooten participated in the fraudulent intent of the trustor, but he claimed under the deed and united with the trustee in defending it against the just claims of the plaintiffs. He has never abandoned this adverse position, and is even now insisting upon a new trial upon the issue involving the validity of the said trust. Occupying this antagonistic position, he seeks to share in the fruits of the plaintiffs' recovery, and the question is, shall he be permitted to do so?

In order to determine this point, it is necessary to consider the true character of this action. It is claimed that it is in the nature of a creditor's bill, and that in such actions all creditors may, at any time before final decree, be allowed to come in and prove their claims. Undoubtedly, such is an incident of what is ordinarily called a "general creditor's bill." Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs
(20) of a corporation. These may be illustrated by the cases of *Pegram v. Armstrong,* 82 N. C., 326; *Wordsworth v. Davis,* 75 N. C., 159; *Long v. Bank,* 81 N. C., 41; *Glenn v. Bank,* 80 N. C., 97; *Dobson v. Simonton,* 93 N. C., 268. In such cases there are many parties standing in the same situation as to their rights or claims upon a particular estate or fund, and the shares of a part cannot be determined until the rights of all the others are settled or ascertained. Of this nature, also, are bills brought to enforce trusts or assignments for creditors, and other instances where there is a community of interest, or where the law devolves upon the court the duty of taking a fund into its custody and distributing it according to the respective interests of the parties. In such cases no priority can be acquired by one person suing or making himself a party before others; and, perhaps, one who has vainly endeavored to defeat the purposes of the action may, upon proper terms, be allowed his share in the fund.

Such creditors' bills, however, are totally different from those instituted by an unsecured creditor (or several creditors, if they choose to unite) against a living debtor. Here the field is open to all, and he

who first secures a priority shall reap the reward of his diligence. Such bills are often said to be in the nature of an equitable *fi. fa.*, or equitable levy (Bisp. Eq., 528), and under them the vigilant creditor may acquire a priority, as he does when he pursues the analogous remedy of execution at law. Bills of this kind are called "Judgment Creditors' Bills" (see Harvard Law Review, October, 1890), and are so familiar in our practice, that it is hardly necessary to illustrate them by a reference to actual cases. They were entertained in equity for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like.

Under the former practice, in either of the last-mentioned cases, it was necessary, before a resort could be had to a Court of Equity, (21) that the creditor should first obtain judgment and show that the legal remedy by execution was ineffectual; but this, under the decision of this Court in *Bank v. Harris,* 84 N. C., 206, is now unnecessary, and both causes of action may be included in one suit. This decision by no means ignores the distinct character of a judgment creditor's bill. On the contrary, it expressly recognizes it as it formerly existed, dispensing only with the necessity of obtaining a judgment in an independent action. The result of the decision is to render the proceeding still more efficacious, as we think that by its institution it creates a preference by way of an equitable lien, whether the interest sought to be subjected be legal or equitable. This view is supported by Wait in his "Fraudulent Conveyances and Creditors' Bills," sec. 85, who, in commenting upon *Bank v. Harris,* says that upon the principles of the case "it would seem to follow that the usual incidents of a (judgment) creditor's suit must attach to the proceeding." Where the contrary is held, we think that an examination of the decisions will disclose that they relate either to the subjects of a general creditor's bill, or were rendered by courts which held that the obtaining of a judgment is a prerequisite to the commencement of a judgment creditor's bill. In reference to this latter requirement, Mr. Wait, *supra,* remarks that North Carolina and Indiana are the only exceptions. The authorities, therefore, in the other States are not entirely applicable to the practice with us.

It should also be noted in this connection, in reference to legal interests, that before the statute of 13 Elizabeth the remedy to set aside fraudulent conveyances was exclusively equitable, and that it has never been held in this State, that the statute deprived a Court of Equity of its jurisdiction in such cases. See remarks of *Pearson, J., in Thig-* (22) *pen v. Pitt,* 54 N. C., 57.

It is believed that any other rule than that which we have indicated would be attended with inextricable confusion and conflict as to

priorities among various creditors pursuing their remedies in other actions and jurisdictions. Even if this were not so as to legal assets, yet if we assimilate in its effect the judgment, when actually obtained, to an execution at law (and this, we think, must surely follow from the principle of *Bank v. Harris, supra,* and especially in view of the system of judgment liens adopted by The Code), the plaintiffs in this action would still have priority, as they have all obtained judgments, and Simeon Wooten has none. He and the plaintiffs had been fighting at arm's length, each endeavoring to establish a priority over the other. The plaintiffs have been victorious, and the deed having been declared fraudulent and void as to them, their preference must be recognized and the claim of the losing party postponed. This, as we have said, would perhaps have been otherwise if there had been such a community of interest in the property as to make it the subject of a general creditor's bill, but no such result as contended for can follow where there is no such common interest, and where the property is open and subject to the action of the most vigilant creditor—*lex vigilantibus favet.* In coming to this conclusion, we are but applying in one action the same principles which were formerly administered in the divided jurisdictions of law and equity. The true spirit of equity in cases of this character is, we think, fully reflected by the remarks of *Chancellor Walworth,* in *Edmeston v. Lyde,* 1 Paige, 637. He says: "On further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should, in the end, be obliged to divide the avails thereof with those who have slept upon their rights, or have intentionally kept back, that they might profit by
(23) his exertion." To the same effect is the language of *Chancellor Kent* in *McDermitt v. String,* 4 Johns. Ch., 691.

It is urged that the order made at Spring Term, 1887 (consolidating the various actions and requiring notice to be published for all creditors to come in and make themselves parties), had the effect of converting this into a general creditor's bill. If we are correct in the view we have taken, such an order could not have been made over the objection of the plaintiffs, if its effect was to deprive them of the priority they had attained by the commencement of the action, nor could the consolidation of other pending suits produce such a result. The order, however, was not objected to, and its effect as to questions of priority among the plaintiffs is not before us, as there seems to be no conflict between them. Conceding, however, that the order placed all who availed themselves of its provisions upon an equal footing, it amounted to no more than if they had united in the first instance, for the property involved was not, under the circumstances, as we have seen, the subject of a general creditor's bill, and the action, in its essential features, still retained its original

characteristics. The order certainly cannot be extended so as to embrace those who, instead of accepting its terms, allied themselves with the defenders of the fraudulent assignment in their efforts to defeat the sole purpose of the action.

Our attention has been called to the case of *Means v. Dowd,* 128 U. S., 273. In that case the creditors secured by the fraudulent assignment were permitted to file their claims, because they were actual creditors, and the estate of the bankrupt was in the custody of the law, and in this respect, as in many others, a proceeding in bankruptcy is in the nature of a general creditor's bill. The entire estate had to be settled among all of the creditors, and there seems to be no positive rule of law or equity which makes the misconduct of a creditor a cause of forfeiture of his debt. The decision, therefore, is not applicable to an action (24) like ours. For the reasons given, we are of the opinion that his Honor committed no error in declining to allow Simeon Wooten to share equally with the plaintiffs in the proceeds of the property included in the fraudulent assignment.

3. We have very carefully examined the record for the purpose of discovering upon what principle the claim of the trustee, to be subrogated to the rights of certain creditors, is based. We have been unable to find anything in support of this contention, and the exception, in this respect, must be overruled.

Upon the whole case, presenting, as it does, several novel and very interesting questions, we can find no error.

Affirmed.

Cited: Monroe v. Lewald, post, 656; *Smith v. Summerfield,* 108 N. C., 286, 287; *Le Duc v. Brandt,* 110 N. C., 291; *Emry v. Parker,* 111 N. C., 264; *Goldberg v. Cohen,* 119 N. C., 72; *Daniels v. Fowler,* 120 N. C., 18; *Williams v. R. R.,* 126 N. C., 921; *Fisher v. Bank,* 132 N. C., 772, 773, 775; *Shober v. Wheeler,* 144 N. C., 410; *Tarboro v. Pender,* 153 N. C., 430; *Smathers v. Hotel Co.,* 167 N. C., 477; *Belcher v. Cobb,* 169 N. C., 692; *West v. Laughinghouse,* 174 N. C., 219; *Sewing Machine Co. v. Burger,* 181 N. C., 256.

J. M. MEYERS AND WIFE v. J. A. RICE AND WIFE.

Petition for Partition—Motion in the Cause—Owelty of Partition—Execution to Enforce Equality.

1. A motion in the cause for execution is the proper proceeding to subject land charged with owelty of partition to the payment thereof.

2. Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share.

3. The purchaser takes with notice of the liens in favor of the other shares.

4. Land was partitioned in 1881, among several tenants in common, and one share, more valuable than the others, was charged with certain sums in their favor. In 1888, sale of the lot so charged was made under executions to discharge the liens in favor of some of the shares and not in favor of others, and the whole of the purchase money was so paid, against the protest of the latter shareholders, who also knew of the sale. The share so sold was purchased by one of the shareholders, in whose favor execution issued, and he made a mortgage to a third person: *Held*, that the shareholders who received none of the proceeds of sale were entitled to have the land resold to discharge the liens in favor of their shares.

5. The lien of such shareholders was prior to that of the mortgage—he took with notice of such lien.

(25) MOTION heard at Spring Term, 1890, of BERTIE, by *Armfield, J.*, in the special proceeding for an execution (in effect a *venditioni exponas*) to sell the land specified therein, based upon the following statement of facts agreed upon by the parties and submitted to the court for its judgment thereon:

1. J. H. Herring died in Bertie County, in 1881, seized in fee of the following land in that county: The Nichols tract, in Mitchells Township, adjoining the lands of Mills Eure, Joseph Willoughby and others, containing one hundred and thirty acres, more or less. Also the Herring tract, in same township, containing one hundred and twenty-five acres, more or less, adjoining the lands of J. A. Rice, John Rice and others, which lands descended, subject to the widow's dower, to J. H. Herring's six children, his only heirs at law, the *feme* plaintiff Louisa, the *feme* defendant Roxana Rice, W. C. Herring, W. S. Herring, J. W. Herring, and Fannie D. Herring (now Fannie D. Marsh).

2. That during 1881 the above lands, by proceedings instituted in this cause by J. M. Meyers and wife, Louisa V., against the other heirs at law, were duly partitioned between the said heirs at law by commissioners duly appointed.

3. That said commissioners, 21 October, 1881, made their report, in which, after valuing the whole lands at $2,400, they divided it into six equal shares, Nos. 1, 2, 3, 4, 5 and 6. Each share, except No. 2, was valued at less than $400. No. 2 was valued at $800, and charged in favor of the other heirs, respectively, for equality of partition. This share No. 2 was allotted to the *feme* plaintiff, Louisa V. (26)

4. Share No. 6 was allotted to Fannie D. Marsh, valued at $260, and share No. 2 was charged in her favor with $140 for equality.

Share No. 5 was valued at $310 and allotted to J. W. Herring, and share No. 2 was charged in his favor with $90 for equality.

5. Fannie D. Marsh and J. W. Herring were under twenty-one years of age 21 October, 1881, and remained so, the said Fannie till ....., 1887, and said J. W. Herring till 20 March, 1889. Fannie D. married M. C. Marsh while under age, and has remained *covert* ever since.

6. That the report of the commissioners was confirmed by the courts.

None of the charges for equality were paid till 1888, when proceedings were had by all the heirs at law, except Fannie D. Marsh and J. W. Herring, to enforce the payment of the amounts due them respectively, and under said proceedings, to wit, executions in this cause in favor of the heirs at law, except Fannie D. and J. W. Herring, the said share No. 6 was sold to the plaintiff J. M. Meyers by the sheriff of Bertie County at $230, and deed made to him. This sale was made 21 October, 1888.

7. The sum paid by J. M. Meyers was not more than sufficient to pay the heirs at law, other than Fannie D. and J. W. Herring, and the whole was paid over to them against the protest of said Meyers, who insisted to the sheriff and clerk that the heirs last named should prorate in said fund, and no part of the amount due them has ever been paid.

8. That Fannie D. and J. W. Herring knew of the sale made 31 October, 1888.

9. That one C. W. Mitchell, after the said purchase by Meyers, loaned him $275, $230 of which was used in paying the sheriff for the land, and a mortgage upon said land was executed to Mitchell to secure him, which was duly registered before the service of the notice in this cause. (27)

10. J. M. Meyers intermarried with Louisa, J. A. Rice with Roxana, before 1881, and were parties to the partition proceedings.

Upon these facts, M. C. Marsh and wife, Fannie D., and J. W. Herring moved the court to issue execution in this cause, and direct a sale of share No. 2 for the purpose of paying the charges for equality aforesaid, interest and cost, in favor of said Fannie D. and J. W. Herring.

J. M. Meyers resists this motion, and insists that, by virtue of the sale and sheriff's deed of 31 October, 1888, he obtained title to the land, discharged of any claim in favor of said parties.

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

"Upon motion of M. C. Marsh and wife, Fannie D., and J. W. Herring, after a full consideration of the facts agreed in this cause, it is ordered that execution issue in favor of Fannie D. Marsh and J. W. Herring against share No. 2 of the lands of the late J. H. Herring allotted in this cause to the *feme* plaintiff, and described particularly in the decree in this cause, for the amounts charged against said share for equality of partition, to wit, the sum of one hundred and forty dollars in favor of Fannie D., and ninety dollars in favor of J. W. Herring, with interest on each sum from 21 October, 1881, till paid, and all cost hereof, and that the said lands be exposed for sale to pay the same.

"Let execution and order of sale issue accordingly."

Thereupon the plaintiffs, having excepted, appealed to the Court.

D. C. Winston for plaintiffs.
Pruden & Vann (by brief) for defendants.

MERRIMON, C. J., after stating facts: The statute (Code, secs. 1892, 1900) prescribes how real estate may be partitioned among persons claiming the same as tenants in common, and it is, among other
(28) things, provided that commissioners for the purpose shall "meet on the premises and partition the same among the tenants in common, according to their respective rights and interest therein by dividing the land into equal shares in point of value, or as nearly so as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary to be paid to the dividends of inferior value, in order to make an equitable partition." The charge made as thus allowed upon the more valuable dividend of land at once becomes not a personal charge against the party to whom this dividend is allotted, but upon the land itself, and judgment confirming the report of the commissioners who partitioned the land creates and establishes the charge and a lien or liens upon such more valuable dividend in favor of the party or parties who received the less valuable dividends. Moreover, the charges thus are several and in favor of the parties respectively who received the less valuable dividends, if there be more than one. Such charge and lien may be enforced by *venditioni exponas* at the instance of the party entitled, and also, in some cases, by process of attachment. *Wynee v.*

Tunstall, 16 N. C., 23; *Jones v. Sherrard,* 22 N. C., 180; *Waring v. Wadsworth,* 80 N. C., 345; *Halso v. Cole,* 82 N. C., 163, and there are numerous cases to the like effect.

In the present case, the more valuable dividend designated as number "two" was charged with one hundred and forty dollars in favor of the less valuable dividend designated as number "six," allotted to Fannie D. Marsh, one of the appellees, and with ninety dollars in favor of the dividend designated as number "five," allotted to the appellee, J. W. Herring, and also with other sums in favor of others of the tenants in common, who received less valuable dividends. Certain of the latter applied for and obtained execution to enforce their respec- (29) tive liens, and the more valuable dividend so charged was sold under the same, and the appellant purchased at the sale. He contends that he purchased that dividend discharged of the charges and lien in favor of the less valuable dividends allotted to the appellees. The court held otherwise, and this is assigned as error.

We are of opinion that the objection of the appellant is not well founded. The more valuable dividend—the land itself—was charged with the sums of money specified in favor of those of less value, allotted to the appellees respectively. The latter each had an interest in the land to the extent of the charge in favor of his dividend, not in common with others, who had less valuable dividends with like charges in their favor, but separate and distinct from them. So that if the more valuable dividend had paid the money charged upon it in favor of one of the less valuable ones, such payment could not affect the similar charge in favor of the others.

The payment of the money thus made a charge upon the more valuable dividend in favor of a less valuable one might be enforced by *venditioni exponas,* sued out at the instance of the owner thereof, but the sale of the land under it could not affect adversely other like charges upon the same, because its purpose would be only to enforce the charge specified in it, and not another or other charges, in the absence of some order of the court to the contrary, made upon proper application and upon notice thereof to the owners of the dividends of less value having like charges. There is nothing in the nature of the writ of *venditioni exponas,* nor is there any principle of law or statutory provision or rule of practice that makes a sale of land under such writ operate so as to pass the title thereof to the purchaser discharged of senior incumbrances or incumbrances of the same date upon it, other than that mentioned in it, and which its direct purpose is to enforce. It would be unreasonable and unjust, as well as violative of common right, to deprive such incumbrancers of their interest in the land, and their security and rights growing out of it, by such a (30)

sale without giving them fair opportunity—a day in court—to be heard as to the expediency and propriety of a sale thereof. It is not sufficient to say they might look to and share in the proceeds of the sale of the land to their respective rights and the priorities of them. If heard, they might be able to show that a sale should not be made at the time and in the way proposed by the mover for the writ of *venditioni exponas*. They have the right to be heard in court, and they cannot be deprived of that right without notice and reasonable opportunity to be heard.

The purchaser of the land cannot reasonably complain that he expected to buy a perfect title. He had opportunity to see the writ under which the sale was made, the judgment or order of the court authorizing or directing it, and know, from the proper records and registries, that there were other incumbrances on the land than that or those which the sale was intended to enforce.

Sales to enforce charges upon land, such as those under consideration, are not altogether like the ordinary sales of land to satisfy judgments for money. But a sale under the writ of *fieri facias* does not operate to pass the title to the land sold under it discharged of prior liens of judgments for money upon it. A sale of land under a junior judgment is made subject to the lien of a senior judgment, and a second sale thereof may be made to enforce the latter, and such second sale will pass the title to the purchaser as if the first sale had not been made. This is well settled, and upon the ground that a sale under execution cannot have the effect to pass the title to land discharged of all prior liens. The judgment docketed creates the lien, and it must have effect and be enforced in the order of priority. *Halyburton* (31) *v. Greenlee,* 72 N. C., 316; *Cannon v. Parker,* 81 N. C., 320; *Worseley v. Bryan,* 86 N. C., 343; *Titman v. Rhyne,* 89 N. C., 64; *Burton v. Spiers,* 92 N. C., 503.

Certain of the tenants in common, to whom were allotted dividends of less value, in favor of which the dividend of greater value was charged with certain sums of money specified, applied for and obtained a *venditioni exponas* to enforce the charges in their favor, and the dividend of greater value so charged was sold, the appellant being the purchaser. That application did not embrace the appellees; no notice of the same was given to them, nor did the *venditioni exponas* purport to embrace the charges in favor of their dividends or themselves. The appellant was chargeable with notice of these facts. It was his duty to himself to see the writ under which the land was sold, and the record authorizing the same, and the presumption is he did so. It must be

taken that he knew he purchased subject to the rights of the appellees and the charges in their favor. It seems he did, in fact. He purchased the land for much less than half its assessed value.

Affirmed.

Cited: Herman v. Watts, post, 651.

ELISHA COPPERSMITH, ADMINISTRATOR, v. STEPHEN P. WILSON, EXECUTOR, ET AL.

Administration—Claims Against the Estate—Claims in Favor of the Estate—Statute of Limitations—Duty of Those Entitled to Administer.

1. Actions upon claims in *favor* of an estate of a decedent must be brought within one year of his death, without regard to when administrator is appointed.

2. Actions upon claims *against* the estate of a decedent must be brought in one year after administration.

3. Time counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remissness in those entitled to administration.

APPEAL at Spring Term, 1890, of PASQUOTANK, from (32) *Whitaker, J.*

A jury trial being waived, by consent, the facts were found by the court.

The action was brought by Elisha Coppersmith, administrator *de bonis non* of the estate of William Coppersmith, against the executrix (and her husband) and the surviving surety of the former administrator, and the executrix of a deceased surety and her husband. The judgment demanded was for an account of the administration, and for such sum as should be ascertained to be due, the bond to be discharged upon the payment thereof.

William Coppersmith died in 1866, and Benoni Cartright qualified shortly after in that year as his administrator, and considerable property came into his hands. His sureties were F. M. Godfrey and John Cartright. The administrator, Cartright, died in 1882, without completing the administration; and his wife, the defendant Penelope (who has since intermarried with the defendant S. P. Wilson), qualified as

his executrix in 1882. One of the sureties, John Cartright, died in 1884, and, in the same year, Pattie Cartright, his wife, qualified as his executrix.

The plaintiff, Elisha Coppersmith, qualified as administrator of the estate of William Coppersmith in March, 1886.

At the time of the death of the said William Coppersmith, as aforesaid, he left surviving him as his heirs at law five children, named, respectively, and of age at the commencement of this suit, as follows: John T. Coppersmith, thirty-seven years; William G. Coppersmith, thirty-four years; Elisha Coppersmith, thirty-two years; Susan Coppersmith (who intermarried with one James T. Chorey on 29 December, 1876), twenty-three years; Henry Coppersmith, twenty-one
(33) years, who are his distributees, and entitled to their respective shares of his personal estate.

The following issues were found by the court, and judgment rendered thereon, as hereinafter set out:

1. Is the claim of John T. Coppersmith, administrator of Ann Coppersmith, barred by the statute of limitations? Answer: "Yes."

2. Is the claim of John T. Coppersmith, administrator of Elizabeth Delon, barred by the statute of limitations? Answer: "No."

3. Is the claim of Elizabeth Coppersmith, owner of the interest of Elisha Coppersmith, deceased, barred by the statute of limitations? Answer: "Yes."

4. Is the claim of John T. Coppersmith, administrator of Fannie B. Coppersmith, barred by the statute of limitations? Answer: "No."

5. Is the claim of Susan Chorey (formerly Coppersmith) barred by the statute of limitations? Answer: "No."

6. Is the claim of Henry Coppersmith barred by the statute of limitations? Answer: "No."

It is adjudged by the court that the action is barred as to the claim of John T. Coppersmith, administrator of Ann Coppersmith, widow of Wm. Coppersmith, deceased, and as to Elizabeth Coppersmith, widow of Elisha Coppersmith and assignee of his interest, and that the same is not barred as to the claim of John T. Coppersmith, administrator of Fannie B. Coppersmith, John T. Coppersmith, administrator of Elizabeth Delon, Henry Coppersmith and Susan Chorey (formerly Coppersmith). This cause, except as to the statute of limitations aforesaid, is referred to William J. Griffin, who will take and state an account of the dealings of Benoni Cartright with the estate of William Coppersmith, deceased, and report the same to the next term of the court, and file the same at least thirty days before the first day of the next term.

1. The defendants except to the findings and rulings of the (34) court, that the claims of John T. Coppersmith, administrator of Fannie B. Coppersmith and Elizabeth Delon, is not barred by the statute of limitations. All the evidence upon the same shows that said Coppersmith, administrator of said Fannie B. Coppersmith and Elizabeth Delon, is barred by the statute of limitations.

2. Defendants except to the judgment of the court rendered in this cause.

It was in evidence as follows: This action began 20 February, 1886; Wm. Coppersmith died in July, 1886, leaving, among other children, Fannie B. Coppersmith and Elizabeth Delon. Elizabeth Delon married before she was twenty-one, and died about the year 1872, before the death of her husband. John T. Coppersmith administered upon her estate about one year ago, and, as such administrator, was duly made a party plaintiff in this action; record stating final account of Benoni Cartright, administrator of William Coppersmith, was filed 1 June, 1869. Receipt of Elizabeth Delon in words and figures following, to wit:

14 February, 1870.

STATE OF NORTH CAROLINA—Pasquotank County.

Received of Benoni Cartright, administrator of William Coppersmith, deceased, seventy dollars ($70) payment in full satisfaction of my distributive share of my father's estate, the said William Coppersmith, deceasd.

Now, therefore, in consideration of the said amount of $70, I do hereby forever discharge the said Benoni Cartright, as administrator aforesaid, and his official bond, from all further liability or responsibility by reason of his said administration as aforesaid, on account of my distributive share of the estate as aforesaid. Witness my hand and seal.

ELIZABETH (her X mark) DELON.

Witness: GEORGE W. SNOWDEN.

Benoni Cartright died October, 1882, and his wife Penelope (35) (who afterwards married Wilson) qualified as his executrix in November, 1882. Thereupon the court found the following facts in writing: That the claim of John T. Coppersmith, administrator of Elizabeth Delon, was not barred by the statute of limitations, and that the claim of John T. Coppersmith, administrator of Fannie B. Coppersmith, was not barred by the statute of limitations.

No counsel for plaintiff.
E. F. Aydlett for defendant.

SHEPHERD, J. The only exceptions presented by the record relate to the claims of John T. Coppersmith as administrator of Elizabeth Delon and Fannie B. Coppersmith. The claims of the intestates were not barred at the time of their deaths, which occurred respectively in 1872 and 1866. There was no administration upon their estate until within a year of the commencement of this action, in 1886. The defendant puts his case entirely upon the construction of The Code, sec. 164. He argues that under this section there is a distinction made between cases where the action survives in favor of, and those in which the action survives against a deceased person, in that in the former the action must be brought within a year of the death of the intestate, without reference to the time of administration, and that in the latter it need not be brought until within a year after administration. The distinction contended for is very apparent from the language of the statute, and is doubtless founded upon the reasons given in *Hall v. Gibbs,* 87 N. C., 4; *Baird v. Reynolds,* 99 N. C., 469; *Long v. Clegg,* 94 N. C., 763. These were cases under the statute of presumption, and in the latter case it is said that the time during which there was no administration upon the estate of the claimant should be counted, because of the remissness of those entitled to obtain administra-
(36) tion.

Dunlap v. Hendley, 92 N. C., 115, may be sustained without reference to what was said upon this point, and we cannot regard it as authority against the plain letter of the statute.

In our opinion, the claims are barred.

Reversed.

Cited: Benson v. Bennett, 112 N. C., 507; *Hughes v. Boone,* 114 N. C., 57; *Burgwyn v. Daniel,* 115 N. C., 119; *Winslow v. Benton,* 130 N. C., 59; *Lowder v. Hathcock,* 150 N. C., 440; *Geitner v. Jones,* 176 N. C., 544.

THE BOARD OF COMMISSIONERS OF GREENE COUNTY ET AL. V. JOHN MURPHY ET AL.

Arrearage of Taxes—Tax Lien on Land—Chancery Jurisdiction to Enforce Collection of Judgment—Sheriff.

In an action against a landowner to enforce the collection of arrearages of taxes alleged to be still due and a lien upon his lands, it appeared that the county taxes due from 1881 to 1886 had never been paid to the *county;* that judgment therefor had been obtained against the sheriff and his

sureties, parts of which were still unpaid. It was not shown that such balance was uncollectable. Another sheriff, charged with the collection of these taxes against the defendant Murphy, desisted, upon his defense and affidavit, that he had paid them to the former sheriff. *Held* (1) that the land could not be so subjected, if at all, to the payment of such taxes; (2) there is no statute prescribing such remedy, and the remedies provided by statute should be exhausted before such action is attempted, if at all; (3) this is not one of the possible cases in which the chancery jurisdiction of the court can be invoked.

APPEAL at March Term, 1890, of GREENE, from *Boykin, J.*

This action is brought by the board of commissioners of the county of Greene to enforce the collection of certain alleged arrearages of taxes due that county for the years 1881 to 1886, inclusive, levied upon certain real estate specified, the property, at the time of such levy, of the defendant John Murphy, and charged against him, parts (37) of which he has since sold to other defendants, and to enforce the alleged lien of such taxes imposed upon the real estate mentioned.

It is alleged in the complaint that so much of the taxes levied upon the land as were due to the State were paid; that so much of the same as were due the said county, or a considerable part thereof, have not been paid; that judgments for the same against the sheriff of that county charged with the collection of such taxes, and his sureties to his official bonds, were obtained in favor of said county; that parts of these judgments have been paid and other parts thereof remain unpaid. It is not alleged that the sureties of the said sheriff, against whom judgments were taken, are insolvent, or that such balances unpaid could not be collected from them by execution. Another sheriff was afterwards charged, in 1888, to collect from the defendant Murphy the alleged arrearages of taxes, but he desisted from so doing upon the ground that said Murphy made affidavit, as allowed by statute, that he had paid such taxes to the former sheriff, but the plaintiffs allege that there was no such payment in fact. The complaint demands judgment against the defendant Murphy for the amount of such taxes unpaid; that the same be declared to be a lien upon the real estate mentioned; that the same be sold, and for general relief. The defendants demur to the complaint and assign as grounds of demurrer, among other things, that the plaintiffs have no capacity, in law or equity, to bring or maintain the action; that the court has no jurisdiction to entertain the action; that the complaint fails to state facts sufficient to constitute a cause of action, etc. The court sustained the demurrer and dismissed the action, and the plaintiffs appealed.

W. C. Munroe for plaintiffs.

G. M. Lindsey and T. C. Wooten for defendants. (38)

MERRIMON, C. J., after stating the facts: If, in possible cases, the chancery jurisdiction of the court might be invoked to enforce liens upon real estate created by taxes duly levied thereupon and the collection of arrearages of taxes in favor of the State or counties, the present is not one of them. The taxes specified in the complaint were duly levied upon the land mentioned; the tax list and the order to collect were placed in the hands of the sheriff, charged by the law to collect the taxes therein specified. He failed to collect the same, as he was bound to do, or he did collect them and failed to account therefor, and thus committed a breach of the condition of his appropriate official bond, and for such breaches judgments against him and his sureties to his bond were obtained in favor of the county of Greene. Such remedy is given by statute. It is not alleged that these judgments cannot be collected, and that the county has no remedy other than that sought by this action. The statutes in respect to revenue and taxation contemplate and intend that taxes shall be levied and the collection thereof promptly enforced in the way and by the means and remedies therein prescribed, and certainly no action like the present one can be employed to enforce such collection until the statutory remedies shall be exhausted, if then. There is no statutory provision that prescribes or allows the remedy intended by this action. *Gatling v. Comrs.*, 92 N. C., 536; *Wade v. Comrs.*, 74 N. C., 81; *Huggins v. Hinson*, 61 N. C., 126. It is very clear that this action cannot be maintained, and we need not advert in detail to the numerous assignments of error.

Affirmed.

Cited: Guilford v. Georgia Co., 112 N. C., 36.

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(39)

H. E. THIGPEN v. L. MAGET.

Landlord and Tenant—Lien for Advancements—Lien for Supplies—Priority of Landlord's Lien.

In an action by a landlord for the value of rents and advancements made to his tenants against the tenant's vendee of the crops, who had also made supplies to him for cultivating them, it appeared from the findings of the referee that the plaintiff advanced certain cotton seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to *retain* parts of the *undivided* cotton seed and crops by way of advancement: *Held*, (1) that plaintiff had a landlord's lien on such seed and crops; (2) that it took priority over defendant's supply lien; (3) that division of the crop and delivery back to the tenant was not necessary to constitute a valid advancement.

THIGPEN *v.* MAGET

ACTION to recover a balance alleged to be due to the plaintiff for rent and advancements to one James Hardy, from whom, it is alleged, the defendants purchased and received property subject to a statutory lien to secure the payment of said rent and advances, heard, upon the report of a referee and exceptions thereto, before *Womack, J.*, at Spring Term, 1890, of EDGECOMBE.

No counsel for plaintiff.
G. M. Fountain (by brief) for defendant. (44)

DAVIS, J. Exceptions to the findings of fact are sent up with the record, but as they present no questions subject to the review of this Court, we take no notice of them.

1. By section 1754 of The Code, when lands shall be rented or leased for agricultural purposes, unless otherwise agreed between the parties thereto, any crops raised on said lands "shall be deemed and held to be vested in possession of the lessor or his assigns at all times until the rents for said land shall be paid," etc. The lien thus provided for shall be preferred to all other liens, and no part of the crops can be removed before its satisfaction, either by the lessee or his assigns, without the consent of the lessor or his assigns. It is insisted for the defendants that the advancements, according to the facts found, were for 1884, and not for 1886, and constituted no lien upon the crops of that year because, from the findings of fact, Hardy rented the plaintiff's land for the years 1885 and 1886 on the same terms as for the year 1884, and at the end of the years 1884 and 1885, all the cotton seed, corn and fodder, being in bulk and undivided, the plaintiff settled her rent with Hardy, without having any particular part of the cotton seed, corn and fodder set apart to herself to satisfy the advances, and not having the cotton seed, corn and fodder in *actual* possession to advance to Hardy for another year upon the terms agreed, the alleged lien upon the crops of 1886 was for a preëxisting debt. We understand this to be the contention of the defendant's counsel. It is true the crop was in the possession of the plaintiff only by virtue of the statute, but the cotton seed, corn and fodder, though not divided and set apart from the bulk (45) of the crop, were all deemed to be vested in possession of the plaintiff, and what was due to her being known in quantity and value, what necessity was there for measuring off so many bushels of cotton seed and corn, in order to give effect to an agreement or contract of renting for the following year? *Cui bono* all that trouble? The contracts or agreements for 1885 and 1886, upon the facts found, were new and independent contracts or agreements, and there being enough cotton seed, corn and fodder belonging to the plaintiff on her farm to pay for

the advancements made, Hardy needing them to aid him in making a crop for the following year on said farm, it was competent for her to agree that he should have them for that purpose, and for Hardy to agree to take them for advancements, and that is a fair construction of the contract, as found by the referee. That the cotton seed were to be returned in kind, or the value paid in money, made them none the less an advancement.

Did the plaintiff lose her lien because she did not have the cotton seed, corn and fodder divided and set apart, take *actual* possession and make *actual* delivery to Hardy, as contended? The legal title to the crop and its possession were vested in her. Hardy's possession was her possession. He could neither dispose of it to another, nor keep and use it himself, without her consent, until he had discharged the lien, and when she consented and agreed that he might have it to aid him in making another crop on the land, by virtue of that agreement, the lien attached to the crop so to be made, as would any other advancement.

But the defendant's counsel says: "It cannot be said that Hardy agreed to receive it as an advancement, for the referee does not find this to be a fact; and, indeed, he could not so find, for there is no evidence that he ever did anything of the kind, but he positively refused to receive it as such." We think this is a misapprehension of the
(46) finding of the referee. While he does not find, in so many words, that Hardy agreed to receive the cotton seed, corn and fodder as an *advancement,* he does not find that Hardy *refused* to receive them as such; and while the findings of fact are not for our review, inasmuch as Hardy could not have removed, disposed of, or used the crop on which the plaintiff had a lien without first satisfying the lien or without her consent, and as he did use the cotton seed, corn and fodder, he must have done so with her consent and the lien attached, or he would have subjected himself to an indictment, and we think the fair construction of the referee's findings is that they were advancements, and the defendant's first exception cannot be sustained.

2. We are unable to see any ground upon which the second exception can be maintained. The referee finds as a fact that 737 pounds of lint cotton on the rent of 1886 were unpaid, and they were certainly due.

3. The third exception is to the ruling that the defendant is liable to the plaintiff for the indebtedness of Hardy. Every person who makes advancements to a tenant or cropper of another does so with notice of the rights of the landlord, and that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. *Thigpen v. Leigh,* 93 N. C., 47.

The defendant having received of Hardy and appropriated to his own use more than enough of the crop upon which the plaintiff had a lien to pay the debt, he became liable therefor, and the third exception cannot be sustained.

4. If the defendant was liable to the plaintiff to the amount (47) of the indebtedness of the tenant Hardy to the plaintiff, it necessarily follows that the plaintiff was entitled to judgment therefor, and the fourth exception cannot be sustained.

There is no error, and the judgment of the court below must be Affirmed.

Cited: Ballard v. Johnson, 114 N. C., 144; *House v. Watson,* 148 N. C., 298.

JAMES W. TUFTS v. J. S. GRIFFIN.

Retaining Title—Conditional Sale—Purchase-money—Possession—Consideration—Payment—Evidence.

1. The plaintiff bargained and delivered to the defendant, a certain article of personal property, and by contract, duly recorded, retained title in himself until the purchase money should be paid; and before any part thereof was paid or due, the property was destroyed by fire while in the custody of the defendant, and without his fault: *Held,* in an action for the purchase money the plaintiff was entitled to recover.

2. The fact that the contract of purchase amounted to a conditional sale does not prevent such recovery.

3. There was a promise to pay and a consideration therefor. The defendant had the use and possession of the property, an interest therein and a right, upon payment of the purchase money, to make his title absolute.

4. Evidence that the plaintiff had not offered to replace the property, or that the defendant was willing to pay upon his so doing, was properly rejected.

ACTION tried before *Womack, J.,* at February Term, 1890, of BERTIE, on appeal from a justice of the peace.

The plaintiff, James W. Tufts, offered in evidence a contract, a copy of which, marked "Exhibit A," is hereto attached and made a part of the statement of facts.

J. S. Griffin, the defendant in the action, was introduced by the plaintiff, and testified that he "executed the contract marked 'Exhibit A.' The consideration was the soda fountain described in the (48)

contract. I received the soda fountain, and I have not paid the sum of $162.50 mentioned, nor any part thereof; the reason I did not pay was because I did not think I owed the plaintiff; the apparatus was burned in the fire, and I thought it was his loss, and not mine; I executed another note like this, which has been paid; the fire was 4 November, 1888; the fire commenced in the adjoining storehouse; my house caught from that; I was careful in regard to fire; I had no clerk and closed every night myself, and was careful."

The defendant then proposed to prove by the witness that plaintiff had at no time offered to replace the fountain burned up, and the plaintiff objected. Objection sustained, and the defendant excepted, and assigns this ruling of the court as the first ground of error.

The defendant then proposed to prove by the witness, that the defendant had at all times been willing, able and ready to pay the sum demanded, if the plaintiff would replace the fountain burned up by the fire. Objection by the plaintiff. Objection sustained, and defendant excepts, and assigns the ruling of the court as the second ground of error.

Upon the foregoing evidence, the court directed the jury to answer the issue as follows:

"What sum, if any, is the defendant due the plaintiff? Answer: $162.50, with interest from 1 November, 1889."

The defendant excepted to the direction of the court, and assigns the same as the third ground of error.

The issue having been found as above, and motion for a new trial having been made and denied the defendant, judgment was rendered in accordance with the verdict in favor of the plaintiff and against the defendant, from which the defendant appealed to the Supreme Court.

(49)

$162.50. LEWISTON, N. C., 13 June, 1888.

For value received 1 November, 1889, after date, I promise to pay to the order of James W. Tufts, $162.50, with interest at 6 per cent. The consideration in this and other notes is the following described soda-water fountain; One 8.1 Ham. Bord. Alaska Spray, No. 1,486; two ten-gallon and one six-gallon copper founts; one three Sterling generator, which I have received of said James W. Tufts.

Nevertheless, it is understood and agreed by and between me and the said James W. Tufts, that the title to the above-mentioned property does not pass to me, and that until all said notes are paid, the title to aforesaid property shall remain in the said James W. Tufts, who shall

have the right, in case of non-payment at maturity of either of said notes, and without process of law, may enter and retake immediate possession of said property wherever it may be, and remove the same.

J. S. GRIFFIN.

Witness: D. C. WINSTON.

D. C. Winston for plaintiff.
W. L. Williams for defendant.

SHEPHERD, J. This is a case of the first impression in this State. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase-money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one (see *Clayton v. Hester,* 80 N. C., 275; *Frick v. Hilliard,* 95, N. C., 117, and the cases cited), and under the contract the defendant took the apparatus into his posssesion and used it in all respects as his own. Without any negligence on the part of the defendant, and before any default in the payment of the purchase-money the property was destroyed by fire.

The question is, who shall bear the loss? The defendant in- (50) sists that it should fall upon the plaintiff, because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called executory (as in the case of *Ellison v. Jones,* 26 N. C., 48), and the vendee is also termed a bailee (*Perry v. Young,* 105 N. C., 466), but it must be observed that these expressions are used in reference to the strict legal title to the property, and they can, therefore, have no influence in the determination of the present question, which is purely one of consideration for an absolute promise to pay.

The recent decision in *Tufts v. Burnley,* 66 Miss., 49, is directly in point. There, it seems, that this same plaintiff, sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes had been paid and before the maturity of the others. The Court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The Court says: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which

only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale.

(51) The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the Court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale, to be defeated upon the nonperformance of the conditions. . . . The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be *ripened* into an absolute title by the performance of the conditions." 1 Whart. Cont., 617.

The vendee had the actual legal and rightful possession, with a right of property upon the payment of the money. *Vincent v. Cornell,* 13 Mass., 296.

The vendor could not have interfered with this possession "until a failure to perform the conditions." *Newhall v. Kingsbury,* 131 Mass., 445.

Having acquired these rights under the contract, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice, to say that there was no consideration for the promise and that the loss should fall upon the plaintiff.

(52) *Swallow v. Emery,* 111 Mass., 556 (cited by the defendant) may perhaps be distinguished from ours, because it was agreed that, upon the payment of the price, the vendor was to *execute a bill of sale to the vendee.* However this may be, we think that the principles enunciated in *Tufts v. Burnley, supra,* are better sustained, both by reason and authority, and we, therefore, affirm the judgment of the court below.

No error.

Cited: Whitlock v. Lumber Co., 145 N. C., 123; *Lancaster v. Ins. Co.,* 153 N. C., 290.

M. L. WOOD, TRUSTEE, ET AL. v. GEORGE WATSON ET AL.

Judgments Void and Voidable Against and in Favor of a Dead Man—Suggestion of Death—Practice—Appeal—Parties.

1. A judgment in favor of a dead man is not void, and not, on that account, irregular.

2. A judgment *against* a party to a suit rendered after his death is voidable, even if the fact of death was unknown.

3. When either party to a suit dies before judgment, it is the duty of the adverse party to suggest the death to the court.

4. If appeal by the adverse party was desired, the proper course was to make the heirs at law parties to the action, and serve notice of appeal upon them.

5. Right of appeal is not lost on account of the death of the adverse party.

MOTION heard before *Womack, J.*, at February Term, 1890, of BERTIE. The facts are stated in the opinion.

D. C. Winston for plaintiffs.
No counsel for defendants.

DAVIS, J. At the Fall Term, 1889, of Bertie, in an action by (53) the plaintiffs against George Watson, the ancestor of the present defendants, judgment was rendered in favor of the defendant Watson against the plaintiffs.

The following is the case on appeal:

This was a motion heard before *Womack, J.*, at February Term, 1890, of Bertie, to set aside a judgment herein rendered at Fall Term, 1889, of said court, which is set out in the record, upon the following facts ascertained and found by the court:

At the time of the rendition of said judgment in favor of George Watson, he, the defendant, had for several months been dead, which fact was then unknown. That plaintiffs gave notice of appeal from said judgment, but, upon hearing of the death of George Watson, took no steps to perfect the same, but caused notices to issue to the present defendants, who are the widow and heirs at law of George Watson, of a motion to set aside said judgment, on the ground that at the time of the rendition of the same George Watson was dead.

The defendants entered a special appearance, and resisted the motion upon the following grounds:

1. That it was the duty of the plaintiffs to suggest the death of the defendant, and not having done so, they are bound by the judgment.

2. That the defendants are the only parties who had the legal right to move to set aside the said judgment, which they elect not to do.

The motion to set aside said judgment was refused, from which refusal the plaintiffs appealed.

Was the judgment in favor of Watson, the *dead* defendant, against the living plaintiffs, void or voidable at the instance of the plaintiffs?

We find many cases, and some conflict, of decisions in which judgment was rendered in *favor* of plaintiffs against *deceased* defendants, but our researches have not enabled us to find any in which judgment was rendered in *favor* of the defendant after his death against a *living* plaintiff.

(54) In *Kelly v. Hooper,* 3 Yerger, 395, and in *Carter v. Cariger, ib.,* 411, it was held that a judgment against a dead man was an absolute nullity. In *Holmes v. Harris,* 8 How. Pr. (N. Y.), 384, it was held that a judgment after the death of a party may be stricken out, and the same was held in *Lockridge v. Lynn,* 68 Geo., 137. It was also held by this Court in *Lynn v. Lowe,* 88 N. C., 478 (*Ruffin, J.,* dissenting), that a judgment rendered against a party after his death is irregular, and may be set aside, to the end that the representative of the deceased defendant may have an opportunity to resist a judgment. In *Knott v. Taylor,* 99 N. C., 511, it was held that a judgment rendered against a dead person—the fact of his death being unknown to the court or the plaintiff—was not void, but irregular and voidable. We refer to the interesting discussion in *Lynn v. Lowe, supra,* and to the authorities there cited, as to the effect of a judgment rendered against a defendant who died before its rendition. In Freeman on Judgments, sec. 140, it is said: "If jurisdiction be obtained over the defendant in his lifetime, a judgment rendered against him subsequently to his death is not void"; again, section 153: "Judgments for or against deceased persons are not generally regarded as void on that account." And this view of the law seems to be in accord with the current authorities upon the subject, though, as has been said, there is want of unanimity in the adjudications, and in this State it may be regarded as settled that the death of a party defendant to an action before trial should be suggested, and the proceedings suspended until the real or personal representatives, as the case may be, can be made parties, and the action continued against them, and if this be not done, and the plaintiff takes judgment against a dead defendant, it may be set aside. *Lynn v. Lowe,* 88 N. C., 478; *Knott v. Taylor,* 99 N. C., 511, and cases there cited.

In *Lynn v. Lowe,* the late *Chief Justice* said: "It was obvi- (55) ously the plaintiff's duty to prevent an abatement of their action,

to bring the fact of the defendant's death to the notice of the court, and to make the other necessary parties in consequence thereof, in order to proceed with the cause. It could not be the duty of any other, since the event that sealed the lips of the deceased recalled the authority of his attorney longer to represent him."

There is a manifest reason why a judgment *against* a dead man may be avoided and set aside as irregular by a proper motion in the action, and that motion, said the present *Chief Justice,* in *Knott v. Taylor,* "might be made by any person having right under or derived from the deceased defendant therein after the action began. This, as to the party who may make the motion, is allowable, because the defendant in the action having died before . . . the judgment was entered, he could not make it, and, in such case, no presumption arises that he assented to and was satisfied with it. Ordinarily, only the defendant against whom an irregular judgment is given can complain of it. If he does not, the presumption is that he is satisfied with it. It is otherwise where he was dead at the time the judgment was given." These reasons do not apply to a judgment in favor of a dead defendant against a living plaintiff.

No action shall abate by the death of a party, except in the cases provided in section 188 of The Code.

Regularly, as is the practice, the death of a party to an action should be suggested, and his representative made a party, and it has been held in California that where the death of the party occurred before the appeal was taken, the fact might be shown in the appellate court by affidavit. *Judson v. Law,* 35 Cal., 463; *Sharteser v. Law,* 40 *ib.,* 96, and *Taylor v. R. R., ib.,* 337.

If, as held by some authorities (see dissenting opinion of *Ruffin, J.,* in *Lynn v. Lowe, supra,* and the cases there cited), a judgment would not be voidable if rendered *against* a dead defendant, it would seem *a fortiori* it would not be void or voidable if rendered in *favor* of a dead defendant *against* a *living* plaintiff, for there is a difference be- (56) tween the two, and a manifest reason in favor of sustaining the validity of the judgment *against* the living plaintiff that does not apply in the case of a judgment *against* the dead defendant. The *living* plaintiff can note exceptions and appeal—"the lips of the dead defendant are sealed." The living plaintiff was present in person or by attorney, and whatever might be the effect of a judgment *against* the *dead* man, there was no irregularity of which the plaintiff can complain. In the case before us, the judgment, so far as the record discloses, was regularly taken in accordance with the uses and practice of the court; the fact that the defendant was dead was unknown at the time of the

trial, and it proceeded against him as if he were alive, resulting in a judgment in his favor, and it was not until after the judgment that the fact of his death appeared *aliunde*. The plaintiff does not seek to set aside the judgment upon the ground of mistake, surprise or excusable neglect, under section 274 of The Code, nor is it pretended that there was any fraud, but simply upon the ground that the defendant against whom he was prosecuting his action was dead at the time, and the fact of his death was unknown to him until, the judgment being adverse to him, he sought, by appeal, to get a new trial or a reversal of the judgment. If declared void or irregular and set aside, the effect would be to give the plaintiff a new trial, whether he would be entitled to it on the hearing of his appeal upon its merits or not, whether the judgment was correct in law or not. This would be manifestly unjust if, upon the hearing of the appeal, it should appear that the judgment below was correct in law.

In section 938 of The Code it is declared: "In no action shall the death of *either* party between the verdict and the judgment be alleged for error, if such judgment be entered within two terms after the
(57) verdict." Clearly the party against whom judgment might be entered would be entitled to appeal, or a writ of *certiorari*, as a substitute therefor.

The right of appeal is given to any party aggrieved, as prescribed in chapter 10 of The Code, or a writ of *certiorari*, as a substitute therefor, in a proper case. The appellant's counsel says that, after learning that the defendant was dead, he took no steps to perfect his appeal, because there was no one upon whom the statement of case on appeal could be served.

We do not think that, even conceding that the judgment was irregular, the plaintiff was entitled to have the judgment set aside (unless merits were shown, and none are stated), nor do we think that he necessarily lost his right to appeal by reason of the fact that the defendant was dead. He might have obtained it, as would a party against whom a judgment was rendered under section 938 of The Code.

Any party, by appeal in compliance with the provisions of The Code in relation thereto, or by writ of *certiorari*, in a proper case, as a substitute therefor, has a right to have any decision of the court below, upon any matter of law or legal inference, reviewed by the Supreme Court, which has "the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Code, sec. 945.

The heirs of the deceased defendant were necessary parties in the prosecution of the appeal, and might have been made parties by proper

orders in the cause, when the appeal could have been heard upon its merits, but the judgment was not void, and the plaintiffs' motion was properly denied.

Affirmed.

Cited: Thomas v. Hunsucker, 108 N. C., 724; *Everett v. Reynolds,* 114 N. C., 368; *Rowe v. Lumber Co.,* 133 N. C., 445.

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(58)

L. J. EDWARDS ET AL. v. R. E. BOWDEN ET AL.

Duress—Mortgage—Foreclosure—Feme Covert—Voluntary Execution —Threats—Fraud—Extortion—Evidence.

1. In an action to foreclose a mortgage executed by a husband and wife, they set up the defense of duress exercised upon the *feme* defendant, in that while she was in her sick-bed her husband threatened if she did not sign the deed he would abandon her and her two children, dependent upon him for support, which threat she believed; that one of the plaintiffs also threatened to sell the chattels of her husband, upon which they held a mortgage, and to put him in jail for failing to convey certain real estate he had agreed in writing to convey, and that she was induced by such threats to execute the deed of mortgage: *Held,* that these facts, taken together, amounted to duress.

2. Neither the threat to imprison, nor to foreclose, nor the threat of abandonment, taken singly would, ordinarily, be sufficient ground for relief. There must be something more than a mere threat.

3. All the combined circumstances of a case, though they do not in themselves amount to technical duress, are still admissible in evidence to make out a case of fraud and extortion in obtaining the instrument.

ACTION for the foreclosure of a mortgage executed by the defendant to the plaintiff on the *feme* defendant's land, heard before *Boykin, J.,* at Spring Term, 1890, of GREENE.

The *feme* defendant, in her answer, alleged that she is a *feme covert,* and that she is the wife of the other defendant, R. E. Bowden; that her signature to said mortgage was obtained by fraud and collusion of the plaintiffs, and the threats and compulsion of her husband; that her said husband, R. E. Bowden, told her that if she did not sign said mortgage deed to plaintiffs, that he would leave and abandon her; that at the time she executed said mortgage deed to plaintiffs she was sick and confined to her bed; that the said Bettie J. did not sign said

(59) mortgage deed willingly and voluntarily, but was constrained to execute same by reason of the threats and compulsion of her said husband, R. E. Bowden, and the fraudulent misrepresentation of the plaintiff, Q. J. Edwards.

The defendant, Bettie J. Bowden, testified that at the time she executed the mortgage deed sued on and at the time when her private examination was taken she was sick in bed; that her husband had threatened her that if she did not sign it that he would leave her; that she had two children, and was dependent upon her husband for her and their support, and that she believed that her husband would execute his threat; that one of the plaintiffs told her that if she did not execute such deed that he would sell all her husband's chattels, upon which they had a mortgage, and would prosecute and put him in jail for failing to convey to them certain real estate which he had agreed in writing to convey to them in order to get advances.

The plaintiffs' counsel contended that there was not sufficient evidence of duress to avoid the deed as to the *feme* defendant.

The court charged the jury, that "if they believed that at the time the *feme* defendant executed the mortgage deed sued on, she was sick in bed, and that the defendant, R. E. Bowden, her husband, had threatened her that if she did not execute the deed that he would leave her; that she had two children, and was dependent upon her husband for her and their support, and that she believed that her husband would execute his threat, and that one of the plaintiffs told her that if she did not execute said deed that he would sell the chattels of her husband, upon which they had a mortgage, and prosecute him and put him in jail for failing to convey to them certain real estate, which he had agreed in writing to convey to them, in order to get advances, and that said *feme* defendant, being induced by said threats of her husband and the (60) said plaintiffs, and on account of her sickness, executed said deed, that this would be duress, and that they should find that she did not execute said deed willingly, and would find for the defendants."

To which part of the charge the plaintiffs excepted. Verdict for the defendants.

Motion for new trial by the plaintiffs on account of misdirection of the jury. Motion denied. Judgment. From which judgment the plaintiffs appealed to the Supreme Court.

Chapter 389, Laws 1889, was passed after these facts occurred.

W. C. Munroe for plaintiffs.

G. M. Lindsey and F. A. Woodard for defendants.

SHEPHERD, J. "By *duress,* in its more extended sense, is meant that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." 2 Greenleaf Ev., sec. 301.

2 Bacon Abridgment, 156, referring to *Lord Coke,* says "that for menaces, in four instances, a man may avoid his own act: 1. For fear of loss of life. 2. Of loss of member. 3. Of mayhem. 4. Of imprisonment." The threat of imprisonment "may be to the person of the party or of the party's husband, wife, parent or child, through constraint of which he—in form—consents to what he otherwise would not." Bishop Cont., sec. 715. Though several modern authorities have been very liberal in the application of this doctrine, we think that a wise public policy requires that contracts solemnly entered into by deed, should not be avoided, except upon the most imperative demands of necessity and justice, and we cannot, therefore, sanction the principle of some of the decisions, that a mere threat of unlawful imprisonment, standing alone, will be sufficient to avoid a deed. There should be some (61) process issued or some steps taken toward the execution of the threat, or, at least, some circumstances attending it which would produce a reasonable apprehension of imminent arrest or imprisonment. In the case of *Ware v. Nesbit,* 94 N. C., 664, the husband had been actually arrested and bailed, and the wife was present and "greatly excited." Afterwards, the sureties of the husband threatened to surrender him and "send him back to jail" unless the debt was compromised. The wife knew of this, and under the influence of this threat executed the deed.

No instructions were asked, says the court, to the effect that the evidence was insufficient to sustain the alleged *duress,* and the ruling was based only upon the exceptions to the instructions given to the jury. The decision leaves us in some doubt whether the court would have held that the evidence was sufficient had the point been properly presented. Assuming, however, that the testimony was sufficient, the case is distinguishable from the present, in that the husband had actually been arrested, and was, it seems, in imminent danger of a new imprisonment by reason of his being surrendered by his bail. This much we have been careful to say, in order to exclude the idea that we think that the simple threat of the plaintiff in this case, was, in itself, sufficient to constitute technical duress. Neither would the threat to foreclose the mortgage upon the husband's chattel property have that effect; nor do we think that the threat of abandonment made by a husband would, under ordinary circumstances amount to such duress.

We are of the opinion, however, that while neither of these grounds would, in itself, be sufficient to warrant a finding of technical duress,

yet when they are taken together, and in connection with the important facts that the wife was prostrated by sickness, and that her privy examination was taken at once and while she was in that condition,
(62) there was sufficient testimony to be submitted to the jury in support of the allegation of fraud and compulsion which is set up in the answer. Especially is this so, when the court made the establishment of all of these circumstances necessary to an affirmative finding, by charging the jury that "if she (the defendant) was induced (to execute the deed) by the said threats of her husband and the said plaintiff, *and on account of her sickness,*" they should find in her favor.

The argument here proceeded almost entirely upon the ground of legal duress, but we think that, taking all of the alleged facts to be true, a case would be made out which would call for the equitable intervention of the court. "In equity there is no rule defining inflexibly what kind or what amount of compulsion shall be sufficient ground for avoiding a transaction. . . . The question to be decided in each case, is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having regard to the age, capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment." Pollock Cont., 524. "Where there is no coercion amounting to duress, but a transaction is the result of a *moral, social or domestic* force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the conditions or circumstances of the person influenced, which renders him peculiarly susceptible and yielding; his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessi-
(63) ties, his ignorance, lack of advice, and the like." Pom. Eq. Jur., 951.

It is true that where duress alone is relied upon, equity follows the law (2 Pom. Eq., 950), but there is something more in this case. We have a woman on a bed of sickness; we have the confidential relation of husband and wife, and the presumed influence of the husband over her. Pom. Eq. Jur., sec. 963; Bispham Eq., sec. 237. We have also (*Huguen v. Basely,* 2 White & Tudor's L. C. 1156 notes) the husband threatening to abandon her and their two children, who were dependent upon him for support, and this in connection with the threats of un-

lawful prosecution and imprisonment of the husband. These combined circumstances bring the case within the principle stated by Pollock and Pomeroy, *supra,* and also by 2 Greenleaf on Ev., sec. 301, *supra,* who says that facts which in themselves do not amount to technical duress are "admissible in evidence to make out a defense of fraud and extortion in obtaining the instrument." It is upon this ground that we rest our decision.

No error.

R. M. MAYO v. J. L. THIGPEN.

Cartways—Impassable Lands—Instructions—Jury—Judge's Charge—Public Road.

1. Upon petition to grant a cartway, the jury found it was "necessary, responsible and just." The plaintiff owned two tracts connected by a narrow strip, but otherwise entirely separated by the lands of defendant. The narrow strip was wholly unfit for a cartway, by reason of ditches and inundations. The defendant asked the court to charge, that if the plaintiff can pass from all parts of his own land to the public road without going over defendant's land, the issue will be found for defendant. The court instructed the jury, that if plaintiff could have a practicable cartway on his own land (to the public road) they should find for the defendant: *Held,* there was no error in this instruction.

2. Where one's lands are connected with the public road, but by an impassable tract, he is entitled to a cartway over the lands of another.

3. The instructions given by the court were substantially such as were asked.

MERRIMON, C. J., dissenting.

APPEAL at Spring Term, 1890, of EDGECOMBE, from *Womack, J.*

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

No counsel for plaintiff. (64)
John L. Bridgers for defendant.

CLARK, J. This is a petition for a cartway. The township supervisors, after "hearing the testimony, viewed the premises and maturely considered the whole matter," all parties being present, adjudged that it was "necessary, reasonable and just" that the petitioner should have the cartway prayed for, and appointed freeholders to lay off the same and assess damages. From this order the defendant appealed to the

board of county commissioners, who, "after hearing testimony *pro* and *con,* and argument of counsel," sustained in all respects the judgment of the township board of supervisors. From this judgment the defendants appealed to the Superior Court. The cause coming on for trial in that court, the following issue was submitted to the jury: "Is the cartway proposed by the plaintiff necessary, reasonable and just?" To which the jury responded in the affirmative, and the court having rendered judgment in favor of plaintiff, the defendant appealed to this Court.

It was in evidence that plaintiff owned two tracts of land—one lying on the public road; the other distant from the public road—1,000 yards; that between the plaintiff's two tracts of land was a tract of land,
(65) entirely woodland, 200 yards wide and 900 yards long, which cut off plaintiff's last-mentioned tract (which is in cultivation and on which is a tenant house) entirely from any access to the public road, except that it is connected by a narrow strip of land belonging to plaintiff, with plaintiff's other tract on the public road. This strip, however, was "wholly unfit for a cartway, by reason of the great number and size of ditches to be crossed and its being continually subject to inundation and overflow."

The defendant asked the court to instruct the jury: "The plaintiff's land, both tracts adjoining and one lying on the public road, if you believe that plaintiff can pass from all parts of his land to the public road without going on defendant's land, you will find the issue in favor of defendant." The court did not give the instruction as asked, but charged, instead thereof, that if plaintiff could have a practicable cartway over the strip of his own land, above referred to, then it was not necessary to have it laid off over defendant's land, and the jury should answer the issue "No." To the failure to give the instruction in the words asked, the defendant excepted, and this is the only error assigned for review.

The instruction given differs from that asked only in the addition by the court of the word "practicable." In this we think there is no error. Webster defines "practicable" as "admitting of use, passable," and gives as an illustration a "practicable road, *i. e.,* a passable road," and Stormouth gives a similar definition and the same illustration. The petitioner is entitled to a passable cartway, admitting of use, to the public road. As the court told the jury, if he could get this by laying it off over the narrow strip connecting this land with his other tract, which lay on the public road, then he could not have it over defendant's land. The jury found that such was not the case. The defendant's proposition "sticks in the bark." A man may have a tract of
(66) land, distant from the public road, connected by an impassable

swamp or other barrier with another tract of his land, which last is accessible to the public road, and defendant's proposition would make the first tract inaccessible and incapable of use. And in this case, by reason of the strip being "continually subject to overflow and inundation," the jury have found that a cartway over it would be impracticable, as did two other tribunals previously, one of them consisting of neighbors who viewed the premises personally, and who, it is to be presumed, had knowledge of the frequency and extent of the inundations to which the strip of land was "continually subject." To confine plaintiff to an impracticable cartway, continually subject to interruption, would make his land valueless, for no tenant would occupy a house in which he might be cut off at any time, and possibly for days at a time, from procuring the services of a physician, obtaining food for his family, and all other intercourse with the outside world which might be necessary.

We do not think the defendant has a right to refuse the plaintiff a passable outlet, the more especially as he can suffer no loss himself thereby, as impartial freeholders will be appointed to assess any damages he may sustain. Code, sec. 2056.

MERRIMON, C. J., dissenting: The petitioner has two tracts of land, each adjoining the other, and for the purposes of a way from a point or particular place on either of these tracts to points or places on the other, or to a public road situate across either of them, they must be treated as one, because the petitioner may make his ways from one point on his own land to another on the same as he may please to do. A public road is situate on and across his land near the center thereof. If he can reach this road from any point on either of his tracts referred to by a way situate altogether on his own land he must do so, although it might be more convenient for him to reach it by a way (67) across the land of the respondent. This is so, because to allow him to have a cartway across the respondent's land would be in derogation of the latter's rights of property. It is settled that he will not be allowed to have such cartway, unless because of real necessity. *Warlick v. Lowman,* 103 N. C., 122, and cases there cited.

The respondent contended on the trial that the petitioner might have a sufficient way wholly situate on his own land from his tract alleged to be inaccessible from the public road, and there was evidence tending to prove that he might. The respondent requested the court to instruct the jury, in substance, that the plaintiff's two adjoining tracts of land, for the purpose of this proceeding, must be treated as one, and if the public road could be reached from the tract alleged to be inaccessible by a way wholly situate on his own land, then they should render a verdict upon

the issue adverse to the petitioner. A material part of this instruction was that the two tracts should be treated as one, and the court should have so told the jury, particularly as it was requested to do so.

It is true that the court told the jury "that if it is practicable for the petitioner to have the outlet desired over his own land, then he is not entitled to have a cartway laid out over the lands of another," but it did not explain to them, in that connection, or at all, that the two tracts adjoined each other and were to be treated as one; that if the petitioner could go from the "Munroe Cobb" place across part of his other tract to the public road, then he could not have the cartway, etc. As the court was requested to direct the attention of the jury to the fact that the two tracts adjoined each other, the public road passing across one of them, and it failed and refused to do so, the jury may have concluded that the petitioner could not get from the "Munroe Cobb" place to the
(68) public road by passing over part of the petitioner's other tract referred to. It is possible the jury took a proper view of the merits of the issue; they may have done otherwise, and this because the court failed to give so much of the special instruction asked for as it failed to give. The refusal to give the instruction was the more serious, as the court failed to explain to the jury what is meant by a "practicable route," and by the terms "necessary, reasonable and just." They were left to determine and apply the meaning of these important terms in view of what the court had refused to tell them.

Per Curiam. No error.

Cited: Cook v. Vickers, 144 N. C., 314; *Ford v. Manning,* 152 N. C., 153.

JOHN PEEBLES v. A. BRASWELL.

Case on Appeal—Certiorari—Lost Papers—Incomplete Record—Laches.

1. When the case on appeal is signed only by the appellant's counsel, and there is nothing to show that it was served on appellee in the time prescribed, it will not be considered in this Court.

2. When it appears that the appellant has been guilty of *laches*, and there is no affidavit to negative it, the application for *certiorari* to the judge to settle the case will be denied.

3. When there is error apparent on the face of the record, the absence of the case on appeal does not, of itself, entitle the appellee to have the appeal dismissed.

4. When a case was regularly constituted in court, complaint and answer filed, verdict and judgment thereon regular in all respects, and the summons, complaint and answer are lost, so that copies are not sent up with the record to this Court, and there is no averment of any effect to have the papers supplied in the court below, though seven months have elapsed since the appeal was taken, and there is no suggestion of any error which would thereby be made to appear: *Held*, that the appellant is not entitled to a *certiorari* for these papers.

APPEAL at the March Term, 1890, of PITT, from *Boykin, J.* (69)

J. E. Moore for plaintiff.
Gilliam & Son (by brief) for defendant.

CLARK, J. There is no case on appeal settled by the judge, nor any "case agreed" signed by counsel. There is a statement of case on appeal, signed only by appellant's counsel, but nothing to show that it was served within the time, or, indeed, ever at all, upon appellee or his counsel. This, it has been held, cannot be considered. *Mfg. Co. v. Simmons,* 97 N. C., 89.

The appellant now asks for a *certiorari,* but there is no affidavit to negative *laches* on the part of the appellant and, so far as the application is to be construed as being for a *certiorari* to the judge to settle the case, it must be denied. *Simmons v. Andrews,* 106 N. C., 201, and cases there cited.

It is true the absence of any case on appeal does not, of itself, entitle the appellee to have the appeal dismissed, as there may be error apparent upon the face of the record proper. *Mfg. Co. v. Simmons, supra.* Upon examination of the record as sent up, we find that the case was regularly constituted in court by summons duly issued and served, complaint and answer filed, orders made in the cause from time to time, trial duly had, issues submitted, verdict of the jury and judgment thereon, all of which are set out and regular in all respects, except that copies of summons, complaint and answer are not sent up, the clerk certifying as cause for omission that said papers had been taken out of his office by appellant's counsel and lost. There is no affidavit to controvert this return of the clerk, and no averment of any effort below to have the papers supplied, as was held requisite in *Nichols v. Dunning,* 91 N. C., 4, though it is seven months since the appeal was taken. It would be a vain thing to send a *certiorari* down for papers which are not in the (70) office, and to supply which no steps have been taken—the loss of which by appellant's counsel, as returned by the clerk, is not controverted, and as to which it is not even suggested that, if supplied and sent up, they would show any error. Indeed, after judgment it is too

late to object that there was no complaint or answer filed *(Robeson v. Hodges,* 105 N. C., 49, and cases there cited), and appellant is in no better condition.

The appellant has, by apparent gross *laches,* for which he does not offer excuse or palliation, failed to perfect his appeal. To permit him to delay the appellee of the fruits of his judgment would grant to his negligence more than it seems he thought he could obtain by proper diligence in supplying the lost papers and sending up a complete record, together with a case on appeal.

The motion for *certiorari* is denied, and the appellee is entitled to have the judgment

Affirmed.

Cited: Howell v. Jones, 109 N. C., 102; *S. v. Foster,* 110 N. C., 510; *Broadwell v. Ray,* 111 N. C., 457; *Hamilton v. Icard,* 112 N. C., 593; *Cummings v. Hoffman,* 113 N. C., 268; *Rosenthal v. Roberson,* 114 N. C., 596; *Sanders v. Thompson, ib.,* 283; *McNeil v. R. R.,* 117 N. C., 643; *Guano Co. v. Hicks,* 120 N. C., 30; *Burrell v. Hughes, ib.,* 278; *Westbrook v. Hicks,* 121 N. C., 132; *Mitchell v. Baker,* 129 N. C., 64; *McLeod v. Graham,* 132 N. C., 474; *Stroud v. Tel. Co.,* 133 N. C., 254.

A. R. HIGH v. W. T. BAILEY, ADMINISTRATOR.

Abandonment—Judge's Charge—Evidence—Administration—Verdict of the Jury—When the Court Will Disturb.

1. In an action involving the issue of abandonment of the wife by the husband, a witness testified, without objection, that the wife left the husband because he would not give her anything to eat. The court charged, if he made her leave, or so failed to provide for her support that she was compelled to leave, in order to provide for herself and family, it would amount to abandonment, and the jury should so find: *Held,* there was no error.

2. This Court will only disturb the finding when there is no testimony to sustain it.

(71) ACTION tried upon issues raised before the clerk, at the Fall Term, 1889, of WILSON, before *MacRae, J.*

The purpose of the action is to recover a fund to the use of the plaintiff, the husband of the defendant administrator's intestate, being a balance of proceeds of personal property left in his hands after settling the estate.

The defendant, administrator and guardian for the children of the intestate by a former husband, resisted the action on the ground, among others, that the plaintiff had abandoned his wife some time before her death. The defendant claimed the fund for the children. There was testimony tending to sustain the contention of the defendant. Verdict and judgment for defendant. Plaintiff appealed.

C. C. Daniels (by brief) for plaintiff.
F. A. Woodard for defendant.

SHEPHERD, J. The single issue submitted to the jury was, "Did the petitioner abandon his wife, the intestate, as alleged?" And the only question presented for our consideration is whether there was any evidence to sustain the affirmative finding of the jury.

It is true, as is contended by the counsel for the plaintiff, that if the wife left her husband voluntarily there could be no abandonment by him, but if, in the language of his Honor, "he made her leave, or so failed to provide for her support that she was compelled to leave, in order to provide for herself and family," this would, in our opinion, be an abandonment by him. *Levering v. Levering,* 16 Md., 219.

One of the witnesses testified, without objection, that he visited the family very often, and that, from what he saw there, the wife left the husband "because he would not give her anything to eat." Surely this was testimony to warrant the charge of the court.

There was other testimony tending to sustain the statement of the witness, and, the jury having passed upon it, we have no (72) authority to disturb their verdict. It is only where there is no testimony that this Court interferes.

No error.

Cited: Humphrey v. Church, 109 N. C., 139; *Setzer v. Setzer,* 128 N. C., 172; *Dowdy v. Dowdy,* 154 N. C., 558; *Crews v. Crews,* 175 N. C., 172.

V. W. LAND v. THE WILMINGTON & WELDON RAILROAD COMPANY.

Railroads—Charter—Right of Way—Statutory Proceedings for Damages—Statute of Limitations—Possession—The Code—Trespass.

1. The defendant, a railroad corporation, entered upon the lands of the petitioner and constructed its road without adopting any of the means pro-

vided in its charter for acquiring title. No time is prescribed in the charter within which the owner is to be barred of his right of entry or compensation: *Held*, that the possession of the defendant being protected by its charter from any action of trespass, or other character, the plaintiff is confined to his remedy of having his damage assessed, as allowed by the charter.

2. The three years statute of limitations, Code, sec. 155, subdivisions 2 and 3, is no bar to such proceedings.

3. It seems that there is no statute of limitations provided for such proceedings.

PETITION heard, upon appeal from the clerk, at the Spring Term, 1890, of NASH, by *Boykin, J.*, against a railroad company for compensation for occupying and using petitioner's land, without complying with the provisions of its charter for appropriating the land to such purposes.

The court rendered judgment in favor of the plaintiff, setting
(73) aside the judgment of the clerk of the Superior Court, wherein the statute of limitations was held to be a bar. From this judgment the defendant appealed.

Don Gilliam (by brief) for plaintiff.
J. B. Batchelor and Jacob Battle for defendant.

SHEPHERD, J. The defendant entered upon the land of the petitioner and constructed its road in 1886. It has no conveyance of the land, nor has it acquired any title by lapse of time. Its title, therefore, must be derived from the provisions of its charter, and this does not provide for the vesting of title in the defendant until, either at its instance (section 14 of its charter, Rev. Stat.), or that of the petitioner (sec. 18, *ib.*), the damages have been assessed and paid. This is also true of the general railroad act (ch. 49, Code), the privileges of which are extended to existing railroad corporations. Code, sec. 1982.

No such proceedings were instituted by either party until the petitioner filed this petition on 15 February, 1890. Unlike the charter of the North Carolina Railroad Company (sec. 29), there is no time prescribed in the charter of the defendant, nor in the general railroad act, in which the owner is to be barred of his right of entry or compensation. It must follow, then, that the defendant is occupying the land of the petitioner without any legal title, and that, in the absence of any statutory provision to the contrary, the petitioner could sue in trespass or in ejectment. The possession of the defendant, how-
(74) ever, is protected by a provision of its charter, to the effect that

where the defendant has entered without any legal proceedings no action of trespass, or of *any other character,* shall be brought by the owner, except a petition to have his damages assessed.

This takes away all damages for the precedent trespass, and confines the owner to the compensation provided by the statute. These extraordinary privileges which have been conferred upon the defendant ought to be sufficient, it would seem, to meet all the reasonable demands incident to the construction of its road. But it is insisted that, while it may occupy the owner's land and acquire title by an adverse possession of twenty years, the owner is powerless to prosecute his only remaining remedy, except within the first three years of that period.

We cannot believe that such an anomalous state of affairs was contemplated by the Legislature.

The defendant could have acquired title by instituting proceedings under its charter, but this it has failed to do, and it would be only following the dictates of common justice to allow the owner his compensation (not damages for the trespass) at any time before the possession of the defendant has ripened into an indefeasible title. In other words, so long as the defendant is content to occupy the land without title, the owner should not be prevented from pursuing his single remedy. In the absence of any legislation in the charter, or in the general railroad acts, the defendant relies upon section 155, subdivisions 2 and 3, of the Code of Civil Procedure. Pierce on R. R., 192, says that such special remedies are not ordinarily barred by the general statutes of limitation, but that this is usually done "by some express provision in the statute which creates the remedy." Conceding, however, that the general statute applies, we are of the opinion that the present proceeding is not embraced in any of its provisions. Subdivision 3 relates only to actions of trespass which, we have seen, cannot be main- (75) tained at all against the defendant. Apart from this, however, trespass is not the true character of this proceeding. In support of this view, we have a case directly in point from Pennsylvania (*McClinton v. R. R.,* 66 Pa. St., 404), in which it is held that "the petition, properly used, is not for the recovery of past damages under an unlawful entry, but for compensation for a right to be invested in the company. Though the latter is often denominated damages, its subject is essentially different from the former. It is called damages only in the sense of an unliquidated demand; but, in its nature, it is the price of a purchased privilege. On the contrary, the claim for the tortious entry and illegal user of the land is purely and properly damages. It is obvious, therefore, that the statute of limitations is not applicable to the petition, which does not determine, unless by consent of the parties, the former damages for intrusion, but compensation only for the future use."

The other provision relied upon (subdivision 2) refers to actions "upon a liability created by statute other than a penalty or forfeiture." We are unable to understand how the liability incurred by the interruption of an owner's constitutional right to occupy and enjoy his property can be said to be created by any statute. It is true that, under the defendant's charter, the petitioner is shorn of all of the usual privileges of ownership, save only a right to have compensation by a particular method of procedure. This right to compensation is conferred by the Constitution, and the liability of the defendant is not "created," but only regulated by statute. The language of the provision mentioned is contained in the Codes of several States, and we have been unable to find any decision applying it to cases like ours. It means precisely what it says, "a liability *created* by statute," such as "an assessment for the reclamation of swamps and overflowed lands" *(People v.* (76) *Hurlburt,* 71 Cal., 72), or the claims of a district attorney for his commissions on debts recovered for the county, where the statute provides for his payment. *Highby v. Calavarus County,* 18 Cal., 176, and like cases. These references serve to illustrate the meaning of the words of the statute, and very clearly indicate that they do not embrace a mere regulation for the enforcement of a right secured by the fundamental law of the land. In conclusion, we will add the remarks of *Chief Justice Thompson* in *Delaware v. R. R.,* 61 Pa. St., 378, that "The defendant has no right to complain of delay as a reason for invoking the statute. The company might and ought to have proceeded and had the damages assessed and paid them, if it did not intend that the plaintiff . . . might take his time to test the damage, inconvenience or otherwise, that the road would be to his property before proceeding." The petitioner is entitled to the relief prayed for.

Affirmed.

Cited: Liverman v. R. R., 109 N. C., 54, 55; *Utley v. R. R.,* 119 N. C., 723; *Narron v. R. R.,* 122 N. C., 859; *Haskins v. Asheville,* 123 N. C., 639; *Dargan v. R. R.,* 131 N. C., 625; *Abernathy v. R. R.,* 150 N. C., 108; *Lloyd v. Venable,* 168 N. C., 533.

L. H. HORNTHAL, ADMINISTRATOR, v. THE ROANOKE, NORFOLK AND BALTIMORE STEAMBOAT COMPANY.

Loss by Fire—Negligence—Steamboat Company—Contract of Insurance—Warehouse—Bill of Lading—Accumulation of Freight—Ordinary Care.

1. The plaintiff brought an action against the defendant steamboat company for failure to safely convey to him certain goods which were destroyed by fire in defendant's warehouse, where they had been stopped on the route. There was a contract on the bill of lading that defendant was not to be liable for any loss or damage arising from fire, etc.: *Held*, that questions tending to show defendant had negligently allowed an accumulation of freight in its warehouse were improperly excluded.

2. The contract on the bill of lading discharged the defendant from its liability as an insurer, if ordinary care was exercised in protecting the goods while in its warehouse.

APPEAL at Fall Term, 1889, of BERTIE, from *Bynum, J.* (77)

The plaintiff alleged that the defendant agreed, in consideration of the freight paid to it by the plaintiff, to safely convey for him from Edenton to Flag Run, on the Roanoke River, certain goods of the value of $346.05; that defendant had failed to do so, and that the same were wholly lost to plaintiff.

The defendant admitted receiving the goods for shipment at Edenton on 11 October, 1884, and that they were not delivered at Flag Run, but denied the right of plaintiff to recover under the contract of shipment; that they were destroyed by fire without any negligence of the defendant.

The material parts of the bill of lading were as follows:

EASTERN NORTH CAROLINA DISPATCH,
Elizabeth City and Norfolk Railroad,
Roanoke, Norfolk and Baltimore Steamboat Co.,
Seaboard and Raleigh Railroad.
H. C. Hudgins, General Claim Agent, Norfolk, Va.

Fast Freight Line between Tarboro, Bethel, Robinsonville, Williamston, Jamesville, Plymouth, Roanoke River, Edenton and Norfolk, Baltimore, Philadelphia, New York, Boston, Providence and the East.

"EDENTON, ..., Oct. ...., 1884.

"Delivered to the steamer Plymouth, by N. S. R. R. Co., the property mentioned and consigned as below in apparent good order, to be forwarded to ....., and there delivered to consignee or connecting line, to be forwarded to destination.

(78) "It is mutually agreed that the carrier shall have liberty to transfer the goods to and transport them by steamers, lighters and barges, with liberty to tow and assist vessels in any situation, and sail without pilot.

"No carrier shall be liable for any loss or damage arising from any of the following causes, viz.: fire from any cause on land or water, jettison, ice, freshets, weather, robbers, collisions, riots, explosions, accidents to boilers or machinery, any accident on or perils of the seas or other waters, or of steam or inland navigation, quarantine, deviation, detention or accidental delay, insufficiency of package in strength or otherwise, rust, dampness, loss in weight, leakage, breaking, sweat, blowing, evaporation, vermin, frost, heat, smell, contact with other goods, natural decay or exposure to the weather, or for loss or damage of any kind on goods whose nature requires them to be carried on deck or on open car, or for any deficiency in the contents of packages if receipted for as in good order."

Noah Burfoot, a witness for the defendant, testified: "I was clerk on the steamer Plymouth, a steamer belonging to the defendant company, in October, 1884, running between Edenton and Williamston. The goods for plaintiff were received on steamer Plymouth at Edenton, on 11 October, 1884, and were carried on that day to Williamston and placed in the warehouse of the company. Flag Run was beyond Williamston and Palmyra; freight was carried above Williamston by small steamers, the Bettie and others. I had no official connection with steamers above Williamston; the goods were not carried up the river from Williamston the day they got there, because the Bettie was not there; the water was very low. I had not been above Williamston, but judging from the water at Williamston, I don't think large draft steamers could go to Flag Run. I think the Bettie made two or three trips—some before, some after the goods were put in the ware-
(79) house that was burned. The warehouse at Williamston was burned."

Upon cross-examination he said: "Edenton and Williamston were the termini of my route; the company had other boats running to Flag Run; I was never at Flag Run; don't know the depth of water above Williamston; our boat, the Plymouth, drew six feet of water; the largest boat of the company drew seven feet and six inches; the Bettie was light draft; drew two or two and one-half feet; don't know, of my own knowledge, the Bettie could not go up at the time we took the goods; don't know date the warehouse was burned; the Bettie made trips before and after the goods were carried to Williamston; Bettie was running when we took the goods; water was very low when we shipped the goods."

Upon the redirect examination, defendant's counsel proposed to ask witness: "What amount of goods were in the warehouse at Williamston between 11 and 19 of October, 1884?" this for the purpose of showing that there was such an accumulation of freight at Williamston that the Bettie could not carry them to Flag Run between those dates.

Plaintiff objected. Objection sustained, and exceptions.

Biggs, a witness for defendant, testified: "The warehouse at Williamston was burned 19 October, 1884. I was president of the defendant company at the time. The company owned the steamer Plymouth, making daily trips from Edenton to Williamston; also owned steamers Connahoe and Meteor, making weekly trips from Baltimore to Bull Hill, when water would admit; freights brought to Williamston by the Plymouth were carried above there by the Connahoe and Meteor; freight was put in the warehouse at Williamston until another steamer came on; was then put on steamer and sent on. Some time in August, 1884, freights brought by steamers Plymouth, Connahoe and Meteor were put in the warehouse at Williamston. The company chartered the Bettie, and she carried freight as rapidly as she could above Williamston in August, September, and October. The Connahoe (80) and Meteor could not get above Coke's Landing in September or October. A man familiar with the water at Williamston could tell, from its condition there, what its condition was above there. Connahoe and Meteor could not, at that time, go as high as Flag Run. The Bettie was a small boat, and made a trip up 4 October, 1884. The record of the steamer Bettie was kept by the captain of the steamer. I have the book in my hand. The record of her trips is in the handwriting of the clerk of the boat; I know his handwriting."

Defendant proposed for the witness to read before the jury, from this book, the entry of the trips of the steamer Bettie.

Plaintiff's counsel objected, upon the ground it was not a record but a declaration of the defendant in its own favor, and incompetent.

Objection sustained, and defendant excepted.

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

AVERY, J., after stating the facts: His Honor, in his charge to the jury, seems to have properly assumed that, by force of the contract contained in the bill of lading, the defendant company was discharged from liability as an insurer, and became responsible only for ordinary neglect, in case the goods received should be destroyed by fire on land or water before delivered at Flag Run. *Lee v. R. R.*, 72 N. C., 236. It necessarily follows, therefore, that any testimony tending to show

that the company was not negligent in handling or taking care of the plaintiff's goods while *in transitu* was material and competent, and should have been admitted if offered.

The plaintiff and defendant contracted with knowledge of the
(81) difficulties and delays attending navigation between Williamston and Flag Run when the water was low and only boats of light draft could pass upon the river. If the defendant company exercised ordinary care in protecting the goods while in its warehouse at Williamston awaiting reshipment, and in transporting them as promptly as, under existing circumstances, it could, by reasonable diligence, remove them in the smaller boats, the stipulations in the contract would operate to relieve the defendant from responsibility. It was material, therefore, that the jury should know whether, while the water was low, so large an amount of freight had accumulated in the warehouse at Williamston that the defendant company could not, by ordinary care, have removed it with the facilities at its command. We think that his Honor erred in refusing to allow the witness to testify as to the accumulation of goods in said warehouse "between 11 and 19 October, 1884." If the company carelessly allowed the plaintiff's goods to remain, when its boat could have carried the articles to their destination before the fire occurred, the defendant would be answerable in damages on account of the negligence, notwithstanding the special contract set forth in the bill of lading.

Error.

(82)

SAMUEL BURWELL v. GEORGE H. SNOW AND C. M. COOKE, COMMISSIONERS.

Insurance for the Benefit of Wife and Children—Assignment of Interest in an Estate—Subrogation to Rights of Creditors upon Payment of the Debts of the Estate—Heirs at Law—Constitution.

1. An assignment of plaintiff's "right, title and interest" in his father's estate does not embrace the insurance money or the property allowed in part payment for its advancement.
2. The insurance money was no part of the estate of the decedent.
3. Such insurance for the benefit of wife and children belongs to them, and is expressly allowed by the Constitution.

APPEAL from an order made by *Boykin, J.*, at February Term, 1890, of VANCE.

H. T. Watkins (by brief) for plaintiff. (86)
Day & Zollicoffer (by brief) for defendants.

MERRIMON, C. J. We are of opinion that the court below misinterpreted the meaning and effect of the clause in question of the deed of trust which, in terms, embraced all the plaintiff's "right, title, interest, claim and demand in and to the estate of his deceased father, H. H. Burwell, including his interest in the tract of land in Mecklenburg County, Virginia, known as the Rawlins farm, the said interest in said estate and land being one undivided one-fifth interest therein." This implies no more than his interest as one of the heirs at law and next of kin of his deceased father. It has reference to the intestate's estate, personal and real, and the interest is specially described as "being one undivided one-fifth interest therein." The intestate left surviving him five heirs, the plaintiff being one of them, and entitled to one-fifth of the estate, and, plainly, he intended to convey that interest. There is no word, or words, in the clause recited that at all imply a purpose to embrace and convey debts due from the estate to the plaintiff. Debts so due to him would not be part of his interest as heir at law or next of kin—as to them, he would be a creditor, and entitled, as such, to be paid.

Moreover, the insurance policy, and the money collected upon (87) the same, did not constitute part of the intestate's estate, as seems to have been supposed, nor was the plaintiff entitled to part of it as such heir or next of kin. The policy and money belonged to the widow and children of the intestate in their own right, and not as heirs and next of kin.

The Constitution (Art. X, sec. 7) provides that "The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband, the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband or any of his creditors." This provision clearly contemplates and intends that the husband may so insure his life, and that the policy of insurance shall at once, upon his death, become the absolute property of his wife and children, and not constitute any part of his personal estate, nor will his heirs or personal representatives or next of kin, as such, have any interest in such policy. *Burton v. Farinholt,* 86 N. C., 260. The purpose is to enable the husband to make valuable provision for his wife and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death.

So that the clause of the deed under consideration no more embraced the plaintiff's interest in the policy of insurance in question than it did any property and rights of the plaintiff he did not acquire as heir at law or next of kin of his deceased father, or from his father at all. The terms of the deed go strongly to show that there was no purpose on the part of the plaintiff to embrace by it his interest in the policy or fund arising from it; it expressly describes his interest conveyed in the estate as one undivided *fifth* therein; his interest in the policy was one *sixth* thereof. If he had intended to convey the latter interest, and to specify the extent of it particularly, he would have done so
(88) correctly, and by appropriate terms.

Nor can the mortgagee defendant reasonably contend that the plaintiff intended to convey his right, to be subrogated to the extent of his share of the money arising from the policy of insurance, to the rights of the creditors of the intestate, whose judgments were paid with the money collected upon the policy. That right, treating it as such, was not part of the estate of the intestate—it was an equitable claim against it. As we have seen, the language employed was not appropriate to convey or transfer debts and claims *against* the estate. Besides, the language of the deed employed to describe specifically and with particularity the interest conveyed, did not describe the right of subrogation as to its extent, or at all correctly; it described the interest conveyed as one-fifth, whereas the right of subrogation was one-sixth in extent.

There is error. The judgment must be so modified as to allow the motion of the plaintiff denied.

Modified.

Cited: Cutchin v. Johnston, 120 N. C., 52, 56.

MARK SMITH v. JOHN TINDALL.

Claim and Delivery—Crops—Landlord and Tenant—Lien for Rents and Advancements—Time of Division—Possession of Crops.

1. In claim and delivery ancillary to an action by landlord to recover of his tenant the crops on which there was a lien for rents and advancements, it appeared that the crop was not all gathered, and had been consumed. It did not appear that the defendant had removed any of it without the consent of plaintiff, nor that any time had been fixed when the rents and

advances should be due. The court directed the jury to find that the plaintiff is not the owner and entitled to the immediate possession of the crops, and rendered judgment for the return of the property to the defendant, if it could be had, and if not, then for its value: *Held*, such instruction and judgment was *error*.

2. The crop in question was vested in the possession of the landlord until his lien for rents and advancements was discharged.

3. In the absence of agreement as to time when the lien for rents and advancements should be enforced—*i. e.*, when the crop should be divided—it should be as soon as it can reasonably be done.

4. The plaintiff was entitled to have his crop—*i. e.*, enough for rents and advancements—gathered at the time he demanded it, nor was he obliged to wait for division until the whole crop was gathered.

5. The proper course, ordinarily, between landlord and tenant, is to have the crops divided as they are gathered, subject to the convenience and the interest of the parties.

APPEAL at Spring Term, 1890, of GREENE, from *Boykin, J.* (89)

The following is a copy of the material part of the case settled on appeal:

"The plaintiff claimed to be the owner of the property in controversy, which was a crop, as landlord of the defendant, for rents due from the defendant, and for advances made by plaintiff to enable him to cultivate the land which he had rented from the plaintiff, and on which the property in controversy was raised. The defendant claimed that the plaintiff was the owner, and entitled to the possession of the same. Under proper proceedings in 'claim and delivery' the property had been delivered to the plaintiff.

"On the trial the plaintiff proved that the property was worth $211.59; that there was due from the defendant to the plaintiff, for rent and advances, a sum considerably in excess of the property in controversy. There was no evidence to show that the defendant had removed any of the crop from the premises, or had disposed of any of the crop, without plaintiff's permission, or as to when the rent was due, or the advances. The crop was not all gathered when (90) this action was brought, which was on the .... day of ....., prior to 31 December of the year during which the land was rented and the crop raised, which is the subject of the controversy. It was in evidence that the crop had been consumed. The court instructed the jury to answer the first issue, which was, 'Is the plaintiff the owner and entitled to the immediate possession of the property in controversy?' 'No.' The plaintiff excepted.

"His Honor rendered judgment for a return of the property to the defendant, if such return can be had, and if not, then for $211.59, the value thereof, together with interest and costs.

"From which judgment the plaintiff appealed to the Supreme Court, on the grounds that the court should have instructed the jury to find that the plaintiff was the owner, but not entitled to immediate possession of the property in controversy, and that the judgment should have been rendered only for the costs, and not for the value thereof, as a return thereof could not be had."

W. C. Munroe for plaintiff.
G. M. Lindsey for defendant.

MERRIMON, C. J., after stating the facts: The crop in question was vested in possession of the plaintiff as landlord, and he had a paramount lien thereon until the rents and the money due to him for advancements made by him to the defendant to make the crop were discharged. The statute (The Code, sec. 1754) so expressly provides. So far as appears, the lease was indefinite as to the time of its termination, and no particular time was specified therein when the crop should be divided, or when the plaintiff might enforce his lien. In such case, the lease terminates when, within a reasonable time, the crop shall be gathered and divided, and the crop should be divided,
(91) in the absence of agreement to the contrary, as soon as conveniently it may be. Indeed, unless otherwise provided by agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. There is no reason, ordinarily, why this shall not be done, and reasons of convenience, economy, safety of the parts of the crop gathered, and security of the rights of the parties interested, strongly suggest that it should be.

In this case it does not appear that, by the terms or effect of the contract of lease, the crop was not to be divided, and the plaintiff have his part thereof, until after the whole crop should be gathered. Nor was any reason suggested on the argument, nor can we conceive of any just one, why the plaintiff was not entitled to have his share of the crop gathered at the time he demanded it. His claims were paramount and had to be satisfied, though they took the whole crop. So the law provides. Why, then, should he delay, or be allowed to delay, the plaintiff having what was his own?

Hence, the plaintiff was entitled, at the time he brought the action, to have so much of the gathered crop as was necessary to pay the rents due him and to pay for the advancements made by him. But the defendant denied his right in that respect, contending that his right did not accrue until the whole of the crop should be gathered, and he refused to allow the plaintiff to have any part of the crop. Thereupon

the action was brought. On the trial, it appeared that the property—the part of the crop gathered—delivered to the plaintiff was less than the part thereof to which he was entitled as landlord. He got, by virtue of the ancillary proceeding of claim and delivery, only part of what he had the right to have. He ought, therefore, so far as appears, to have recovered.

This case is materially different from *Jordan v. Bryan,* 103 (92) N. C., 59. In that case, the lease was for the year 1887, and the time agreed on when the advances made for 1887 should be due and demandable was when all the crops were gathered and divided. There was no agreement as to the time when the crops should be divided." As we have seen, in the present case, the lease was indefinite as to the time of its termination, and no time was fixed therein by its terms when the crop should be divided, or when the plaintiff might demand and have his part thereof.

The court erred in directing the jury to render a verdict in the negative upon the issue submitted to them. The plaintiff is entitled to a New trial.

Cited: Perry v. Bragg, 111 N. C., 166; *Rich v. Mangum,* 112 N. C., 82; *Kiser v. Blanton,* 123 N. C., 405.

(93)

MARY A. WHITE v. LUZINKA E. MORRIS ET AL.

Irregular Judgments—Impeachment for Fraud—Personal Service—The Code—Service on Sunday—Guardian ad Litem—Infants—Appearance—Waiver of Jury Trial.

1. Judgments, unless when impeached for fraud, will not be set aside for mere informalities or omissions which do not defeat the ends of justice, especially after the lapse of years.

2. The failure of personal service is cured by the act of 1879 (The Code, sec. 387).

3. Service of summons on Sunday is not invalid; every act may be lawfully done on Sunday which may be lawfully done on any other day, if there is no statute forbidding it.

4. An appearance waives all such irregularities of service.

5. An irregular or erroneous judgment against an infant stands in full force until reversed.

6. A judgment may be set aside when the irregularity has not been waived or cured and may yet work injury to the complaining party.

7. It is competent for the attorney and guardian *ad litem* to waive a jury trial for infants, even where they have not been regularly served with summons.

8. If the judge find the facts and there be no objection, it must be presumed it was with consent of all parties.

9. Where it appeared that the infant heirs of the alleged bargainor, in an action to set up a lost deed, were not served with summons, nor was there guardian *ad litem;* that they had no general or testamentary guardian; that the summons was endorsed, served on a day which was shown to be Sunday; that the date of such endorsement was nearly a month before it was issued; and it further appeared that summons was served upon the grandfather of the infants, with whom they lived, and that their guardian *ad litem* entered an appearance in court and filed answer for them; that attorneys were employed for them: *Held,* that these facts, taken together, did not disclose such irregularity as entitled the infants to have the judgment set aside.

MOTION to set aside a judgment rendered in this action at Fall Term, 1871, of PASQUOTANK, "on the ground that it is irregular and void," heard before *Whitaker, J.,* at Spring Term, 1890, of PASQUOTANK.

The defendants say that at the time this action was instituted and judgment obtained against them they were aged, respectively, 7 and 9 years, and that no defense was made for them, as they are informed and believe; that they were without general guardian; that they were never served with process and never had a day in court to make their defense; that the court failed to appoint a guardian *ad litem* for them, as required by law, and no defense was made for them; that no issues were submitted to a jury, as required by law; that a jury trial was not waived; that the judgment was "irregular and void," and that they have a good and meritorious defense to the action.

The plaintiff denies all this, and says that the judgment was regularly and properly rendered upon the findings of fact by the court, and if there were any irregularities in the proceedings they were cured
(94) by the judgment and by the act of 1879, etc. She further says that the defendants were represented by able counsel, who filed an answer to the complaint for them, and that a fair and impartial trial resulted in the judgment now sought to be set aside, and that by reason of the delay of the defendants to make this motion, by lapse of time, death of witnesses and failure of memory, it will be a hardship upon her if this motion shall be granted.

It appears from the record sent up as a part of the case on appeal that the original summons was issued on 19 April, 1871; that it was,

"on the return day thereof," returned by the sheriff, executed as follows: "Received 26 March, 1871. Served by leaving a copy of the summons with the grandfather of the defendants, Reuben Nixon, with whom they lived. Copy of summons left at his house." Signed by the sheriff.

It further appears from the record that a complaint was duly filed at the Spring Term, 1871, alleging, in detail and at length, the sale of the land described therein by Mordecai Morris (the ancestor of the defendants) to the plaintiff, the consideration thereof, the execution of the deed by Mordecai Morris, and its loss; that Mordecai Morris is dead, and the infant defendants were his only heirs at law, and closing with the prayer: "That a guardian *ad litem* be appointed for the said minor defendants to answer the complaint and defend their interest in this action, and that the plaintiff may have a decree that said deed was executed and lost, and that the title to said land is in the plaintiff from the execution of said deed, and that the defendants may be decreed to execute a new deed to plaintiff, conveying the said land to her, and for such other relief," etc.

To this complaint an answer was filed at the same term (Spring Term, 1871) by Martin & Reid, attorneys for defendants, denying in detail all the material allegations of the complaint. They further say that if any deed was ever executed it was only intended as a mortgage or trust, was so received by the plaintiff, and all that (95) was due has been long since paid.

At Fall Term, 1871, the following appears from the record:

MARY A. WHITE *v.* LUZINKA MORRIS and ELOISE MORRIS, by WILLIAM L. REID, Guardian *ad litem.*

Upon application to the court, William L. Reid, Esq., is appointed guardian *ad litem* and *prochein amie* to the infant defendants, and his answer to this complaint allowed and adopted as the answer of said infant defendants.

And thereupon, upon the pleadings and testimony in said action, it is ordered, adjudged and decreed by the court that there was a contract of sale and for the conveyance of the land named in the pleadings from Mordecai Morris to the plaintiff before that day, and that said conveyance was actually executed as early as 28 January, A. D. 1868, conveying the said lands named in the pleadings in fee to the said plaintiff, for the consideration, amongst others, of the sum of $2,800, and that said deed is lost. It is ordered, adjudged and decreed that the lands named in the pleadings be and they are hereby declared to be vested in

fee in the plaintiff, Mary A. White, and that the defendant do make a conveyance of said lands, when they come of age, to the plaintiff or to her heirs or assigns.

It is ordered and adjudged that this judgment be enrolled and registered in Pasquotank County, and that the costs be paid by the plaintiff.

C. C. POOL, J. S. C.

This decree was enrolled and also registered in the office of register of deeds for the county.

(96) From the evidence furnished by the record in the cause, and affidavits (not necessary to be set out in determining the questions before this Court), the court finds the following facts:

"That no summons or notice was served on either of these defendants or upon any guardian *ad litem;* that both of the defendants, at the time of said judgment, were infants, under 14 years of age, and had no general or testamentary guardian.

"That the date, '27 March, 1871,' endorsed on back of summons by B. F. Wiley, sheriff of Gates County, was Sunday; that summons was issued 19 April, 1871; that W. L. Reid and W. F. Martin, attorneys at law, filed an answer for and in the name of the defendants; that W. L. Reid was appointed guardian *ad litem* for defendants, and filed an answer as such; that this was an action to set up a lost deed, alleged to have been executed to plaintiff for valuable consideration by one Mordecai Morris for land formerly owned by Mordecai Morris, who was dead at the institution of this action, having left no will; that the defendants were the only heirs at law of said Mordecai Morris; that the defendants were 25 and 27 years old when they made this motion; that this motion was made at Spring Term, 1888; that defendants instituted suit in February, 1886, to set aside this judgment, but said suit was dismissed at June Term, 1887.

"Defendants excepted to the finding of the court, the fact that *W. L. Reid filed an answer* as guardian *ad litem* for the defendants, upon the ground that there is no evidence for finding that fact. There was no evidence before the court of said W. L. Reid's appointment as guardian *ad litem* for defendants, except the final judgment rendered in the court, and no evidence in regard to said Reid filing any answer as said guardian *ad litem,* except what appears in said final judgment, marked 'A,' and defendants' affidavit, marked 'B,' and made a part of

(97) this case. There was no answer of W. L. Reid as guardian *ad litem* of defendants found on file with the papers in this cause, and no evidence that it had been lost. All of the pleadings in the original case are hereto attached and made part of this case."

Upon the facts found, the court rendered judgment dismissing defendants' motion. Defendants appealed.

J. W. Albertson, Jr., for plaintiff.
E. F. Aydlett for defendants.

DAVIS, J., after stating the facts: Was the judgment in question irregular and void?

There is a presumption in favor of the validity of every judgment of a court of competent jurisdiction, and in this there is no distinction between judgments against adults and judgments against infants, where the parties are properly within the jurisdiction of the court (*Mauney v. Gidney,* 88 N. C., 200), and while it is, for obvious reasons, the duty of the courts to see that the rights and interests of infants are guarded and protected, and, where they are without regular guardians, to see that suitable and fit persons are appointed guardians *ad litem* to protect and defend them in their rights when litigated before the courts, yet, in the absence of any charge that the court has been imposed upon by fraud and collusion, it will be presumed that every court, having jurisdiction of the parties and the subject-matter, does what is necessary to give effect to its proceedings, this presumption in favor of the validity of judicial proceedings will not permit the judgments of courts to be set aside or annulled, in the absence of fraud, for mere informalities, technicalities or omissions that do not affect their merits or defeat the ends of justice. *Omnia presumuntur rite esse acta.* It would tend to lessen public confidence in the efficacy of judicial proceedings if (98) the judgments of courts, after the lapse of years, are to be disturbed for the want of formal and technical precision in the record of their proceedings and judgments. It is for this manifest reason of public policy, as well as in the interest of substantial justice, which is not always subserved by reopening and prolonging litigation, that the courts have gone very far in upholding the validity of loose and informal proceedings and judgments, as in the case of *Howerton v. Sexton,* 90 N. C., 581, and similar cases. Besides, it is enacted (The Code, sec. 276) "that no judgment shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

In this case the defendants insist that the judgment was irregular and void upon several grounds. The first is that there was no personal service on the infants.

Formerly, an infant was brought into court just as any other defendant was. If he had a general guardian, process was served upon the guardian; if there was no general guardian, the court acquired jurisdiction by service of process upon the infant, and appointed some suitable person—frequently some officer of the court—as guardian *ad litem,* who accepted service and defended for him; but since the Code of Civil Pro-

cedure (The Code, sec. 217), the service upon a minor under the age of 14 must be upon him personally, and also his father, mother or guardian, or, if there be none in the State, then upon any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. In the present case, process was not served upon the defendants *personally,* as was required, but upon their grandfather, with whom they lived.

(99) The failure of personal service is cured by the act of 1879 (The Code, sec. 387), which makes valid the "proceedings, actions, decrees and judgments" in civil actions and special proceedings of the courts, notwithstanding there has been no *personal* service of summons in actions pending against infants, and prior to 14 March, 1879, unless impeached and set aside for fraud. But the defendants say that the curative act of 1879 does not apply to cases in which there has been no service of process upon any one, and that in this case there never was any valid service of process upon anybody, because it was served, as appears by endorsement on the summons, on 26 March, 1871, and that is found as a fact to have been Sunday, and was therefore void. The record shows that the summons was issued on 19 April, 1871, and executed on 26 March, 1871. This was impossible, in the order of time, and it is manifest that there was some mistake in regard to the dates. But, assuming that it was on Sunday, it is said in *S. v. Ricketts,* 74 N. C., 192, that "In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there be some act of the Legislature forbidding it to be done on that day." Under the law prior to The Code, it was made illegal to execute any civil process on Sunday, and all such process might be "abated by the plea" (Revised Code, ch. 31, sec. 54), and now, under The Code, sec. 291, no person can be arrested in a civil action on Sunday. But we need not pursue this branch of the question, as there was an appearance, and, as is well settled, this cured any preceding irregularity and constituted a cause in court, and placed the defendants in the same situation in relation to it as if process had been properly and regularly served upon them. *Turner v. Douglass,* 72 N. C., 127. It gave the court jurisdiction.

In *Marshall v. Fisher,* 46 N. C., 111, it is said that a judgment against an infant appearing by attorney, though erroneous, "is of full force and effect until reversed," and the objection, says *Pearson, J.,* could (100) only be taken advantage of by a writ of error. As writs of error are now abolished in civil actions, and appeals substituted therefor (see The Code, sec. 544, *et seq.*), it can now be only by appeal. See, also, *Turner v. Douglass, supra.*

The defendants rely upon *Stancill v. Gay,* 92 N. C., 464; *Larkins v. Bullard,* 88 N. C., 35, and *Perry v. Adams,* 98 N. C., 167. There is a very clear distinction between those cases and this. In them *there was no service of process at all, on anybody,* no guardian *ad litem* appointed to protect their rights, and no answer by any one for them, and the curative act of 1879, neither by its letter nor spirit, was intended to make the proceedings and judgments valid in such cases. In *Perry v. Adams* the present *Chief Justice* said: "The object of the curative statute is to cure the judgment and proceeding, when such *personal* service was omitted, but it does not embrace cases where *no service* was made upon the infant, or any other person in his behalf, as the statute requires to be done." In the case before us there was service upon the grandfather of the infants, with whom they lived, and an appearance and answer for them.

The defendants say, secondly, that there was no evidence before the court to support the finding of fact that "W. L. Reid filed an answer as guardian *ad litem* for the defendants, or of his appointment as guardian *ad litem.*" The recitals and facts appearing in the record constitute evidence, in themselves, to support the finding, and this objection cannot be sustained.

The law is careful in protecting the rights of infants, and when they are brought within the jurisdiction of the courts, by proper or sufficient process, a guardian *ad litem* should be appointed for them, who shall, "if the cause in which he is appointed be a civil action, file his answer to the complaint within the time required for other defendants," and the requirements of The Code, sec. 181, and, as the present (101) *Chief Justice* said, in *Ward v. Lowndes,* 96 N. C., 378: "This statute should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceeding, or proceedings, in them."

In *Williamson v. Hartman,* 92 N. C., 239, it is said: "Generally, a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be, such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it. While, as has been said, the courts will always be careful of the rights of infants, they will not set aside irregular judgments against them as a matter of course, and before doing so, it ought to appear from the record, or otherwise, that the infant has suffered some substantial wrong or injury. Of course, it may be impeached for fraud, and will also be set aside if void."

It is insisted, thirdly, that no issues were submitted to the jury, and that there was no waiver of trial by jury, as required by The Code, and the judge had no right to find the facts in the manner set out, and that

the judgment rendered was void for this fatal irregularity. The defendants were properly in court by their guardian *ad litem* and by attorney, and it was competent for them to waive a jury trial, which should have been properly and regularly done in the mode prescribed by statute; but if the judge proceeded to find the facts, and there was no objection, neither before nor after the rendition of the judgment, during the term, and without appeal, it must be taken to have been rendered by consent and a waiver, and they will be estopped. *Leach v. R. R.,* 65 N. C., 486; *Crump v. Thomas,* 85 N. C., 272; *Stevenson v. Felton,* 99 N. C., 58; *Spencer v. Credle,* 102 N. C., 68; *R. R. v. Parker,* 105 N. C., 246.

(102) When the court has jurisdiction of the parties and of the subject-matter, and renders judgment regularly in term, it will be assumed, after judgment, that any preceding informality has been waived by consent; and if the judgment is taken without objection, though it be erroneous, if there is no appeal, it will be too late to say that there was no waiver.

The court having jurisdiction of the parties, if there was no consent, the proper remedy was by appeal, as in the cases of *Andrews v. Pritchett,* 66 N. C., 387, and *Chasteen v. Martin,* 81 N. C., 51.

It appears from the recital in the judgment that the guardian *ad litem* adopted the answer that had been filed for the defendants. This answer, sent up as part of the case, is not a mere formal answer, but a denial, in detail, of the allegations of the complaint, and sets forth affirmatively matters of defense, manifesting an intelligent interest in behalf of the infant defendants. It does not appear how the defendants suffered any wrong or injury, or that any injustice was done them; and in the absence of fraud, of which there is no allegation or intimation, the judgment must be presumed to have been fairly and regularly taken. *Wiseman v. Penland,* 79 N. C., 197.

Affirmed.

Cited: S. v. Penley, post, 810; *Taylor v. Ervin,* 119 N. C., 276; *Henry v. Hilliard,* 120 N. C., 485; *Rodman v. Robinson,* 134 N. C., 507; *Lumber Co. v. Lumber Co.,* 137 N. C., 438; *Carraway v. Lassiter,* 139 N. C., 155; *Rackley v. Roberts,* 147 N. C., 207; *Yarborough v. Moore,* 151 N. C., 122; *Hughes v. Pritchard,* 153 N. C., 141.

(103)

T. G. SKINNER ET AL. v. HARVEY TERRY.

The Code—Judgment—Mistake—Excusable Neglect—Frivolous Demurrer—Default of Answer—Motions—Multiplicity of Suits.

1. The Code, sec. 274, allowing the court to relieve a party against a judgment on account of mistake, excusable neglect, etc., refers to mistakes of fact—not of law.

2. So, where a defendant whom the court had refused to allow to file answer, after overruling a frivolous demurrer, neglected his appeal and allows judgment to be entered against him, because he was surprised by the action of the court and misunderstood the effect of the judgment: *Held*, there was no error in denying his petition to set the judgment aside on that account.

3. Where it appeared, upon inspection of the record, that the amount of the final judgment so rendered on default of answer could not be ascertained by computation or be fixed by the terms of the contract sued on, such judgment was irregular and should have been set aside by the court, even though the demand for it was not based on that ground. The overruling of the frivolous demurrer is of no avail to the plaintiffs, but leaves the parties just as if it had not been filed.

4. The law does not favor a multiplicity of motions when one will put an end to the controversy, and sufficient grounds appear of record to sustain it, though not relied on by the party seeking relief.

5. Regularly, the motion should have been made in the county where the judgment was rendered; but where it appears that the parties consented to have it heard in another, no objection can be taken on that account.

MOTION tried at chambers in Edenton, CHOWAN, May, 1890, before *Whitaker, J.*

W. B. Rodman, Jr. (by brief), for plaintiffs. (106)
L. D. Stark for defendant.

MERRIMON, C. J. The statutory provision (The Code, sec. 274) invoked by the defendant provides that "The judge . . . may, also, in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," etc. This implies not simply any, but reasonable, mistake, inadvertence, or excusable neglect as to, or surprise occasioned by, some fact or something that has not been done, of which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other

proceeding of which he complains. And such judgment, order, or other proceeding must have been given or taken against him through such mistake, inadvertence, surprise, or excusable neglect. The statutory provision does not extend to mistakes as to the law applicable, or as to what the complaining party might, or ought, or ought not to do in the course of the trial, or as to what steps he ought to take with a view to have errors of the court corrected. It does not imply that the court may grant a new trial or set aside a judgment for errors of law (107) of the court, or upon the ground that the party was ignorant of the law or his rights, and as to the methods and means whereby he might assert or enforce them. He may reasonably be misled or surprised by matters of fact, and on that account be excused and relieved from the judgment against him, but errors of the court must be corrected by itself, in the appropriate way and at the proper time, or by the court of errors.

The judgment of which the defendant complains was not given against him through his mistake, inadvertence, surprise, or excusable neglect as to a fact or matters of fact. His mistake was as to what steps he ought to have taken to have the alleged errors of the court corrected. The court held that his demurrer was frivolous, and he excepted. He then requested the court to allow him to file an answer, and thus make defense. The court held that it had not power to allow him to file an answer, and he again excepted, and appealed. This was his proper course, but he abandoned his appeal and thus lost his opportunity to have the errors assigned corrected. That he thus improvidently lost his remedy, through mistake or ignorance of the law, is no reason why the judgment should be set aside. The court, therefore, properly denied the motion upon the grounds specially assigned.

We think, however, that the court should have granted the motion so far as to modify the judgment and make the same a judgment by default and inquiry, as allowed by the statute (The Code, sec. 386). It was clearly irregular, in that it was final. The plaintiffs' cause of action alleged did not warrant such judgment. They alleged in their complaint simply that the defendant was indebted to them "in the sum of $1,000 for services rendered upon his retainers" in the case specified. They did not allege and set "forth one or more causes of action, each (108) consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation," or that the defendant had agreed or promised to pay them the sum specified, or any particular sum of money. They must have done so to entitle them to a judgment by default final. The Code,

secs. 385, 386; *Witt v. Long,* 93 N. C., 388; *Hartman v. Farris,* 95 N. C., 177. That the defendant's demurrer was adjudged to be frivolous (*Moore v. Hobbs,* 79 N. C., 535) could not help the plaintiffs and entitle them to judgment by default final. The statute (The Code, sec. 388) does not provide that such adjudication shall have such effect. It simply puts the demurrer out of the way and leaves the party prejudiced by it to obtain his judgment, as if it had not been filed. Regularly, the plaintiff or party prejudiced thereby should apply to the court at the return term to have the demurrer or other pleading adjudged frivolous, but if he fails to do so then, and does so successfully afterwards, he would be in the like case as if he had failed to take judgment by default and inquiry when he might have done so at the return term and failed to do so.

Such irregularity of the judgment was not assigned specifically as one of the grounds of the motion, but the real purpose of the latter was to have the judgment in question set aside for any proper cause. The motion was made in the action, and it embraced the whole record within its scope, so that the court could see, and ought to have seen, the irregularity and granted the defendant such relief as the nature of his motion would allow and he appeared to be entitled to have. There was no substantial reason why such relief should not be granted. It would be circuitous, dilatory, and serve no useful or just purpose to deny the motion upon the particular grounds assigned by the mover, and leave him to make another motion for the same purpose, simply assigning in its support a ground not specified, but which plainly appeared in (109) the record at the hearing of the first motion. The law does not encourage unnecessary circuity of method, but, on the contrary, the court will settle and administer the right in the action promptly, without regard to mere forms. *Moore v. Nowell,* 94 N. C., 265; *Patrick v. R. R.,* 93 N. C., 422; *Harris v. Sneeden,* 104 N. C., 369.

It was objected in this Court, on the argument, that the motion was made in vacation time, and heard in a county other than that in whose court the judgment was given. This objection would have force but for the fact that it sufficiently appears by the record that the plaintiff—the parties—consented to allow it to be thus made and heard. It appears that the plaintiffs accepted service of notice of the application; that the hearing was continued, by consent, from day to day, and that the parties—both the plaintiffs and defendant—were represented by counsel, who argued the motion at length at the hearing, and no such objection was made—at all events, none appears in the record. The reasonable and strong implication is that the parties consented to allow the motion to be made and heard in vacation and at the place specified. By consent,

this might be done. *Coates v. Wilkes,* 94 N. C., 174; *Bynum v. Powe,* 97 N. C., 374; *McNeill v. Hodges,* 99 N. C., 248; *Gatewood v. Leak, ib.,* 363.

Reversed.

Cited: Williams v. R. R., 110 N. C., 474; *Johnson v. Loftin,* 111 N. C., 323; *Fertilizer Co. v. Taylor,* 112 N. C., 145; *Crabtree v. Scheelky,* 119 N. C., 58; *Ledbetter v. Pinner,* 120 N. C., 457; *Cowles v. Cowles,* 121 N. C., 279; *Phifer v. Ins. Co.,* 123 N. C., 409; *Collins v. Pettitt,* 124 N. C., 736; *Cantwell v. Herring,* 127 N. C., 83; *Scott v. Life Assn.,* 137 N. C., 524, 527; *Mann v. Hall,* 163 N. C., 51, 53.

(110)

STATE EX REL. COUNTY BOARD OF EDUCATION v. THE COMMISSIONERS OF CURRITUCK COUNTY.

Constitutional Limitation of Taxation—State and County Taxes—Levy—School Taxes.

1. The constitutional limitation of taxation for ordinary State and county purposes is 66⅔ cents on $100 worth of property.
2. A levy beyond the limitation is void.
3. The taxes levied for the State are paramount to, and take precedence over, taxes levied for county purposes.
4. The tax of 12½ cents on $100 worth of property for school purposes is a State tax, and placing it upon the levy as a county tax by the county authorities does not change its character—their levy is void.
5. The county authorities levied a tax of 41⅔ cents on $100 worth of property; the State, by statute, levied a tax of 41½ cents; 15½ cents, an amount equal to the school tax and the pension tax, was collected under the head of county taxes; the treasurer held in his hands an amount equal to the school fund: *Held,* in an action for this fund, by the county board of education against the county commissioners, that they were entitled to recover.

APPEAL at Spring Term, 1890, of CURRITUCK, from *Whitaker, J.*

Action brought in the name of the State on relation of "The County Board of Education," against the Board of Commissioners of the County of Currituck, the treasurer and sheriff of that county, to compel the defendants to pay to the relators the sum of money specified and demanded in the complaint, for the purposes of the free public schools of the county named. The following is a copy of the material parts of the complaint:

1. That the defendants, the Board of County Commissioners and the Magistrates of Currituck County, at their regular meeting in June, 1889, at which meeting it was their duty to levy the taxes for said year, levied on $100 worth of property 41⅔ cents for county (111) purposes—the State having levied 25 cents on $100 worth of property—and failed and refused to levy 12 cents, or any other sum, on $100 worth of property for school purposes, as prescribed by section 2589 of The Code.

2. The sum of 41⅔ cents levied as aforesaid was necessary to defray the many expenses of the county government, and the same could not be met with a smaller levy.

3. That the taxable property listed in said county for the year 1889 amounts in value to $696,422.19, and the tax lists as levied went into the hands of the sheriff of the county and was by him collected and paid into the hands of defendant treasurer of said county, who has in hand now of the same the sum of $871, which is sufficient to pay 12½ cents named by the plaintiff for and due the school fund, but if taken would leave the county without sufficient funds to pay its ordinary and necessary expenses.

4. That the said treasurer is about to pay out all the funds now in his hands as aforesaid, upon orders of the county commissioners, in the ordinary course of the business of the county, which will not leave any fund out of which can be levied and collected the 12½ cents for the school fund.

5. That all the school fund arising from all other sources than the 12½ cents mentioned in item 1 of this complaint is exhausted, and unless the said 12½ cents are given to the schools the same will be entirely *without* the means of having public schools for four months.

1. It does not appear that it was the duty of the commissioners and justices of the peace to make the levy of 12½ cents set forth in the complaint, nor the duty of Cowell, treasurer, to pay the same to the plaintiff or retain it for the plaintiff.

2. It appears that the tax already levied is equal to the full (112) limit allowed by the Constitution.

3. It appears that the tax assessed of 41 cents for county purposes is not more than sufficient to provide for the same, and if 12½ cents be deducted, as demanded, the county will be left without means to pay its ordinary and necessary expenses.

4. It appears that the said commissioners and justices met and performed their duties, as they understood them, at the time and place required by law, and that they have no authority to reconvene and make the levy at any other time.

5. It appears that the facts stated are insufficient to entitle the plaintiff to the writ of *mandamus* against said commissioners and justices of the peace.

The court overruled the demurrer and gave judgment for the plaintiff, and the defendants, having excepted, appealed.

Theo. F. Davidson, Attorney-General, for plaintiff.
W. D. Pruden for defendants.

MERRIMON, C. J., after stating the facts: It is settled by many decisions of this Court that the *equation and limitation of taxation* established by the Constitution (Art. V, sec. 1) prohibits and prevents the levy of a greater capitation tax than $2 on each taxable poll, and a tax for the equal amount on property valued at $300 in cash, to raise revenue for the *ordinary* purposes of the State and county governments. This is equal to a tax levy of 66⅔ cents on property valued at $100 in cash. For such purposes the whole tax levy cannot exceed the sums mentioned. *R. R. v. Holden,* 63 N. C., 410; *Mauney v. Comrs.,* 71 N. C., 486; *Trull v. Comrs.,* 72 N. C., 388; *French v. Comrs.,* 74 N. C., 692; *Griffeen v. Comrs., ib.,* 701; *Clifton v. Wynne,* 80 N. C., 145; *Barksdale v. Comrs.,* 93 N. C., 472.

(113) The taxes for the State are levied by statute, and before the levy for the several counties by the proper county authorities; and hence, as well as for other reasons, the tax levy for the State is paramount, has precedence and must prevail to the exclusion, if need be, of the like levy for the county, unless otherwise provided by statute. And, moreover, the several counties can only levy taxes to meet the *ordinary* expenses of the county government within the limitation of taxation mentioned, and to the extent the power of taxation for ordinary State and county purposes has not been exhausted by the levy for the State. Any levy for such purpose beyond this limitation would be void, because in violation of the Constitution and without authority.

The statute (Laws 1889, ch. 216, sec. 3) prevailing at the time the defendant commissioners and justices of the peace undertook and purported to make the tax levy in question, levied a tax for the ordinary purposes of the State of 25 cents on property of the value of $100. The other statute (The Code, sec. 2589) also levied a tax of 12½ cents on property of the like value for the support of the public schools; and the other statute (Laws 1889, ch. 198, sec. 17) also levied a like tax of 3 cents for pensions. Thus the tax levy for the ordinary purposes of the State was 40½ cents on property of the value of $100. This left the county authorities named at liberty, within the limitation, to levy a tax for ordinary county purposes of only 26⅙ cents on property valued

at $100. For the reasons already stated, they could not exceed that sum. Hence the levy they undertook to make in excess of it was void. The levy made by them was valid only to the extent of 26⅙ cents on property valued at $100.

The levy of 12½ cents school tax for the State, and 3 cents for pensions was not formally and specifically set forth in the tax list, a copy of which was directed and delivered to the sheriff, as directed by the statute (Laws 1889, ch. 216, sec. 38), as it should have been. (114) Nevertheless, the sheriff, as tax collector, collected as taxes a sum of money equal to the whole levy for the State, as explained above, and also the lawful levy for the county, to wit, 26⅙ cents for the county. The excess of this levy collected as for the county could not, did not, make it belong to the county; the latter was not entitled to have it, because, as to it, the levy for the county was void, it being to that extent in excess of the limitation of taxation. Although the money was so collected as taxes for the county, it, in contemplation of law, belonged to the State by virtue of the levy for public schools. The mere fact that it was collected as taxes under an improper head, informally and under misapprehension, could not entitle the county to have it, nor could such fact deprive the State of the right to have it by virtue of the lawful levy for a lawful purpose. To place the tax levied by the statute on the tax list was not essential to create the right of the State. If the county authorities had undertaken to levy and collect taxes for county purposes to the amount of 66⅔ cents on property of the value of $100, ignoring the statutory levy for the State, this surely could not have the effect to deprive the State of so much of the taxes collected as might be embraced by the levy for it. In such case it would be the duty of the sheriff to account and pay to the State its part of the taxes collected. From the tax list the State's share could be readily ascertained. *Clifton v. Wynne, supra.* The money in question, therefore, belongs to the State.

Affirmed.

Cited: Herring v. Dixon, 122 N. C., 423; *Comrs. v. McDonald,* 148 N. C., 126; *Charlotte v. Brown,* 165 N. C., 437; *Bennett v. Comrs.,* 173 N. C., 628; *R. R. v. Comrs.,* 178 N. C., 453.

(115)

W. F. KORNEGAY & CO. v. THE FARMERS & MERCHANTS STEAMBOAT COMPANY.

Parties—Lien—Mortgage—Prior Incumbrance—Motion.

1. The plaintiff furnished the defendant materials for fitting a steamboat in 1883, and they were used for this purpose, and, shortly thereafter, in the same year, duly filed notice of lien: *Held*, in an action to enforce this lien, a subsequent mortgagee was not a necessary party, and still less where the court was ready to proceed to judgment when the motion was made.

2. Where there is a defect of parties, and this appears from the complaint, objection should be taken by demurrer; otherwise, in the answer.

APPEAL at February Term, 1890, of CRAVEN, from *Womack, J.*

This action was brought, as stated in the case settled on appeal for this Court, "to recover of the defendant $2,000 on a contract made by the plaintiff with the defendant for certain machinery, described in article 2 of the complaint, and for $79.16 for the value of certain articles furnished to defendant, as alleged in article 1 of the second cause of action in the complaint, and to have the same declared a lien on the steamboat Carolina, described in the complaint, and that said steamboat be sold to satisfy the same, under the contract, lien and notice.

Pursuant to previous contract, the plaintiff furnished defendant certain materials for fitting out its steamboat in 1883, and shortly thereafter docketed a notice of this lien in the Superior Court of Craven.

The defendant, in its answer, denied the allegations of the complaint, and set up the fact that said steamboat had been conveyed to T. E. Hooker by a bill of sale, shown to the court and dated 25 January, 1884, and recorded in the United States customs house, 26 January, 1884.

At May Term, 1886, of said court the cause was referred to
(116) Henry R. Bryan, Esq., pursuant to the order in the record.

The cause came on for a hearing upon the report of the referee, and the exceptions filed thereto by the defendant, and his Honor found the facts to be as reported by the referee, and adopted them as his own.

The defendant thereupon moved that the plaintiff be required to make T. E. Hooker a party to the action. Motion refused. Exception by defendant.

The exception of the defendant was then overruled, to which the defendant excepted, and judgment was rendered as set out in the record, to which judgment defendant excepted for error by the court as above set out.

Clement Manly for plaintiff.
M. DeW. Stevenson and W. W. Clark for defendant.

MERRIMON, C. J., after stating the facts: After the court had found the facts of the case in the course of the action, and was ready to proceed to give judgment, the defendant moved that T. E. Hooker be made a party thereto, on the suggested ground that the defendant had executed to him a mortgage of the vessel mentioned to secure his debt, subsequent to the lien thereon of the plaintiff, specified in the complaint. That such person had such mortgage did not render him a *necessary* party to this action. Any rights, legal or equitable, acquired by him by virtue of it, were subsequent, subject to and distinct from the lien of the plaintiff. The plaintiff's cause of action was distinctly against the defendant—not against the mortgagee—his rights in litigation did not at all depend upon the rights or claims of that mortgagee; nor had the latter rights or cause of action as against the plaintiff and the defendant, as to the plaintiff's cause of action in litigation. Granting that the mortgagee had some interest in the vessel, it was acquired subsequent to the (117) plaintiff's first lien, and it was not necessary to litigate that interest, settle and determine the same, in order that the plaintiff's cause of action should be settled and determined.

It is only "when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in." Code, sec. 189; *Colgrove v. Koonce,* 76 N. C., 363; *Wade v. Saunders,* 70 N. C., 277; *McDonald v. Morris,* 89 N. C., 99; *Boyle v. Robbins,* 71 N. C., 130.

The plaintiff alleged no cause of action against the mortgagee mentioned, nor does he seek redress against him. If the title to the vessel was in the latter, the defendant might have made that a defense; indeed, it seems that it intended to make such defense. *Morehead v. R. R.,* 96 N. C., 362; *Sons of Temperance v. Aston,* 92 N. C., 588.

If there was a defect of material parties, the defendant should have taken advantage of the same in apt time by demurrer, if such defect appeared from the complaint; otherwise, in his answer. Otherwise, he will be deemed to have waived such objection. Code, sec. 239, par. 4, secs. 241, 242; *Usry v. Suit,* 91 N. C., 406; *Lunn v. Shermer,* 93 N. C., 164; *Leak v. Covington,* 99 N. C., 559; *Mining Co. v. Smelting Co.,* 99 N. C., 445. The defendant did not demur upon the ground that the mortgagee was a necessary party, nor did it so insist in the answer. But if it had done so, such objection, as we have seen, would not necessarily have availed anything.

When the action is for the recovery of real or personal property, a person not a party to it, who has an interest in the subject-matter of the

action *may,* upon his application, be made a party by proper amendment. The mortgagee here did not ask to be made a party. Code, sec. 189.

(118) On the argument the defendant's counsel cited and relied upon *Hinson v. Adrian,* 86 N. C., 61. But that case does not decide that subsequent incumbrancers are necessary essential parties to actions to enforce prior incumbrances, and must, therefore, be made such. It simply decides that subsequent, indeed, all incumbrancers, should be made parties, with a view to complete administration of their rights, respectively, in their just order. It applies a rule of equity practice very convenient and wholesome, that ought generally to be observed. The court may allow a motion to bring in such parties—it might, *ex mero motu,* direct and require them to be brought in, where it could see from the record that there were interested incumbrancers, not before it. *Southall v. Shields,* 81 N. C., 28, recognizes the same rule of practice. In that case, however, the rights of the *feme* plaintiff depended, in some measure, upon the rights of the parties which the court directed to be brought in.

The cases just cited do not imply that a senior incumbrancer cannot have his rights enforced by action, in the absence of the junior incumbrancer. There is no imperative reason why he cannot, and while, ordinarily, the latter might apply, or the court might, for proper considerations appearing, direct that he be brought in, it ought not, would not, unless because of very weighty considerations, delay the action, after the case had been heard and was ready for the final judgment to be given, to bring him in.

In this case the subsequent incumbrancer did not ask, nor did the court deem it necessary, that he be brought into the action, nor did the defendant move that he be, until the court had settled the facts, and was about to proceed to judgment, and there was no serious consideration assigned why he should be. The court properly declined to grant the motion.

Affirmed.

Cited: Lumber Co. v. Hotel Co., 109 N. C., 663; *Williams v. Kerr,* 113 N. C., 311; *Styers v. Alspaugh,* 118 N. C., 634; *Gammon v. Johnson,* 126 N. C., 67; *Howe v. Harper,* 127 N. C., 357; *Jones v. Williams,* 155 N. C., 188; *Brown v. Harding,* 170 N. C., 262; *Armfield Co. v. Saleeby,* 178 N. C., 304.

(119)

C. T. LAWRENCE v. J. R. WEEKS.

Landlord and Tenant—Agricultural Partnership—Mortgage—Crop Lien—Innocent Creditors Without Notice—Equity—Release—Registration.

1. A note secured by a lien and chattel mortgage, duly recorded 24 April, 1889, was assigned for value without notice of any equities and before due, to the plaintiff. Previous to this assignment, and on the 12th day of March, 1889, the tenant of the maker of plaintiff's note had executed to defendant a lien for supplies and advancements upon the crops cultivated by him, and his landlord (the maker of said note) executed to defendant a release of the landlord's lien for rent. This release was never recorded. The plaintiff's assignor, the payee of the note, had notice, and plaintiff did not have notice, of defendant's liens. The crop raised by the tenant was two bales of cotton, worth $92.53, which was taken and converted by the defendant: *Held*, that the plaintiff was entitled to recover the landlord's share—one-half the value of the cotton.

2. The assignee, for value of note before it is due, and without notice, takes it, discharged of any equities of the maker, or any one claiming under him, against the payee.

3. The agreement between the landlord and the defendant could have no greater force than an unrecorded mortgage to affect the rights of subsequent innocent creditors for value.

4. Where B. was to furnish land, farming implements, feed and team, and W. was to do the work, and the crops were to be equally divided: *Held*, that there was not an agricultural partnership, and the release of B. showed the relation of landlord and tenant.

CONTROVERSY without action, heard and determined before *Armfield, J.*, at September Term, 1890, of HALIFAX, upon the following facts agreed upon and submitted:

1. In the beginning of 1889, one W. S. Biggs was engaged in the cultivation of the soil in said county, upon the following described land: His own land, bounded by the lands of the Higgs tract, W. F. Riddick and W. H. Kitchin.

2. Upon said land in said year the said Biggs cultivated a (120) one-horse crop for wages, and a one-horse crop was cultivated thereon by Bryant Wiggins, under the following agreement between himself and said Biggs: Biggs was to furnish the land, farming implements, the corn, and feed the team, and the said Wiggins was to do the necessary work, and the crop was to be equally divided.

3. The said Biggs, on 19 April, 1889, executed to John T. Brinkley a lien and mortgage, which was duly recorded on 24 of said month. The note therein mentioned was for the purchase-money of horses, theretofore sold to said Biggs by said Brinkley.

4. The said Brinkley, immediately after the execution of said mortgage, sold the note therein mentioned for valuable consideration to the plaintiff, and the same is now due and unpaid.

5. To enable the said Wiggins to cultivate the said crop, the defendant J. R. Weeks agreed to make, and did make, advances to him in the sum of $80, and took from him, before making any advances, an agricultural lien, which was duly registered on 12 March, 1889, and excepting that part thereof which reads as follows, was never registered:

"I, the owner of the land described in the foregoing instrument, do hereby agree with the said J. R. Weeks, in consideration of the advance to be made to Bryant Wiggins by J. R. Weeks, that the above given lien shall have priority to the rents due me by Bryant Wiggins during 1889, over any rents to which I may be entitled, upon the crop to be made by said Bryant Wiggins on said land during said year.

"W. S. BIGGS. [Seal.]

"Witness: J. R. ANDERSON."

6. There were two bales of cotton raised on the land cultivated by said Wiggins worth $92.53, and the said Weeks took possession (121) of both bales and converted them to his own use.

7. The plaintiff had no actual notice of the signing of the said writing by said Biggs at the time of the transfer by said Brinkley to him, but said Brinkley had actual notice of said paper signed by said Biggs at the time of the execution of the mortgage and lien to him.

If the court shall be of the opinion that the plaintiff is entitled to recover, it will give judgment in his favor for $46.26, one-half the value of said cotton, or any amount he may be entitled to, and for costs, otherwise it will give judgment against the plaintiff for costs.

The court gave judgment for the defendant, and the plaintiff appealed.

W. A. Dunn (by brief) and J. B. Batchelor for plaintiff.
R. O. Burton, Jr., for defendant.

DAVIS, J., after stating the facts: The agricultural lien set out is in the usual form, for supplies to an amount not to exceed $80, to be advanced to Bryant Wiggins during 1889, "to be by him expended in the cultivation of a crop during said year upon the following described land . . . owned by W. S. Biggs, situate in Conoconary Township."

The mortgage from Biggs to Brinkley, also set out in the case, is to secure advances "in money or supplies to an amount not to exceed the sum of one dollar," and an existing indebtedness of $280.56, due 1 November following, and conveys, besides certain personal property, "all of the crops which may be made by him the present year on the land of his own in Halifax County, bounded by the lands of the (122) Biggs tract, W. T. Riddick and W. H. Kitchin land, and upon any other that he may cultivate in said county," etc.

It is insisted for the plaintiff (appellant) that the lien given by Wiggins to Weeks is void for vagueness and uncertainty in the description of the land: "Owned by W. S. Biggs, in Conoconary Township."

It is further contended for the appellant that if it be conceded that the instrument executed by Biggs, and attached to the lien given by Wiggins to Weeks, subordinated his interest in the crop to the debt that might be due from Wiggins to Weeks for advancements, yet, as it was not registered, it passed nothing as against creditors or purchasers for value, and to this it is replied: It passed an *equity* which is good against the plaintiff as to his preëxisting debt.

These are questions with which we need not trouble ourselves, for, as the note, with the mortgage securing it, was not due till November, 1889, and was transferred to the plaintiff before it was due, and, without notice to him, he took it, discharged of any equity that either the maker or any one claiming through him might have against the payee in the note.

While Brinkley, the payee of the note and mortgagee, had *actual* notice of the paper signed by Biggs, releasing his preferred lien for rents to Weeks, yet Weeks had the lien executed by Wiggins duly registered, without taking the precaution to have the agreement of Biggs registered with it as a part thereof; and, as to third parties, the agreement had no more force and effect than an unregistered mortgage or lien would have, and an unregistered mortgage or lien will not operate to the prejudice of creditors or purchasers for value—certainly of purchasers or creditors for value, and without notice. This is too well settled to need citation of authority.

The defendant says that the mortgage to Brinkley did not in- (123) clude the crop made on the land by Wiggins, for, as to that, Biggs and Wiggins were agricultural partners, and for this he cites *Lewis v. Wilkins,* 62 N. C., 303, and *Reynolds v. Pool,* 84 N. C., 37.

There was no contract of partnership (Code, sec. 1744)—certainly none by express agreement—and both the lien made by Wiggins to the defendant Weeks, and the *unregistered* agreement by Biggs attached

thereto, not only precludes the idea of a partnership by implication, but they show too plainly to admit of doubt that the relation between Biggs and Wiggins was that of landlord and tenant, or cropper.

Upon the case submitted, the plaintiff was entitled to judgment for $46.26, and costs.

Reversed.

W. E. SUGG v. O. C. FARRAR & CO.

Landlord's Lien—Waiver—Revocation—Executory Agreements—Consideration.

1. In an action for the value of certain cotton, it appeared that the plaintiff, who had a landlord's lien thereon, had directed one of the defendants (who were the purchasers thereof from the plaintiff's tenants) to pay over the purchase-money to the tenants, and then, the next day, and before the money was actually paid, the plaintiff revoked the order. There was no consideration for the order, and there was no change of the *status* of the parties. The defendants, three days thereafter, paid the money—the price of the cotton—to the plaintiff's tenants, who knew nothing of the order: *Held*, the plaintiff was entitled to recover.

2. A mere executory agreement, without consideration, where the *status* of the parties remains the same, may be revoked.

3. A thing of value, as a lien, may be given up, but a contract to give it up, in order to be enforced, must be based upon a consideration.

(124) ACTION tried at Spring Term, 1890, of EDGECOMBE, on appeal from a justice's court, before *Womack, J.*

There was evidence tending to show that the plaintiff leased certain lands for the year 1888 to Keel & Brother, at the stipulated rent of 4,800 pounds of lint cotton, and that during said year he advanced to them, to be used in the cultivation of the crops grown on said land, guano of the value of 1,605 pounds of lint cotton; that Keel & Brother paid plaintiff 5,836 pounds of cotton, leaving still due on said advance, 589 pounds of cotton; that on 19 October, 1888, Peyton Keel, of Keel & Brother, delivered to the defendants five bales of cotton of the crop grown on said land during that year, and on 20 October, 1888, one bale more of said cotton; that on 22 October, 1888, O. C. Farrar, of the defendant firm, applied to the plaintiff to know if the said firm could not pay the price of said cotton to the said Keel & Brother, when plaintiff consented that they might do so; that upon reflection the plaintiff addressed a letter to O. C. Farrar the following morning, notifying him that he would not waive his lien as landlord until the balance due him

(589 pounds of lint cotton) was paid, and recalling the permission given the day before that the money might be paid to Keel & Brother, which letter was delivered to the said Farrar on the same day it was written; that thereafter, on 25 October, 1888, without having before seen either of the firm of Keel & Brother, or had any communication with them after the time the cotton was delivered by them to these defendants, these defendants paid to the said firm of Keel & Brother the price of the six bales of cotton. There was evidence on the part of the defendants tending to show that the price of the said cotton was paid by the defendants before the said letter was received.

It was further contended on the part of the defendants that (125) the plaintiff had no power to recall or revoke the permission given the defendants to pay the money to Keel & Brother.

By consent of parties, his Honor reserved this question until after the verdict, and submitted this issue to the jury:

"In what sum are the defendants indebted to the plaintiff?" The jury answered for their verdict, "Fifty-one dollars and twenty-one cents."

His Honor, being of opinion with the defendants upon question reserved, rendered judgment for the defendants.

From which judgment the plaintiff appeals.

No counsel for plaintiff.
H. L. Staton (by brief) for defendants.

DAVIS, J. The facts of this case are not as fully and clearly stated as they might have been, but it is plainly to be inferred, from the record, that the defendants purchased the cotton of Keel & Brother (the tenants of the plaintiff) before his lien as landlord had been fully satisfied. The plaintiff had one of three remedies: he could have sued for the specific property, or in tort for its conversion, if its delivery was refused (*Belcher v. Grimsley,* 88 N. C., 88), or he might have waived the tort, by ratifying the sale, and have brought his action in the nature of assumpsit for money had and received. He has elected to pursue the last named remedy, and he is entitled to recover, unless the defense relied upon is valid.

The "price" of the cotton was in the hands of the defendants, subject to the lien and for the use of the plaintiff, and his right to it was distinctly recognized. Now, in this state of the case, the plaintiff, upon the application of one of the defendants, and without any consideration therefor, consented that the defendants might pay the price to Keel & Brother.

So far as appears, the latter had no knowledge of this transaction, nor does there appear to have existed any privity between them and the defendants. (126)

Before the defendants had paid the money to Keel & Brother, who appeared to have been the only parties interested in the matter, and before, so far as the case discloses, they even had knowledge of the plaintiff's consent that the defendants might pay the money to them, and before there was any alteration or change in the condition or relation of the parties, the plaintiff revoked the permission given to the defendants, and required them to pay the money to him, according to the original obligation. It is contended, for the defendants, that when the plaintiff consented that they might pay the price of the cotton to Keel & Brother, "it was a complete waiver and cancellation of plaintiff's lien, and that very instant the ownership of the price of said cotton became a vested right in Keel & Brother, and they could have successfully maintained their action against the defendants for the recovery thereof, had they declined to pay it to them," and that the plaintiff has no power to recall or revoke the permission given the defendants to pay the money to Keel & Brother. Undoubtedly, if the defendants had paid the money to Keel & Brother before the revocation of the permission, they would not be liable, for they would have been paying out the plaintiff's money in accordance with his express authority and permission; but we are unable to see, if plaintiff's permission was necessary, why he could not revoke it at any time before it was acted upon, or how he lost his lien by what occurred between him and the defendants. The agreement was an executory one, and without consideration, and even if it appeared that the defendants were acting as the agents of Keel & Brother (and no agency appears), it would not have worked a discharge of the lien. Keel & Brother could not have compelled either the plaintiff or defendants to have executed the agreement against the plaintiff's consent, for the plain reason that there was an entire absence of any consideration. "A lien must be regarded as something of value. (127) It may be given up without any valuable consideration; but an agreement to give it up, in order to be obligatory, must be based upon a legal consideration." *Danforth v. Pratt,* 42 Maine, 50. The plaintiff simply, and without any consideration, gave his consent to the defendant to pay the price of the cotton to Keel & Brother. Before the defendants had acted upon the consent thus given, and before any rights had accrued to anybody by reason of the consent, it was withdrawn, and, when paid, it was against the consent of the plaintiff, without any authority, and made the defendants liable. The fact that the defendants paid the money to Keel & Brother *after* the revocation of authority to do so, cannot protect them. The cases cited by counsel

for the defendants have no application to this case. The case of *McDougall v. Crapon,* 95 N. C., 292, relates to a common-law lien where the *surrender of the possession* is a discharge of the lien, whereas the lien here is conferred by statute, and is not lost by the wrongful act of the tenant, who cannot transfer the possession to any one to the prejudice of the landlord. In the other case, *Brem v. Covington,* 104 N. C., 591, there was a consideration, and the order was held to be irrevocable. Here, there was no consideration, and the revocation was before any *rights* had accrued to be prejudiced. The plaintiff was entitled to recover, and there is

Error.

Cited: White v. Boyd, 124 N. C., 178.

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(128)

JOHN T. HINTON v. GRIFFIN PRITCHARD ET AL.

Real Estate—Declaring Trusts—Plaintiff and Defendant—Possession—Trustee for Another's Benefit—Account—Evidence—Admissions.

1. In an action for the possession of certain lands, the defendant answered, alleging that the plaintiff, pursuant to previous understanding, purchased them for defendant, but took title, to be held in his own name until he could pay the purchase-money advanced, to which payment the rents were to be applied. Plaintiff went into possession and so continued for several years: *Held,* (1) that the defendant was entitled to have plaintiff declared a trustee to hold the lands for his benefit, to the extent of defendant's interest therein; (2) that the statute of limitations was no bar to defendant's action.

2. Conversations, before and at the time of the transaction between plaintiff and defendant, tending to show plaintiff's knowledge of his trust, are clearly admissible as evidence.

3. Plaintiff's admissions to third persons, subsequent to the transaction, tending to establish the trust, are admissible as evidence.

4. The plaintiff plead a docketed judgment, which was a valid and subsisting lien upon whatever interest defendant had in the lands: *Held,* that the court erred in directing an account of this judgment and refusing to direct the payment of the same.

5. Discussion by *Merrimon, C. J.,* of the evidence necessary to establish a trust.

APPEAL at Spring Term, 1890, of HERTFORD, from *Whitaker, J.*

(135) *W. D. Pruden for plaintiff (appellant).*
E. F. Aydlett and J. W. Albertson, Jr., for defendant.

MERRIMON, C. J. The defendant had purchased the land in controversy and paid a large part of the purchase-money, but did not get the title for it. Afterwards judgment was obtained against him for the balance of the purchase-money, and the land was sold to satisfy that judgment, and, at the sale thereof, the plaintiff purchased and took the title therefor. The defendant, however, alleges that the plaintiff, at the time of, and before, the sale, agreed, by parol, to aid him by purchasing the land for him, and taking the title to it to himself, and holding it in trust for the defendant, to be conveyed to him when, and as soon
(136) afterwards, as he should pay the plaintiff the amount of money the latter paid for it, at the instance of the defendant, and that the plaintiff did purchase the land in pursuance of such agreement, charged with such trust in favor of the defendant. The plaintiff denies that he made any such or like agreement.

It is conceded that such a trust, when it exists, may be upheld and enforced, but it is contended that the evidence produced on the trial to prove its existence was incompetent, or, if competent, was insufficient in quantity and kind to establish it. The plaintiff, testifying in his own behalf, stated that the parol agreement was substantially as alleged by him in the pleadings. The defendant was certainly an eligible witness to prove any pertinent fact that might be proven by parol evidence. It was material to prove the parol agreement, as alleged, and the testimony of the defendant was competent and pertinent for that purpose. The testimony of several witnesses as to admissions and declarations of the plaintiff, on numerous occasions after he purchased the land, in respect to the alleged agreement, was competent as corroboratory of the evidence of the defendant. But such evidence would not, of itself, be sufficient to establish the alleged trust. It should be supplemented and strengthened by pertinent facts and circumstances admitted or proven to exist *dehors* the deed for the land taken by the plaintiff, inconsistent with his purpose, to purchase the same exclusively for himself, and tending more or less strongly to show a purpose to create the trust. The trust is in derogation of what is expressed in the deed, and the burden is on the party asserting its existence to make it appear by certain, strong and convincing proof. The court is slow to declare and establish such trust except upon the strongest pertinent proofs. It looks anxiously for facts and circumstances pointing to it, in addition to the simple evidence as to the agreement creating it. *Brown v. Carson,* 45

N. C., 272; *Clement v. Clement,* 54 N. C., 184; *Leggett v. Leg-* (137) *gett,* 88 N. C., 108; *Williams v. Hodges,* 95 N. C., 32; *Smiley v. Pearce,* 98 N. C., 185; *McNair v. Pope,* 100 N. C., 404.

There were admissions in the pleadings and evidence other than that which went directly to prove the agreement, tending strongly to show that the plaintiff agreed to aid the defendant and purchase the land in trust, as alleged. The evidence, we think, was pertinent and sufficient, if the jury believed it. It was in evidence, and not controverted, so far as appears, that the defendant at first purchased the land for $4,300; that of this sum, he paid at once $2,800; that the plaintiff afterwards purchased it at the price of $3,097; that at the time of his purchase, it was worth from $12,000 to $15,000, and that at the time he had a mortgage of the defendant's interest in it to secure a debt due from him to the plaintiff for about $700, which debt and mortgage yet remain undischarged. Now, it would be most unreasonable to infer, and highly improbable, that the defendant would be content to lose the money he had paid for the land, and to allow the mortgage debt to remain undischarged, when the land, at the time the plaintiff purchased it, was worth four times what he paid for it! This is especially so, in view of the relation of the parties as mortgagor and mortgagee. And, moreover, it is scarcely probable that the plaintiff could, or would, be so unconscionable as to take the defendant's land at such a sacrifice. It appears that, shortly after the plaintiff bought the land, he took possession of it and held it for seven or eight years, and this might go to show that he bought it for himself; but this fact is shorn of its force by repeated admissions and declarations made to the defendant, and several other witnesses, at various times—some of them as late as 1885—to the effect that he held the land in trust for the defendant.

The defendant's cause of action is not barred by the statute of limitation, nor by the lapse of time. There was evidence tending to prove that the plaintiff took and held possession of the land by agree- ment with the defendant, recognizing the latter's right, and the (138) jury so found, within a short period before this action was brought. The failure to close the trust for so long a while seems to have been by the mutual assent of the parties.

We are, therefore, of opinion that the several exceptions to evidence received on the trial are unfounded, and that the court properly gave judgment declaring the trust in favor of the defendant. We think, however, it erred in refusing to embrace, in the order directing an account, the docketed judgment mentioned and specified in the pleadings in favor of the plaintiff and against the defendant, and refusing to direct the payment of the same. That judgment was a lien upon whatever interest the defendant had in the land, subject to the two prior liens of the plaintiff.

The court had jurisdiction of the parties to the judgment, the land upon which it was a lien; it was before the court, and, so far as appears, there was no valid objection to it. There was no reason why the court should not administer the plaintiff's right to have it paid, or direct that it share, in its order, the proceeds of the sale of the land. It was not essential that it should be enforced by the ordinary execution. The jurisdiction of the court, as to it, was sufficient to enable it to enforce the lien. *Currie v. Clark,* 101 N. C., 321. The judgment appealed from must be so enlarged in its scope as to embrace the judgment just mentioned and direct its payment, and the judgment, thus enlarged, must be

Affirmed.

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(139)

H. A. BOND v. JACOB WOOL.

Riparian Rights—Navigable Streams—Water Front—Entry and Grant —Wharves—Evidence—Demurrer—Trespass—Injunction.

1. By demurring, the defendant admits the truth of the testimony in the aspect most favorable to the plaintiff.

2. In the absence of specific legislation, riparian owners have a qualified property in their water fronts.

3. Their right to construct wharves on such water fronts is subject to legislative control and the regulation of an adjoining incorporated town.

4. All vacant and unappropriated lands belonging to the State are subject to entry, except lands covered by navigable streams.

5. Persons owning lands on navigable streams may erect wharves next to their lands up to deep water, and may make entry and obtain title as in other cases, subject to the regulation that they must not obstruct navigation, and that they shall be confined to the straight lines from their water fronts.

6. By making entry under the laws of the State, such riparian owners of lands on navigable waters may acquire an absolute, instead of qualified, property in the land covered by water up to deep water.

7. So, where the plaintiff, owner of a tract of land on navigable water, and those under whom he claims, have occupied the shallow waters immediately fronting his land since 1802, by building fish-houses therein, no entry having been made under the statute: *Held,* (1) that he had only a qualified property therein; (2) that a defendant who, in order to gain access to deep water, erected on his own natural water front a pier which stood between the plaintiff's fish-houses and deep water on one side, was not a trespasser. The plaintiff was only entitled to access to deep water in his immediate water front.

8. Where it appeared that the defendant, who was preparing to erect a fish-house and landing which, when erected, would obstruct plaintiff's egress to deep water on one side, though not immediately in front, threatened to tear down plaintiff's wharf erected on plaintiff's own water front: *Held*, that defendant was not subject to injunction, it appearing that he was solvent and that the trespass was not continuous in its nature.

APPEAL from *Whitaker, J.*, at Spring Term, 1890, of CHOWAN. (140)

The contention of the parties will be better understood with the aid of the following map referred to in the testimony. [See diagram.]

The plaintiff, complaining of the defendant, says—

1. That on 3 November, 1887, he was the owner and in the quiet and rightful possession of certain buildings and structures in Edenton, at the foot of Water street, which were used by him in landing fish caught in Albemarle Sound and packing the same for market, and which he had constructed at large expense.

2. That these houses and structures are reached by boats from Albemarle Sound and Edenton Bay, and if this means of approach be cut off they will be rendered entirely valueless.

3. That on the day named, the defendant threatened wrongfully to tear down and destroy said buildings and structures, and unless restrained by this Court will do so, wrongfully and unlawfully.

4. That the defendant also threatened at the same time, and has procured timber for the purpose of carrying out his said threat, to construct a wharf in Edenton Bay, running out from certain lots owned by him in Edenton, in such a manner as to obstruct and cut off all approaches by water to the plaintiff's said property, and so as to obstruct and impair the navigation of said bay and Albemarle Sound.

5. That Edenton Bay and Albemarle Sound are navigable waters.

6. That Edenton is an incorporated town.

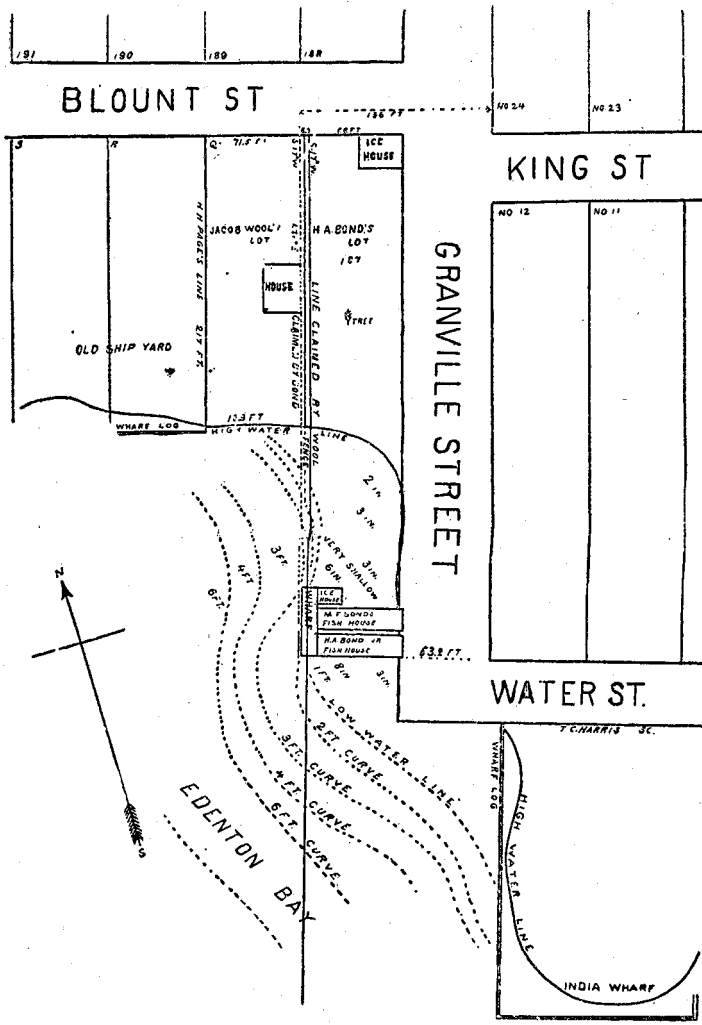
7. That the defendant is not a citizen of the United States, and has obtained and can obtain no grant for the land covered by the water in which he proposes to construct his said wharf.

8. That the said action of said Wool is wrongful and unlawful. (141)

Wherefore, plaintiff demands judgment that the defendant be restrained and enjoined perpetually from destroying, interfering with and injuring the plaintiff's said houses and structures, and from obstructing the approaches to the same, and from building the wharf aforesaid, and for other relief to which this complaint may entitle him.

W. M. Bond and Pruden & Vann (by briefs) for plaintiff (147) *(appellant).*

J. W. Albertson, Jr., and C. M. Busbee for defendant.


191
190
189
188
BLOUNT ST
NO 24
NO 23
KING ST
NO 12
NO 11
ICE HOUSE
JACOB WOOL'S LOT
H A BOND'S LOT
HOUSE
TREE
OLD SHIP YARD
WHARF LOG
HIGH WATER
LINE CLAIMED BY WOOL
GRANVILLE STREET
WATER ST.
M F BOND'S FISH HOUSE
H A BOND JR FISH HOUSE
T C HARRIS &C.
LOW WATER LINE
2 FT. CURVE
4 FT. CURVE
6 FT. CURVE
EDENTON BAY
HIGH WATER LINE
INDIA WHARF

AVERY, J. By demurring the defendant admits the truth of the testimony in the aspect most favorable to the plaintiff. *Nelson v. Whitfield,* 82 N. C., 46. He, therefore, concedes that the plaintiff and those under whom he claims have had open, notorious adverse possession of lot No. 187 (which is bounded by Blount and Granville streets on the north and east, by defendant Jacob Wool's lot on the west, and by the Machemacomac creek, an arm of Edenton Bay, on the south) for more than fifty years under a connected chain of title, beginning with (148) the will of Penelope Bond in 1802. It is further admitted that the dotted line running about one foot west of the plaintiff's fish-house is the western boundary line of lot No. 187, extended southward across or into Machemacomac creek, and that the piles driven by the defendant into the water to form a support for his proposed building, were not, and an extension of them would not have been, at any point, east of said dotted line. Does the testimony, not denied, show that the defendant Wool was a trespasser when the action began? We think not.

In the absence of any specific legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable waters. Gould on Waters, sec. 149; 6 Lawson's Rights and Rem., sec. 2931; *Yates v. Milwaukee,* 10 Wall., 497; *Dutton v. Strong,* 1 Black, 31; *Stillman v. White,* 3 Woodbury & Minot, 538 to 551; *Vondolson v. Mayor New York,* 17 Fed., 817; 28 Myers Fed. Dec.—Riparian and Littoral Proprietors—689 to 761, especially pages 691 and 706; Houck on Rivers, secs. 280-281; *S. v. Narrows Island Club,* 100 N. C., 477; *Broadnax v. Baker,* 94 N. C., 681; *R. R. v. Schumer,* 7 Wall., 272; *Lewis v. Keeling,* 46 N. C., 299.

Leaving our legislation out of view, the plaintiff, or H. A. Bond, Sr., under whom he claims, is, at least in the discussion of this appeal to be considered as holding, as an incident to the ownership of lot No. 187, the right to build fish-houses over the water at any point east of the dotted line and southward and in front of said lot between (149) the land and navigable water, and this privilege the plaintiff has exercised and enjoyed since 1878, as had his father for nearly twenty years before. But the defendant Wool has, if his interest is not affected by our statute, a property of the very same nature in all of the water bounded by his front on the north, the dotted line on the east, navigable water on the south, and an extension of his western boundary line south-

ward to navigable water on the west. He, too, has the right to construct piers, wharves, landings and fish-houses within the limits mentioned. According to the testimony, he had driven piles into the earth under the shallow water in a line just up to west of the dotted line, but had not extended his foundation as far south as the plaintiff's fish-houses. Clearly, then, if the western boundary line of lot No. 187 be located where the plaintiff claims that it runs, the defendant had not trespassed on the water front of that lot by crossing over to the east of it, but had, as far as his plans were developed, by his acts, shown a purpose to avoid the consequences of occupying the territory east of his own frontage, or east of the dotted line, which meant the same. This qualified property, that, according to well-settled principles, as interpreted in nearly all of the highest courts of the United States, is necessarily incident to riparian ownership, extends to the submerged land bounded by the water front of a particular proprietor, the navigable water and two parallel lines projected from each side of his front to navigable water.

At common law, land covered by water was the subject of grant, except where the tide ebbed and flowed; but, with the exception of a short interval, land covered by navigable water beyond the influence of tides was not subject to entry and grant under the statutes in force in North Carolina from 1777 to 1854. *Hatfield v. Grimstead,* 29 N. C., 139; Laws 1777, ch. 114; 1 Potter Revisal, p. 278; Rev. Stat., ch. 42, sec. 1.

Laws 1854-55 (Code, sec. 2751) provide that "All vacant and
(150) unappropriated land belonging to the State shall be subject to entry, except lands covered by navigable streams: *Provided,* that persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the land covered by water adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. And when any such entry shall be made in front of the lands of any incorporated town, the town corporation shall regulate the line on deep water to which entries shall be made; and for all lands thus entered there shall be paid into the treasury the sum of one dollar per acre. Also when any person shall have erected a wharf on public lands of the description aforesaid, before the passage of this section, such person shall have the liberty to enter said land, including his wharf, under the restrictions and upon the terms above set forth."

It seems that Laws 1777, ch. 114, sec. 10, restricted the right of entry on navigable waters to the water-mark, but did not, by any prohibitory

provision, prevent the riparian grantee from acquiring, with the absolute property, to the margin of the water, the qualified property, which gave him access to the *navigable* water and the right to erect piers and wharves so that he might utilize the water for the transportation of persons and the products of the land. The act of 1854-55 (Code, sec. 2751, par. 1) made an exception in favor of riparian owners of land on any "navigable sound, river, creek, or arm of the sea," by giving to them the exclusive privilege of acquiring the absolute fee in the precise territory on their fronts, in which they already held, as incident to the original grant, the qualified property, or appurtenant right, (151) which we have defined. It does not seem that the General Assembly intended, if it had the power to do so, to wrest from riparian proprietors any rights that they already held, but to allow them, at a fair price, to acquire an absolute, instead of a qualified, property. It is apparent that where one holds lands abutting upon navigable waters, of the kind mentioned in the act, it would be the part of wisdom, if the right of access to, and use of, the water is at all valuable, to close with the State and take the proffered title in fee. One of the advantages, of which we can conceive, arises out of the provisions of the very next subsection to that we are discussing. So that in no view of the case, has the plaintiff or his father acquired more than a qualified property in the land covered by water, or any right or interest whatever west of the red line, while the defendant has driven no piles east of that line. The defendant has not, therefore, committed any trespass on the plaintiff's front. If the defendant, in order to gain access to the deep water on his own natural front, had located a fish-house immediately west of that occupied by the plaintiff, he would not, in any view of the case, have incurred liability to an action on the part of the plaintiff. The plaintiff offered no grant. He had a right to take out a patent only for the land extending out to the deep water between the dotted line and a prolongation of his eastern boundary line southward towards the bay. If his fish-house opened on deep water only on the west, he could remove it far enough south to gain access to navigable water by the southern door, and he or his father has the privilege of acquiring title to the land on his natural front to that point. There is no general allegation in the complaint that the defendant had trespassed upon the plaintiff's land (lot No. 187), but a specific charge that he has trespassed by driving piles into the lands covered by water along a certain line. If, therefore, there is evidence to show a trespass north of the shore by crossing over the dotted line, there is no allegation in the complaint that would correspond with the proof, even under the liberal rule laid down in *Harris v. Sneeden,* 104 N. C., 369. (152)

The only remaining question is, whether the testimony establishes the right of the plaintiff to demand a perpetual injunction in order to restrain the defendant from injuring or destroying the fish-house or any part of it. Notwithstanding the denials in the answer, the defendant, by demurring to the evidence, admits that he threatened to tear down a part of plaintiff's wharf, and proposed to build a fish-house and landing immediately to the westward of that occupied by plaintiff, and that he said in the plaintiff's presence, after ordering the latter to remove his said wharf, that if the order should not be obeyed he would remove it himself.

As we have already stated in substance, the testimony not only fails to establish *prima facie* a continuous trespass on the part of the defendant upon any portion of the premises claimed by the plaintiff, but it does not show even that his lot or water front has at any time been actually invaded by the defendant. His demand for extraordinary relief rests, therefore, solely upon the idea that he may rightfully invoke the aid of equity to prevent the threatened injury to the fish-house or wharf. The general rule is, that where one is shown to be engaged in committing acts that would amount to waste, if his occupation or entry upon land is wrongful, equity will not interpose by injunction unless—

1. The plaintiff also sets up an apparently good title and the owner fails to deny at all, or to sufficiently controvert, such claim of title.

2. Unless it appears by the allegation of specific facts that the acts complained of will probably be productive of irreparable injury to the plaintiff.

(153) As a general rule, too, such relief will not be granted to put a stop to, or prevent, the commission of waste, unless it appears, likewise, that the party who is doing the injury is insolvent, but an exception to this general principle grows out of the provision of chapter 401, Laws 1885, that it shall not be necessary to allege the insolvency of a defendant where the trespass is continuous in its nature, or consists in the cutting and removing of timber-trees. The facts admitted fail to bring this case within the exception. *Rollins v. Henry,* 77 N. C., 467; *Dunkart v. Rinehart,* 87 N. C., 224; *Lumber Co. v. Wallace,* 93 N. C., 22; *Ousby v. Neal,* 99 N. C., 146; *Lewis v. Lumber Co., ib.,* 11; *Frink v. Stewart,* 94 N. C., 484. The mere threat made by the defendant, who is perfectly solvent, to tear down a part of a landing, without any overt act evincing a purpose to execute it, is not, of itself, sufficient to warrant the interposition of the Court of Equity. High on Injunction, sec. 425; *Gibson v. Smith,* 2 Atkins, 182. The threatened injury differs widely from the tearing down of dwelling houses or the cutting down of fruit trees or ornamental trees, for which it has been held that there could not be sufficient compensation in damages. High on Injunction, sec. 462.

For obvious reasons the defendant has the right to build a wharf or landing on his own water front, and cover it so as to protect fish or other articles landed there, and he will not be restrained in the exercise of this right, because, in building at the deep water line, he may cut off the western approach to the plaintiff's house or close its western door. There is no error, and the judgment below is

Affirmed.

Cited: Wool v. Saunders, 108 N. C., 743, 745; *Knight v. R. R.,* 111 N. C., 83; *Hopkins v. Bowers, ib.,* 178; *Gwaltney v. Land Co., ib.,* 552; *Tate v. Greensboro,* 114 N. C., 404; *S. v. Eason, ib.,* 791; *Comrs. v. Lumber Co.,* 116 N. C., 732; *Whitley v. R. R.,* 122 N. C., 989; *Holly v. Smith,* 130 N. C., 86; *Land Co. v. Hotel,* 132 N. C., 530; *S. v. Twiford,* 136 N. C., 607; *Riddick v. Dunn,* 145 N. C., 34; *Brewer v. Wynne,* 154 N. C., 471; *R. R. v. Way,* 172 N. C., 779.

(154)

JOHN L. HINTON ET AL. V. D. D. FERREBEE ET AL.

New Contract—Principal and Surety—Discharge—Married Women—Equity.

1. A bond and mortgage was executed by a husband and his wife as his surety, and afterwards a renewal thereof; and, to keep the debt alive, another bond and mortgage was executed by the same parties: *Held,* that such new bond and mortgage was not a discharge of the old mortgage, and the wife is bound thereby, even though the new mortgage is invalid as such for want of privy examination.

2. The rule that a new contract giving time to the principal releases the surety is of no avail to discharge a surety who seeks to hold to the benefits of the old contract.

APPEAL at Fall Term, 1890, of CAMDEN, from *Connor, J.*

The action was brought by Hinton, assignee of Williams, on a promissory note secured by mortgage, date 28 January, 1875, and executed by defendants Ferrebee and his wife as his surety, and on a promissory note, executed by the same parties as a renewal of the original note and for the purpose of keeping the debt alive.

The other facts sufficiently appear in the opinion.

E. F. Aydlett for plaintiffs.

T. C. Fuller for defendants.

SHEPHERD, J. Under the direction of the court, the jury found that the indebtedness secured by the mortgage of 1875 had not been paid; that it was not barred by the statute of limitations; that the matters in controversy had not been previously adjudicated. His Honor, however, was of opinion that, taking all of the plaintiffs' testimony to be true, the mortgage was discharged.

(155) The ruling is based upon the principle, that if the creditor enters into a binding contract to give time for payment to the principal, and this is done without the consent of the surety, the latter is discharged. Adams' Eq., 107. This is undoubtedly true, as a general legal proposition, but we think that it is inapplicable to the facts of this case. Standing alone, the acceptance of the note of 1885 from the husband for the original indebtedness, "compounding the interest accrued" and extending the time, would have unquestionably discharged the surety wife. But the testimony (which we must accept as true) discloses quite a different state of circumstances. It plainly appears that the bond and mortgage of 1885 were given in renewal of those of 1875 in pursuance of an *entire* agreement—that is to say, that not only a new bond was to be given, but also a new and valid mortgage. The bond was accordingly executed by the husband and wife, but she was never legally privily examined as to the execution of the mortgage, and the latter is therefore of no effect. The defendants, the devisees of Mrs. Ferrebee, now repudiate the entire transaction on the ground of coverture, and at the same time endeavor to assert a technical discharge growing entirely out of the same. The discharge of bonds under the principle invoked, was originally administered in equity alone, and surely no Court of Equity would, under the circumstances of this case, decree a release of the surety. It is true that the bond executed by the husband and wife, being a mere executory contract, could be avoided by the wife upon the plea of coverture, and would be of no effect as to her as a legal obligation *(Farthing v. Shields,* 106 N. C., 289), but we cannot hold that its acceptance by the plaintiffs, upon the very material inducement that she was to concurrently execute a valid mortgage to secure it (which, as we have seen, was never done), was such an alteration of the original contract, *"without her consent,"* as to discharge her from the obligation. We place our decision not upon the ground of any legal efficacy to be attached

(156) to the acts of the wife, but upon the principle declared in *Burns v. McGregor,* 90 N. C., 222; *Walker v. Brooks,* 99 N. C., 207, and *Hodge v. Powell,* 96 N. C., 64. If, as held in these cases, a married woman cannot retain the fruits of a contract which she repudiates on the ground of coverture, it must follow that she cannot, under such circumstances, assert a technical right to the discharge of an antecedent obligation.

We are of the opinion that the mortgage of 1875 has not been discharged, and that the plaintiffs are entitled to a decree of foreclosure. The indebtedness is to be computed according to the terms of the original mortgage.

Reversed.

Cited: Long v. Rankin, 108 N. C., 337; *Fort v. Allen,* 110 N. C., 192.

CHARLES REIZENSTEIN, ADMR., v. M. HAHN.

Consent reference—Partnership—Administration—Judgment—Arbitrator—Jury Trial.

1. In an action by administrator of a deceased partner against the one surviving, it was ordered, with consent of all parties, that "all the partnership matters and all the issues arising out of the pleadings shall be referred to O. M., whose findings and decision on the same shall be final and conclusive between all the parties hereto." The arbitrator found for the plaintiff, and the court gave judgment accordingly. There was no exceptions filed and no demand for jury trial: *Held,* that the judgment must be sustained.

2. The award of the arbitrator, when made a judgment of the court, is final and conclusive between the parties.

APPEAL from *Armfield, J.,* at Spring Term, 1890, of CRAVEN.

Plaintiff moved the court for judgment on the report of O. Marks, to whom the case had been referred at a previous term by an order in the record. Said order and report are as follows, to wit: (157)

"This cause coming on to be heard before his Honor, E. T. Boykin, Judge, on the sworn complaint of plaintiff and answer of defendant and, by consent of all parties hereto, it is ordered and adjudged that all the partnership matters of A. & M. Hahn and M. Hahn & Co., and all issues and matters arising out of the pleadings in this action, be referred to O. Marks, whose findings and decision on the same shall be final and conclusive between all the parties hereto.

"As arbitrator in this case, in which Charles Reizenstein, administrator of A. Hahn, is plaintiff, and M. Hahn is defendant, after hearing all the evidence of matters referred to me, I find as my judgment that M. Hahn is indebted to Charles Reizenstein, administrator, in the sum of three hundred and eighty-eight dollars and twenty cents ($388.20).

"O. MARKS."

The defendant objected to plaintiff's motion for judgment, "because there was no order of the court or agreement that the findings of said referee should be entered as a judgment of the court." There being no exceptions filed or suggested to the report of the referee, and no demand for a trial by jury, his Honor confirmed the report of the referee, and gave judgment for plaintiff in accordance therewith, and defendant appealed to the Supreme Court.

The plaintiff, as administrator of A. Hahn, brought the action against the defendant M. Hahn, as surviving partner of the firm of A. & M. Hahn, composed of said intestate and defendant; and alleged that the defendant had collected a large amount of the partnership assets for which he had not accounted, and that he refused to pay over to plaintiff a large sum due him as administrator as aforesaid, and asked that an account be taken.

(158) Defendant denied that he had failed to account for said assets, and averred that in a settlement with plaintiff he had overpaid the latter. Defendant asked, by way of counterclaim, judgment for excess so paid over and above what was due. The defendant also prayed that an account be taken.

C. Manly for plaintiff.

M. DeW. Stevenson and W. W. Clark for defendant.

AVERY, J., after stating the facts: The consent order provided that all issues arising out of the pleadings should be referred to O. Marks, whose findings and decision on the same should be *"final and conclusive* between all the parties hereto." The award of Marks could not have the effect contemplated by the parties unless it assumed the shape of a judgment or rule of the court so as to operate as an estoppel upon the parties to the action. *Robbins v. Killebrew,* 95 N. C., 19; *Lusk v. Clayton,* 70 N. C., 184. As a judgment it would be final and conclusive, both upon plaintiff and defendant. *Keener v. Goodson,* 89 N. C., 273. We think, therefore, that the judge who heard the case below properly construed the order as an agreement to submit the controversy to an arbitrator and make his award a rule of court. If this be the correct construction, it follows then, as there is no limit imposed upon the power of the arbitrator, that his award cannot be impeached in the absence of anything on the face of it to show that he acted upon an erroneous view of the law. *Keener v. Goodson, supra; Miller v. Bryan,* 86 N. C., 167; *Long v. Fitzgerald,* 97 N. C., 39; Morse Arb. & Aw., 293-297.

Affirmed.

Cited: Smith v. Kron, 109 N. C., 105.

(159)

FANNIE H. PITTMAN v. ELIZA PITTMAN ET AL.

Uses and Trusts—Parol Declaration—Evidence—Statute of Frauds.

1. The seventh section of 29th Charles II has never been adopted in this State, and declarations of trusts are governed by the rules of the common law, and may be made by parol.

2. At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title.

3. Hence, it follows that a subsequent declaration in an unsealed writing, and without consideration, will not warrant the court in declaring a trust.

4. Such a writing, being upon its face insufficient, and it being necessary, in order to make out the plaintiff's case, to connect it with the transfer of the legal title, it is competent for the owner of the latter to show that the conveyance was made by the plaintiff grantor with intent to defraud his creditors, and thus bar him of equitable relief.

5. Discussion by *Shepherd, J.*, of uses and trusts, and the parol declaration thereof.

APPEAL from *Boykin, J.*, at Fall Term, 1889, of HALIFAX.

Only so much of the facts need be repeated as is necessary to an understanding of the opinion of the Court.

On 7 October, 1871, John B. Pittman, the plaintiff, conveyed the land in controversy to R. W. Pittman, and on 18 November, 1871, the said R. W. Pittman executed the following document:

ENFIELD, HALIFAX COUNTY, N. C.,
18 November, 1871.

To J. B. PITTMAN, Parish of LaFourche, Louisiana.

DEAR BROTHER:—The property I bought of you, 7 October, 1871, for the sum of $500, will be transferred to you again at any time you may wish, as I hold it in my name and for your benefit. (160)

Your brother, truly, etc.,

Witness: R. A. PITTMAN. R. W. PITTMAN.

In 1883, R. W. Pittman died, having devised the said land to the defendant P. Eliza Pittman, who afterwards executed the following document:

ENFIELD, N. C., 23 September, 1884.

This is to certify that I agree and bind myself to make a deed for 93 acres of land and improvements thereon, where I now live, and bounded west by R. A. Pittman's, south by Montgomery Whitaker's place, east

by Merritt tract, belonging to me, north by main run, Beech Swamp. I agree to make this deed any time John B. Pittman or his agent may require it, as I hold it as his trustee, for him and his benefit.

P. ELIZA PITTMAN.

Signed in the presence of these witnesses:
Witness: R. A. PITTMAN.

Both of these instruments were registered. The land remained in the possession of R. W. Pittman up to the time of his death, and has since that time been in the possession of the defendant.

The defendant tendered the following issues, which were accepted by the court:

1. Was the land conveyed to R. W. Pittman with intent to hinder, delay and defeat the creditors of John B. Pittman?
2. Are the plaintiffs estopped to claim this land?
3. Was the agreement of 23 September, 1884, founded on any valuable consideration?
4. Was said agreement founded on a consideration against good morals?

(161) After the introduction of the above paper-writing, the defendant offered to prove that the conveyance made by the plaintiff to R. W. Pittman was made with intent to defraud his (the plaintiff's) creditors. The court excluded the testimony. The defendant excepted, and there was a verdict and judgment for the plaintiff. The defendant moved for a new trial, which was refused, and defendant appealed.

There was no other evidence as to the existence or declaration of the alleged trust, except the said writings. There was no other evidence of any consideration for the writings, but it was admitted that there was none.

T. N. Hill and W. H. Day for plaintiff.
R. O. Burton, Jr., for defendants.

SHEPHERD, J. The plaintiff seeks the equitable aid of the court for the purpose of having the defendant declared a trustee for his benefit, in respect to a certain tract of land of which the defendant is legally seized in fee.

It appears that on 17 October, 1871, the plaintiff, upon the apparent consideration of $500, conveyed the land in question to R. W. Pittman, who devised it to the defendant in this action.

The evidence in support of the alleged trust consists of two unsealed paper-writings, one signed by R. W. Pittman, the grantee of the plaintiff, and the other by the defendant, his devisee. These writings declare

that the subscribers hold the land in trust for the plaintiff, and that they are willing to execute title to him. The writings were made subsequently to the transfer of the legal title, and appear to be entirely voluntary.

It is alleged by the defendant that the conveyance to her devisor was made for the purpose of defrauding the creditors of the plaintiff, and that, as the plaintiff does not "come into equity with clean hands," he is entitled to no relief. *Turner v. Eford,* 58 N. C., 106; *Jackson v. Marshall,* 5 N. C., 323; *Vick v. Flowers, ib.,* 321; *York v.* (162) *Merritt,* 77 N. C., 213.

Testimony was offered tending to establish this defense, but upon objection it was excluded by the court, and the defendant excepted.

We suppose that his Honor excluded this testimony upon the grounds that the writings, upon their face, entitled the plaintiff to the relief demanded, and that, as he was not compelled to resort to the original transaction (that is, the transfer of the legal title), in order to make out his case, the testimony as to the alleged illegal purpose was irrelevant. *S. v. Bevers,* 86 N. C., 588. We can conceive of no other theory upon which the testimony was rejected; for if the writings, by any reasonable construction, relate to the transfer of the legal title, the testimony would have been plainly admissible, as the plaintiff would necessarily be establishing his trust through a transaction which the defendant offers to show is tainted with fraud, and this, it is well settled, he cannot do. See *Turner v. Eford* and the other cases cited, *supra.*

Assuming then, with his Honor, that the writings contained no evidence of a declaration of trust contemporaneous with the transmission of the legal title, or of any other antecedent obligation, we are confronted with the interesting question whether the legal owner of land can be divested of his property by a simple voluntary parol declaration that he holds it in trust for another. The seventh section of the statute of 29 Charles II, requiring "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party," etc., has been very generally adopted in the United States, and the doctrine of the declaration of express trusts, as laid down by the various text-writers, is based almost entirely upon decisions of the courts since the enactment of the said statute. As the above provision is not (163) embraced in our statute of frauds, it therefore becomes necessary that we should inquire into the manner in which express voluntary trusts in land could be created at common law. *Foy v. Foy,* 3 N. C., 131. Doubts were at one time entertained whether trusts could be created by parol, but it is well established that this could be done at common law, both as to real and personal property. "A trust in reality, like a use, was, in technical language, 'averable,' that is, could be

created by word of mouth." The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where, of course, no writing was necessary. But where a deed was requisite for the conveyance of the legal estate (as in covenant to stand seized to uses), these uses and trusts were not averable, but could be created only in the same manner as legal estates. Bispham Equity, 95 Hill Trustees, 86; Gilbert Uses, 270.

Trusts and uses were raised in the same manner, and if a feoffment was made without consideration, a use resulted to the feoffor, unless the use of trust was declared at the time of the conveyance. Now, it must be observed that no consideration was necessary to a feoffment. The conveyance itself *raised* the use and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffor, unless declared at the time of the feoffment, and this declaration might be voluntarily made by parol, either in favor of the feoffee or of a third person. But there was a great difference, in this respect, between a conveyance which operated by transmuting the possession and the covenant to stand seized, which had no operation but by the *creation of a new use;* and, as this use was raised by equity an equity never acts without a consideration, a consideration was always necessary to the transfer (164) of the interest by this conveyance; whereas, in the case of a feoffment or fine, the use arises upon the conveyance itself. . . . It seems, therefore, that at common law only the solemn conveyance, by livery of record, could raise the use by its own virtue, and dispense with the deed declaring it, as well as the *consideration* for raising it. Roberts on Fraud, 92. It appears, then, that at common law no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession, the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity for a consideration.

This view is distinctly approved in *Wood v. Cherry,* 73 N. C., 110, where it is said by *Pearson, C. J.,* that a trust can only be created in one of four modes: "1. By transmission of the legal estate, when a simple declaration will raise the use or trust. 2. A contract, based upon a valuable consideration, to stand seized to the use or in trust for another. 3. A covenant to stand seized to the use of, or in trust for, another upon good consideration. 4. When the court, by its decree, converts a party into a trustee, on the ground of fraud." See, also, *Frey v. Ramsour,* 66 N. C., 466; *Shields v. Whitaker,* 82 N. C., 516; Malone Real Property, 487.

Counsel for plaintiff called our attention to passages to be found in 2 Pom. Eq. Juris., secs. 996, 997; 1 Lewin on Trusts, 68, and other works, to the effect (as stated in Bispham Eq. Juris., 102), that "where a settler is possessed of the legal title to the subject-matter of the settlement, he may create a valid trust thereof, either by a declaration that he holds the property in trust, or by the transfer of the legal title to the property to a third party, upon certain trusts. In other words, he may constitute either himself or another person the trustee. If he makes himself the trustee, no transfer of the subject-matter is necessary." We have examined, with much care, the cases cited in support of this very general proposition, and especially those collected in the English and American Notes to *Ellison v. Ellison,* the (165) leading case upon voluntary trusts (1 White & Tudor's Leading Cases, par. 1). As far as our researches have extended, we can find no decision which authorizes the application of the principle stated to a case like ours. The cases are somewhat conflicting, and chiefly concern the voluntary disposition of choses in action and equitable interests in land. These being in England, and many of the States, incapable of transfer at law, and equity requiring a consideration, it followed that no gift could be made of them, as in the case of things passing by delivery or other legal methods of transfer. To obviate this difficulty it was held if the owner declared himself a trustee in respect to such property, equity would give such declarations the same effect as the law would give to a gift of property susceptible of, and perfected by, a legal assignment. The doctrine, it seems, was extended to cases where the owner had a right to make a legal transfer of the property, and the decisions disclose many refined distinctions and much conflict of judicial opinion, leaving us without any very clear and well-defined principles upon which the doctrine, as thus extended, is to be administered. We think, however, that it was not intended to apply where the law *requires,* as in the case of land, a certain method of transfer, and this view is well sustained by *Judge Hare* in *Bond v. Hunting,* 28 P. F. Sm., 210. "It was established," he says, "at an early period, that the transfer of the legal title in trust for a third person would vest the beneficial interest in the latter." Such was the origin of uses, and subsequently of trusts. A declaration of trusts, under the circumstances, substantiates the existence of a duty which would be obligatory, independently of the declaration. But it does not follow that an admission can give rise to a fiduciary obligation where none exists.

The ordinary power of a chancellor (said *Gibson, C. J.,* in *Reade v. Robinson,* 6 W. & S., 329), extends no further than the execution of a trust sufficiently framed to put the title out of the (166)

grantor, or to the execution of an agreement for a trust, founded on valuable consideration; and the language of the same judge, in *Morrison v. Beirer,* 2 W. & S., 86, shows that he regarded a declaration of trust as inoperative where it did not rest on an antecedent obligation.

In this uncertainty we may revert to principles. A declaration of trust by the owner of property in favor of a volunteer has no peculiar efficacy. It is simply a gift, which derives its force from the will of the donor. As applied to land, it is consequently invalid if not under seal, and perhaps even then, unless the estate lies in grant. Where the law prescribes the mode of conveyance, it must be followed. When, however, there are no legal means of transfer, any words expressing an intention to confer a present interest may be effectual in equity. This reasoning is supported by *Sir John Romily, M. R.,* in *Bently v. Mackey,* 15 Beavan, 12, who says that, in all cases where the legal owner intends voluntarily to part with the property in favor of other persons, the court requires everything to be done which is requisite to make the legal transfer complete. See, also, Pomeroy Eq. Juris., sec. 998, and note.

In *Thompson v. Branch,* 10 Tenn., 390 (Meigs), we have a case directly in point. It is there decided that "an unsealed written acknowledgment or memorandum by a party clothed with the legal title to land, that another is interested in a certain number of acres, will not raise a trust to convey the quantity specified without proof of a consideration paid to the party making the acknowledgment or memorandum." The Court said: "We cannot recognize the principle contended for. The legal title was in Joseph Branch. If he is forced to part with that legal title, it must be upon the ground that he holds it in trust for John Branch. But how can a trust be raised (167) without a consideration?"

In view of the above reasons and authorities, we are of the opinion that the writings relied upon by the plaintiff are not in themselves sufficient to entitle him to relief; and that, inasmuch as he must, in the absence of a consideration, connect the declaration with the transmission of the legal title, the testimony tending to show fraudulent purpose of the conveyance was erroneously rejected. It may be that the greater security afforded by the seventh section of the statute referred to has encouraged some departure from the ancient rules of the common law upon the subject under consideration, but in North Carolina, where we have no such statutory protection, and where express trusts in land may still be declared by parol, very grave considerations of public policy forbid any relaxation of the rules of the common law in this respect. To declare a trust in this case would contravene several other principles which have been firmly established

by this Court, one of which is that no parol trust can be proved by subsequent declarations *alone*. *Smiley v. Pearce,* 98 N. C., 185. Again, this Court has decided that, in the absence of legislation, no peculiar efficacy is to be given a parol declaration simply because it happens to be in writing, and that, upon principle, it is of no higher dignity than one which is purely oral. *Williams v. Hodges,* 95 N. C., 32. Now, if this be so, and we hold that these declarations are sufficient, it will be difficult to escape what would seem to be the logical conclusion, that a voluntary trust may be declared by a simple oral declaration, unaccompanied by the transfer of the legal title. We are not prepared to adopt a principle which must necessarily result in a serious impairment of the stability of titles to land in this State, and we are deeply impressed with the conviction that the only "sure and safe way" is to adhere strictly to the principles of the common law in reference to this important subject. There must be a

New trial.

Cited: Dover v. Rhea, 108 N. C., 92; *Blount v. Washington, ib.,* 232; *Blackburn v. Washington,* 109 N. C., 489; *Cobb v. Edwards,* 117 N. C., 246; *Sykes v. Boone,* 132 N. C., 202, 205; *Faust v. Faust,* 144 N. C., 386; *Odom v. Clark,* 146 N. C., 551; *Chappell v. White, ib.,* 574; *Gaylord v. Gaylord,* 150 N. C., 237.

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(168)

FANNIE E. GODWIN, GUARDIAN, v. FANNIE E. WATFORD ET AL.

Will — Executrix — Waste—Account—Bond for Security—Receiver—Tenant for Life—Jurisdiction—Two Years After Qualification.

1. Where it appeared that the defendant was executrix of her husband's will, and tenant for life, or during widowhood, of all his property, real, personal and mixed; that the testator made sundry devises and bequests, to take effect upon her death, or widowhood; that she did not marry again, and took possession and wasted and lavishly used said property; that she was insolvent, and had filed no account of the property, as required by law, except one inventory: *Held,* that there was no error in giving judgment directing the executrix to account and give bond for the security of the property, and, in default thereof, that a receiver be appointed.
2. The court had jurisdiction to grant the relief given.
3. It was not necessary to wait for the lapse of two years next after qualification before bringing an action to compel an executor to account.

APPEAL at Spring Term, 1890, of BERTIE, from *Armfield, J.*

The complaint alleges, in substance, that Calvin Godwin died in the county of Bertie in 1887, leaving his will, which was admitted to probate on 9 August of that year; that he left surviving him his wife, Fannie E., who qualified as executrix of his will; that she afterwards intermarried with David A. Watford, who afterwards died; that she afterwards intermarried with John Barnes, who afterwards died, and she is now a widow; that the testator provided for his said wife as follows:

"I give and devise to my beloved wife, Fannie E. Godwin, for and during the term of her natural life, or so long as she remains my widow, all my property, real, personal and mixed, of what nature or kind soever, and wherever the same shall be at the time of my death, except my mill and two acres of land, the mill site."

(169) That he made sundry other devises and bequests, to take effect at the death of his wife, or, if she should marry again—and she did marry again, as stated above—that she took possession of valuable lands and personal property, so devised and bequeathed; that she used the same carelessly, lavishly and wastefully; that she neglected to take care of the property, permitted it to go to ruin; that she diverted parts of it to her own purposes; that she was insolvent, and the devisees and legatees would lose much of what belonged to them by virtue of the will; that she made and filed no account of the property, as the law required she should do, etc., etc. The complaint demands judgment that she be required to account; to give proper bond to secure the property; that if she would not, that a receiver be appointed to take charge of the land and other property, to the end the whole might be administered as directed by the will; for general relief, etc.

The executrix admits, in her answer, that she was executrix, as alleged; that she had so intermarried again; that she took possession of the property, real and personal—used and was using the same; she denied that she was negligent and wasteful; alleged that she had used the property as well as she could; that she had made one return of inventory of the same, which she believed to be true; she admitted that the estate was solvent; that she received moneys belonging to the same, and she alleged that she was the owner of land worth about $1,000, and had personal property worth about $500, and owed no debts, etc. The case was heard, it seems, by consent, upon the complaint, the will, a copy of which was annexed thereto, and the answer of the executrix. The court gave judgment, directing that the executrix account; that she give bond with security for securing the property by a day designated, and in default thereof, that a receiver be appointed.

(170) From that judgment the executrix appealed to this Court.

Winston & Williams (by brief) for plaintiff.
No counsel for defendant.

MERRIMON, C. J., after stating the facts: This case was not argued in this Court for the appellant, and we find it difficult to determine what the precise purpose of the appeal is. We learn, from the brief of the appellee, that "the only question presented for solution by the Court is whether there is a proper case for the intervention of a Court of Equity to protect a fund now in the hands of" the appellant executrix. Or, stating the question with more directness, Does the complaint state facts sufficient to constitute a cause of action?

The precise purpose of the action does not appear very clearly from the complaint, but it is, certainly, as we understand it, to compel the defendant executrix to an account of the estate of testator in her hands, to recover the property, legacies and distributive shares by those entitled to have the same, and to protect the property pending the action. Such being the purpose, a cause of action is alleged, and the court had jurisdiction of the subject-matter. It is not alleged that two years had elapsed next after the qualification of the executrix at the time the action was begun, but it is alleged that the estate is wholly solvent, "and there is no reason why any executrix under the will should retain any part of the fund in hand," and this is expressly admitted by the answer. In such case the executrix may be compelled to account and to pay legacies before the lapse of two years next after the qualification. The Code, sec. 1512; *Clements v. Rogers,* 91 N. C., 63, and the cases there cited.

The jurisdiction and powers of the court, in such actions, (171) are very comprehensive as to the purposes contemplated by them. It is competent in them "to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require." This implies ample power in the court to protect the property, by appropriate ways and means—to grant an injunction, appoint receivers, etc., etc., in such cases. The Code, sec. 1511; *Bratton v. Davidson,* 79 N. C., 423; *Pegram v. Armstrong,* 82 N. C., 326; *Stenhouse v. Davis, ib.,* 432.

Affirmed.

Cited: Allen v. Royster, post, 282; *Edwards v. Lemmonds,* 136 N. C., 330.

SALOME LEONARD v. SAMUEL H. LEONARD, EXECUTOR.

Divorce—Year's Provision—Widow.

When the wife commits adultery, and is not living with the husband at the time of his death, she is barred of the right to "year's provision." Code, sec. 2116.

APPEAL from clerk, tried before *Bynum, J.*, at March Term, 1889, of GUILFORD. Defendant appealed.

J. H. Dillard and James E. Boyd for plaintiff.
John W. Graham and L. M. Scott for defendant.

CLARK, J. This was a proceeding by the plaintiff, claiming to be the widow of James Leonard, against the executor, to require him to give bond and to allot to her a year's provision, alleging that he had (172) refused to do so upon her application. The jury, in response to issues submitted, found that the plaintiff committed adultery prior to 1868, and had not since lived with her husband, and was not living with him at his death.

It is unnecessary to consider the other exceptions, as upon the issues found we think judgment should have been entered for the defendant. The Code, sec. 2116, provides: "If any married woman shall commit adultery, and shall not be living with her husband at his death, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery may be pleaded in bar of any action or proceeding for the recovery of such rights and estates."

Formerly the adultery of the wife, and living separate from her husband at the time of his death, ousted the woman of her dower (statute 13 Ed. I; *Walters v. Jordan,* 35 N. C., 361), but did not deprive her of her year's provision and distributive share of the estate. *Walters v. Jordan,* 34 N. C., 170. In 1871-72, ch. 193, sec. 44, it was enacted that if any married woman shall elope with an adulterer she shall thereby lose all right to dower, year's provision and distributive share. In *Cook v. Sexton,* 79 N. C., 305, this act was construed by the Court, which held it to be entirely prospective, and not applicable when the elopement had taken place prior to the passage of the act, but also held that the Legislature might, by the use of appropriate words, have taken away the inchoate right to dower and year's provision. The Code of 1883 does not reënact the act of 1871-72, above cited, but in section 2116 it uses, in regard to year's provision and dis-

tributive share, the language *verbatim* used in section 2102 in regard to forfeiture of dower. The forfeiture, by these sections, takes effect, not when the wife shall commit adultery, but when she does so and "shall not be living with her husband at his death." It leaves open to her the door of condonation and pardon, and it stands (173) open, and the forfeiture is not complete till the death of the husband without the reconciliation and return of the wife. Here the act was passed in 1883, the death of the husband took place in 1887. If the words should be taken as prospective, still the forfeiture was incurred and completed many years subsequent to the adoption of the statute. In its wording it essentially differs from the act construed in *Cook v. Sexton,* and that decision has no application.

Per Curiam. Error.

NORFOLK NATIONAL BANK, OF NORFOLK, VA., v. W. J. GRIFFIN ET AL.

Contract—Accommodation Paper—Endorsement.

While, at common law, a bond made payable to the obligor is void, and a promissory note made payable by the maker to himself creates no liability, for the reason that a person cannot contract with himself, yet, where such promissory note is made for the purpose of enabling the maker to raise money, and is endorsed by him for that purpose, the endorsee may recover upon it, not only against the payee and endorser, but against all others who may have signed it.

APPEAL from *Whitaker, J.,* at Spring Term, 1890, of PASQUOTANK.

A jury trial was waived, and the judge found the following facts:

W. J. Griffin and W. O. Temple were partners, under the firm name of Griffin & Temple. On 23 March, 1889, the said W. J. Griffin and W. O. Temple, as individuals, and the other defendants, W. S. Temple and J. R. Etheridge, executed a promissory note, as follows: "Sixty days after date we, jointly and severally, promise to pay (174) Griffin & Temple, negotiable and payable without offset, at the Norfolk National Bank, four hundred dollars for value received," etc. Ethridge and W. S. Temple received no benefit from the note, but signed the same for the accommodation of Griffin & Temple and to enable them to raise money. The note was endorsed for value to the plaintiff by Griffin & Temple, the plaintiff having knowledge of the facts; that no part of the note had been paid.

Upon this state of facts the court rendered judgment in favor of the plaintiff against all the defendants, from which Etheridge and W. S. Temple appealed.

Pruden & Vann (by brief) for plaintiff.
E. F. Aydlett for defendants.

CLARK, J. A bond made payable to the obligor is void. *Pearson v. Nesbit,* 12 N. C., 315; *Justices v. Shannonhouse,* 13 N. C., 6; *Justices v. Armstrong,* 14 N. C., 285. A bond is a deed, and no man can execute and deliver a deed to himself.

"According to common-law principles, a promissory note made payable by a person to himself creates of itself no liability upon him to pay it. This is so, not for the reason that it is contrary to public policy, immoral or illegal, but because a person cannot contract with himself." *Jenkins v. Bass,* 88 Ky., 397. Indeed, there is no contract till such paper has been endorsed over to another, when there springs up by the law merchant a valid contract between the maker and endorsee. 1 Daniel Neg. Instruments, sec. 130; *Wood v. Maytton,* 10 Adolphus & Ellis, 809 (59 E. C. L.); *Smith v. Lusher,* 5 Cowen, 688; *Plets v. Johnson,* 3 Hill (N. Y.), 112; *Jenkins v. Bass, supra.*

(175) In this case the note, upon its face, was executed for the purpose of being negotiated. It is found, as a fact, that the defendants signed it as accommodation paper to enable those of the makers who are named as payees therein to raise money on the paper. Doubtless they were so named as payees because it was not yet known who would lend money on the note, and it was desired not to leave the names of payees in blank. Such practice is not unusual, and is well recognized by the law merchant.

The note was negotiated, as defendants intended should be done, and value received thereon. To protect them, upon the technical grounds set up, against the consequences of their own act, would be against good morals, and would enable them to perpetrate a fraud on the plaintiff. By the endorsement to plaintiff the contract, till then imperfect, became perfect and completed.

No error.

MARY E. BEVILLE v. H. S. COX.

Married Woman—Contract.

If a *feme sole* employs a servant for a definite period, and marries before the expiration of such period, compensation for the whole time can be recovered in a justice's jurisdiction, if under $200; but, if there was an express or implied agreement for services for an indefinite time, compensation for

services rendered after marriage can only be recovered against the wife when charged expressly or by necessary implication on her separate estate, and only then by an action in the Superior Court.

ACTION brought to recover compensation for services by plaintiff to the testatrix of the defendant, and tried, upon an appeal from a justice's court, at August Term, 1890, of GUILFORD, before *MacRae, J.*, upon the following issue, to wit:

"Is the defendant indebted to the plaintiff, as alleged? If (176) so, how much?"

The plaintiff, in support of the issue on her part, offered testimony tending to prove that the testatrix sent for her; that she went to her home and remained there, doing the cooking, washing and house work for testatrix, and some outdoor work, from February, 1885, to May, 1888—about three years and three months—and that in August, 1886, testatrix was married to the defendant, who is now her administrator, and that the services rendered by her were reasonably worth one dollar per week; and further, that testatrix, about a week after plaintiff went to her house, told her if she would stay with her she should be paid for her services.

And in further support of said issue, plaintiff introduced testimony tending to show that she continued to live with the testatrix after her marriage to defendant, serving as before, and that after said marriage testatrix became an invalid, was confined to her bed for a year, had to be lifted up and down, and that she (the plaintiff) during said time did all the waiting upon her. It was admitted that testatrix of defendant died in 1889, and left a last will and testament, the execution of which was committed to the defendant, as administrator with the will annexed.

The defendant also introduced evidence.

The plaintiff insisted that the alleged promise to pay for her services was a continuing contract, and that she was entitled to recover for the whole time she remained with testatrix, and as well the time after her marriage with Cox as before.

The defendant insisted that if she was entitled to recover at all, she could not recover against testatrix from the time of her marriage with Cox, but must look to her husband. His Honor instructed the jury, among other things, as follows, to wit: (177)

"If the plaintiff went there at the request of testatrix to work for her, and testatrix promised to pay her for her services, she is entitled to reasonable wages, and if those services were for the necessary expenses and support of the family, and were continued after the marriage, under a contract to be paid for her services, she will be entitled to recover in this action for the whole time."

To this part of the charge the defendant excepted. Verdict and judgment for the plaintiff. Appeal by defendant.

Dillard & King and J. E. Boyd (by brief) for plaintiff.
J. T. Morehead for defendant.

CLARK, J. If the testatrix, while a *feme sole,* had contracted with plaintiff for services for a definite period, the marriage of the testatrix before the expiration of such time would not impair the obligation of the antenuptial contract, and plaintiff could have recovered in an action before a magistrate compensation (if not more than $200) for the whole period, although part of the services were rendered after marriage. The Code, sec. 1823; *Hodges v. Hill,* 105 N. C., 130. But when the contract is for no specified time, the obligation to pay arises as the services are rendered. Marriage having changed the status of the employer, her liability, in such case, for services rendered after marriage, depends upon whether expressly, or by necessary implication, she charged her separate estate with payment for such services. *Farthing v. Shields,* 106 N. C., 289. And that can only be determined in an action brought in the Superior Court. *Dougherty v. Sprinkle,* 88 N. C., 300.

Per Curiam. Error.

Cited: Beville v. Cox, 109 N. C., 269; *Cotton Mills v. Cotton Mills,* 116 N. C., 649; *Harvey v. Johnson,* 133 N. C., 363.

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(178)

C. A. STOKES v. SUFFOLK & CAROLINA RAILROAD COMPANY.

Common Carriers—Negligence—Evidence—Judge's Charge.

In an action to recover damages for injuries alleged to have been received because of the negligence of a railway company to provide suitable means by which passengers might have access to trains, there was evidence tending to show that a shallow ditch, not more than 2 feet wide, ran parallel with defendant's track at the point where passengers got on and off the cars; that a bridge or platform, 15 feet wide, was erected over it; that it was in good condition, except that one plank was slightly shorter than the others; that the plaintiff, in the daytime, in attempting to get on the train, stepped into a hole caused by the short plank, and was injured: *Held,* the defendant was entitled to an instruction that if the jury found the bridge to be such as testified to, it was sufficient as a crossing place for passengers, and the defendant was not chargeable with negligence.

APPEAL from *Whitaker, J.*, at Spring Term, 1890, of CHOWAN.

The plaintiff brought this action to recover damages sustained by her, occasioned by the defendant's failure "to keep the bridges and other approaches to the said train (that of the defendant), at that point over which the plaintiff was compelled to pass, in a safe and suitable condition, but allowed them to be, on the day named, dangerous to persons approaching said train."

On the trial the defendant requested the court to instruct the jury, among other things, as follows:

"1. That if the jury find that the said bridge was constructed as a crossing for the witness Jones over a drain not over 8 or 10 inches deep, and was in good condition and at least 15 feet wide, the only defect being that one plank was slightly shorter at one end than the other planks of the bridge, that would not constitute negligence on the part of the defendant.

"2. That if the jury find as a fact that the bridge or crossing, (179) over the end of which the plaintiff fell, was 15 feet wide at the narrowest point, over a drain not over 8 inches deep at the deepest part, and sloping off at both edges, and not over 2 feet wide, perfectly sound in all respects, the only defect being a plank slightly shorter at one end than the other planks of the bridge, it would constitute a sufficient crossing for foot passengers boarding the train, and would not of itself be negligence on the part of the defendant."

There was evidence tending to prove the facts suggested by the instructions asked for. There was a verdict and judgment for the plaintiff, and the defendant appealed to this Court.

Pruden & Vann filed a brief for plaintiff.
L. L. Smith for defendant.

MERRIMON, C. J., after stating the facts: The court declined to give the instructions asked for by the defendant, or the substance of them. In view of the allegations of the complaint and the issues submitted to the jury, it was material for the defendant to prove that the bridge in question was sufficient and safe for passengers crossing the same to get on and off the defendant's train. If it was sufficient, then the jury might have found that the plaintiff incautiously, carelessly and negligently fell from the bridge and injured herself, or that the fall was a mere casualty, for which the defendant could not justly be held responsible. There was evidence produced tending to show that a side ditch, from 4 to 6 feet wide at the surface—not so wide at the center—and about 8 inches deep, was situated parallel and near the defendant's railroad track at a point where its train stopped to let off and take on pas-

(180) sengers; that three bridges crossed this ditch within the distance of 75 yards; that the bridge was about 15 feet wide, about that length crossing the ditch; that it was near a road crossing; that it was solid; that one plank on it was a little shorter—6 or 8 inches—than the others; that the shortness of this plank might easily be seen; that plaintiff fell through the bridge at the end of the short plank, etc., etc.

We cannot hesitate to say that if the bridge was such a one as the defendant, in view of the evidence, contended it was, it was sufficient as a crossing place for passengers going on the defendant's train, and the defendant was not chargeable with negligence simply on the ground of insufficiency of the bridge for such purpose; nor would the fact that one of the planks was shorter by 8 inches than the others, of itself, constitute negligence of the defendant, especially if it was plainly observable by passengers. When there is evidence to support a material aspect of the case contended for, the court should give appropriate instructions as to the same, particularly when it is requested to do so. And in a case like the present one the court might instruct the jury that if they believed a certain state of facts, of which there was evidence, there would be negligence chargeable against a party; otherwise, there would be none.

The view contended for by the defendant was material—there was evidence tending to prove it, and we think the instructions asked for, above set forth, or the substance of them, should have been given, along with the instructions the court gave the jury. They might have led the jury to a different conclusion from that reached by them.

New trial.

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(181)

JOHN BUIE v. ELLEN SCOTT ET AL.

Action to Recover Land—Judgment—Witness—The Code, sec. 590.

1. In an action to recover land bought by the plaintiff at an execution sale, under a judgment obtained by himself, he is not a competent witness to prove the date of the debt on which such judgment was rendered, when the judgment debtor is since deceased and defendant claims under him. *Sumner v. Candler,* 86 N. C., 71, approved.

2. In such action, if it appear that no homestead was laid off, advantage can be taken of it, though not specially pleaded by defendant. *Mobley v. Griffin,* 104 N. C., 112, approved.

3. The date of a judgment will be taken as the date of the debt upon which it was rendered, unless the contrary appear of record. *Mebane v. Layton,* 89 N. C., 396, approved.

BUIE *v.* SCOTT

ACTION to recover land, tried before *Brown, J.*, and a jury, at May Term, 1890, of CUMBERLAND.

The defendants appealed.

The facts sufficiently appear in the opinion.

Neill W. Ray for plaintiff.
R. P. Buxton (by brief) for defendants.

CLARK, J. The plaintiff seeks to recover the land in controversy as purchaser at a sale under an execution issued on a judgment in which he was plaintiff. It appears from the evidence offered by the plaintiff that no homestead was laid off, and that this land was all that the judgment debtor owned. The judgment, obtained before a magistrate and docketed in the Superior Court, was dated 1 April, 1873, and bore interest from that date. It did not show the date of the indebtedness on which it had been rendered. The original papers before the justice, and the note on which judgment had been granted, had been lost. The debt was presumably of the date of the judgment. *Hill v. Oxendine,* 79 N. C., 331; *Mebane v. Layton,* 89 N. C., 396. It therefore (182) became material to show the date of the note. *Mobley v. Griffin,* 104 N. C., 112; *McCracken v. Adler,* 98 N. C., 400. The judgment debtor was deceased at the time of this trial, and his widow is the principal defendant, having intermarried with the other defendant. The case states: "The plaintiff then proposed to prove by himself the date of the said note and contents thereof, to show when said debt was contracted, in addition to what may be contained in the judgment roll of the Superior Court. This was objected to by the defendant. Objection overruled, and exception by defendant. Plaintiff then testified that the note referred to was dated in 1861, but could not give exact date." It was error to admit this testimony. In *Hussey v. Kirkman,* 95 N. C., 63, it is held that while a plaintiff in an action may be competent to testify to the *handwriting* of a deceased person to a paper-writing by which it is sought to charge his estate, he is incompetent to testify to the *contents* of such paper. In the present case the answer, "The note was dated in 1861," means, clearly, that the paper was executed in 1861, for it is stated that the question was asked "to show when the debt was contracted." This, necessarily, was testimony as to a personal transaction between the plaintiff and the deceased, and incompetent, under The Code, sec. 590. *Sumner v. Candler,* 86 N. C., 71.

The date of the indebtedness is not stated in the justice's judgment, nor has such judgment been since amended to show it. There was a motion for leave to issue execution, which was allowed, and in stating case on appeal in that case (*Buie v. Simmons,* 90 N. C., 9), from the

order allowing it, the judge does state, incidentally, as a fact found, that the indebtedness was contracted prior to 1868. Such finding is not in the record proper, but in the statement of case on appeal, and was not as to a matter in issue on the motion. It is therefore not an estoppel.

Williams v. Clouse, 91 N. C., 322. The plaintiff evidently
(183) thought this, and endeavored to show the date by his own testimony, as above.

Error.

Cited: S. c., 112 N. C., 377; *Fulton v. Roberts,* 113 N. C., 428; *Bright v. Marcom,* 121 N. C., 87; *McEwan v. Brown,* 176 N. C., 252.

C. M. HERNDON ET AL. v. THE IMPERIAL FIRE INSURANCE COMPANY.

Insurance Policy—Arbitration—Award—Evidence—Contract on the Policy.

In an action on an insurance policy the defense was settlement by arbitration, according to the terms of the policy. The court ruled that the agreement to submit, and the award, were not competent, either to support the plea of arbitrament and award or as a binding agreement upon the parties thereto.

APPEAL at January Term, 1890, of DURHAM, from *Armfield, J.*

The action was on an insurance policy. The defendant set up, among other things, that the amount of the loss had been settled by arbitration and was no longer an open question.

The policy of insurance contained the following stipulation:

"Proceedings in Case of Loss.—It being understood and agreed that all proceedings after a loss shall be in accordance with the terms and stipulations printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be resorted to in order to determine the rights and obligations of the parties hereunto."

(184) Endorsement on Policy.—"The sound value and the loss or damage to property partially or totally destroyed (unless the amount of said loss or damage is agreed upon between the assured and this company) shall, at the written request of either party, be determined by an appraisal of each article of personal property, or by an estimate in detail of a building, by competent and impartial persons, one to be selected by this company and one by the assured; and when either party demands it, the two so chosen shall select a third person to

act with them in case of disagreement; and said persons so selected shall form a board of appraisers; and the award, under oath, of any two, in writing, shall be binding and conclusive as to such sound value, loss or damage; but no appraisal nor agreement for appraisal shall be construed under any circumstances as an admission of the validity of said policy or of this company's liability thereon, or a waiver of any condition of said policy. Each party to pay its own and one-half the expense of the third appraiser.

"The award of the appraisers, in writing, under oath, shall form a part of the preliminary proofs hereby required; and until sixty days after such proofs and certificates are received by this company, books and vouchers procured, and examinations permitted, the loss shall not be payable."

The defendant offered in evidence the submission to appraisers, the oath of appraisers and their award, all in writing. The plaintiff objected. The objection was sustained and the evidence excluded.

His Honor held that the agreement to submit to appraisers and the award of the appraisers were not competent evidence for any purpose or in any way, either to support the plea of arbitrament and award or as a binding agreement upon the parties thereto. The defendant excepted.

The award was strictly within the terms of the submission, and was definite and full.

W. W. Fuller for plaintiff.

J. W. Hinsdale (by brief) and J. S. Manning for defendant. (185)

SHEPHERD, J. His Honor held "that the agreement to submit to appraisers and the award of the appraisers were not competent for any purpose or in any way, either to support the plea of arbitrament and award, or as a binding agreement upon the parties thereto."

The contrary was decided at the last term of this Court in *Mfg. Co. v. Assurance Co.*, 106 N. C., 28. In addition to the many authorities cited in that case, we will now add the recent case of *Hamilton v. Ins. Co.*, 136 U. S., 242.

In justice to the learned judge who tried this case, we will remark that the questions passed upon by him had not then been decided by this Court.

Reversed.

Cited: Herndon v. Ins. Co., post, 195.

KLEBER DENMARK v. THE ATLANTIC & NORTH CAROLINA RAILROAD COMPANY.

Damages—Issues — Negligence—Contributory Negligence—Practice in Submitting Issues of Damages—Instructions of the Court—Verdict.

1. In an action against a railroad for damages the defendant tendered the issues: (1) Were plaintiff's injuries caused by the negligent running of defendant's engine? (2) Was there contributory negligence on the part of the plaintiff? (3) What damages is the plaintiff entitled to recover? The court declined to submit these, and substituted instead a single issue—What damages, if any, is the plaintiff entitled to recover? *Held*, (1) to be error; (2) the question of the *quantum* of damages is a mere incidental one, depending upon the real issues of fact raised by the pleadings.

2. Where the court below assumes the responsibility of settling the issues on trial, this Court, construing the statute, has laid down three rules: (1) Only issues of fact raised by the pleadings must be submitted; (2) the verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment; (3) of the issues raised by the pleadings, the judge may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon.

3. The statute (The Code, secs. 395, 401) requiring issues of fact raised by the pleadings to be submitted to the jury is mandatory.

4. The better practice is to submit an issue upon the question of contributory negligence.

5. Discussion by *Avery, J.*, of the practice in submitting issues as to damages.

(186) APPEAL at January Term, 1890, of WAYNE, from *Whitaker, J.*

The counsel for the defendant tendered the following issues:

1. Were the plaintiff's injuries caused by the negligent running of defendant's engine?

2. Was there contributory negligence on the part of the plaintiff?

3. What damages is the plaintiff entitled to recover?

The judge who presided declined to submit those proffered, and substituted instead of them a single issue, which, with response of the jury to it, is as follows: What damages, if any, is the plaintiff entitled to recover? Answer: $5,000.

The defendant excepted to the refusal of the court to submit those tendered, and to the substitution of the issue passed upon by the jury.

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

AVERY, J., after stating the facts: When the judge who tries (187) an action assumes the responsibility of settling the issues, he finds that this Court, in construing the statute, has laid down three rules for his guidance:

1. Only issues of fact raised by the pleadings must be submitted to the jury.

2. The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment.

3. Of the issues raised by the pleadings, the judge who tries the case may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence, through the medium of pertinent instructions on some issue passed upon. *McAdoo v. R. R.*, 105 N. C., 140; *Emery v. R. R.*, 102 N. C., 209; *Bonds v. Smith*, 106 N. C., 562; *Boyer v. Teague*, 106 N. C., 633.

The question of the *quantum* of damages is an incidental one, the right to have them assessed at all depending upon the preliminary decision of the real issues of fact raised by the pleadings. Hence, in common practice, when the *nisi prius* judge instructs the jury how to write their responses to them, he generally directs that if their findings upon certain preliminary issues are favorable to the defendant, it will dispense with the necessity of assessing the plaintiff's damage. But in some other instances in common practice the question of the amount of damages is, with the approval of the court below, answered, and that court, and sometimes the appellate tribunal, subsequently pass upon the reserved issue of law, whether the responses to the main issues are a sufficient predicate for a judgment for the amount so conditionally determined. This common practice is founded upon reason and authority. (188)

It is well settled that the statutes (The Code, secs. 395, 401) are mandatory in the requirement that an issue or issues of fact raised by the pleadings shall be submitted to the jury. *Rudasill v. Falls*, 92 N. C., 222. But section 400 in express terms distinguishes issues of fact from mere inquiries of damages by providing that "Every *issue of fact joined in the pleadings* and *inquiry of damages* required to be tried," etc., "shall be tried at the next term," etc.

In *Miller v. Melchor*, 35 N. C., 439, *Pearson, J.*, delivering the opinion of the Court, announced that the action of trespass for *mesne* profits, which, it had been contended, was a distinct action for damages, was in fact "a mere elongation of the action of ejectment," that action being

divided, at the suggestion of the court, into two parts, in order to save time and merely as a matter of convenience." Hence it was held not to be error, in that case, to allow the jury to assess actual damage in ejectment, because the nature of the original action was such that, upon the finding that the defendant was guilty of the trespass, he could recover damages only as an incident to that finding. The inquiry as to damages was postponed to save time, because, in case the verdict was "not guilty," the time spent in hearing evidence as to the *quantum* of damages would have been wasted. So the common practice, regulated by The Code, sec. 386, of taking judgment by default upon the main issues, and, when the demand is for unliquidated damages, of continuing the inquiry to the next term, is a recognition of the distinction we have drawn.

But this Court has held that it was error, where issues of fact were raised by the pleadings, to allow the jury to return as their verdict that "they find all issues of fact in favor of the plaintiff, and assess his damages" at a given sum. *Bowen v. Whitaker,* 92 N. C., 369.

The main issue of fact raised by the pleadings was whether the plaintiff's injuries were caused by the negligence of the defendant company, and that, with appropriate instruction, would have been sufficient.
(189) *Scott v. R. R.,* 96 N. C., 428; *McAdoo v. R. R.,* 105 N. C., 151.

But, while it is not error to decline to do so, it is generally much more satisfactory to the court below, and to the appellate court, to add an issue involving contributory negligence; and, also, where the question is raised by conflicting evidence, a third, so framed that the jury may specifically determine whether the defendant could, by the exercise of ordinary care, have avoided inflicting the injury complained of, notwithstanding the negligence of the injured party.

It is not necessary to pass upon the other exception, and perhaps not advisable to do so, because, upon another trial, additional evidence may be offered, so as to present a case widely different from that before us.

There was error in refusing to submit at least the issue involving the question whether the injury was caused by the defendant's negligence, and a new trial must be granted.

Error.

Cited: Braswell v. Johnston, 108 N. C., 151, 152; *Bottoms v. R. R.,* 109 N. C., 73; *Humphrey v. Church, ib.,* 138; *Cornelius v. Brawley, ib.,* 548; *Blackwell v. R. R.,* 111 N. C., 153; *Bass v. Nav. Co., ib.,* 456; *Vaughan v. Parker,* 112 N. C., 100; *Clement v. Cozart, ib.,* 414; *Redmond v. Mullenax,* 113 N. C., 510; *Smith v. R. R.,* 114 N. C., 765, 766; *Downs v. High Point,* 115 N. C., 186; *Patton v. Garrett,* 116 N. C., 856; *Jordan v. Farthing,* 117 N. C., 186; *Sherrill v. Tel. Co., ib.,* 364; *Tankard v. R. R., ib.,* 560; *Pickett v. R. R., ib.,* 638; *Baker v. R. R.,* 118

N. C., 1023; *Ellerbee v. R. R., ib.*, 1026; *Nathan v. R. R., ib.*, 1070; *Tucker v. Satterthwaite,* 120 N. C., 122; *Rittenhouse v. R. R., ib.*, 546; *Bank v. School,* 121 N. C., 108; *Patterson v. Mills, ib.*, 266; *Willis v. R. R.,* 122 N. C., 907; *Pierce v. R. R.,* 124 N. C., 93; *Cox v. R. R.,* 126 N. C., 105; *Bogan v. R. R.,* 129 N. C., 157; *Ray v. Long,* 132 N. C., 893; *Hatcher v. Dabbs,* 133 N. C., 241; *Davis v. R. R.,* 147 N. C., 70; *Busbee v. Land Co.,* 151 N. C., 515; *In re Herring,* 152 N. C., 259; *Hanford v. R. R.,* 167 N. C., 279; *Cullifer v. R. R.,* 168 N. C., 311; *Nance v. Tel. Co.,* 177 N. C., 317.

JACKSON PATE v. H. S. HAZELL.

Personal Property—Possession—Prima Facie Evidence of Ownership—Title by Possession.

1. Four years possession of a chattel does not give title in North Carolina.

2. The legal owner of a sewing machine leased it to one A. who leased to the plaintiff, and he held it for four years, when it was discovered and taken: *Held*, that the legal owner was entitled to it.

3. Possession of a chattel is *prima facie* evidence of ownership, and, if adverse and long continued, may ripen into a good title.

ACTION to recover the possession of a sewing machine, tried at (190) April Term, 1890, of WAYNE, by *Brown, J.*

The plaintiff testified that he was in possession from 1886 to 1890, and that it was pawned to him by defendant's lessees.

The facts are set out in the opinion.

W. S. O'B. Robinson for plaintiff.
No counsel for defendant.

SHEPHERD, J. The defendant, the legal owner of the sewing machine, leased it to Annie Smith (now Mrs. Atkinson), who, with her husband, pledged it to the plaintiff. The plaintiff held it in his possession about four years, when it was discovered and taken by the defendant. The plaintiff claims title by reason of his four years possession.

It is argued that the possession of a chattel confers title when the possession has been of sufficient duration to bar an action for its recovery, and for this position the case of *Campbell v. Holt,* 115 U. S., 620, is cited. Whatever may have been held by that Court, we are of the

opinion that no such principle has ever been recognized as a rule of the common law in North Carolina. Such was the statute law before the adoption of the present Code (see chapter 65, section 20, Rev. Code), but this was repealed, leaving no fixed period when such possession should raise a conclusive presumption of title.

There is no doubt that the possession of a chattel is *prima facie* evidence of ownership, and this possession, if adverse and long continued, may ripen into a good title; but we cannot hold, in the absence of legislation, that four years possession (especially under the circumstances of this case) can have the effect of defeating the true owner, who is now in the actual possession of his property.

Affirmed.

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(191)

C. M. HERNDON ET AL. V. THE LANCASHIRE INSURANCE COMPANY.

Removal of Causes to United States Courts—Citizenship—Residence—Jurisdiction.

1. In order that the jurisdiction of the United States Circuit Court may attach to an action pending in a State court, if the jurisdiction depends on the diverse citizenship of the parties, it must affirmatively and distinctly appear from the record or petition that the plaintiff and defendant therein were citizens respectively of different States at the time the action was commenced, as well as at the time application for removal was made.
2. Diverse citizenship will not be inferred from the fact stated, that the parties were *residents* of different States.
3. Residence does not imply citizenship for the purpose of giving such jurisdiction.

MOTION to remove cause to United States Circuit Court, heard by *Graves, J.*, at October Term, 1889, of DURHAM.

In this action, at the appearance term, the plaintiff filed his complaint, and the following is a copy of the first paragraph thereof:

"The plaintiffs, complaining of the defendant, allege:

"1. That C. M. Herndon is a resident of the State of North Carolina and of Durham County; that G. W. S. Loucks, W. H. Wheeler, and P. H. Glatfeller are residents of the State of Pennsylvania, and that defendant is a corporation, duly organized and doing business in said State of North Carolina, and was such corporation, engaged in said business, at the time hereinafter mentioned, said corporation having been formed, as plaintiffs believe, under the laws of Connecticut, but having complied with the laws of North Carolina governing fire insurance companies."

At the same term the defendant filed its petition, whereof the following is a copy:

"The defendant respectfully showeth to the court:

"That the plaintiff C. M. Herndon is a citizen, resident of the (192) county of Durham, State of North Carolina, in the Western District of North Carolina of the Circuit Court of the United States; that his coplaintiffs, G. W. S. Loucks and W. H. Wheeler, trading as Loucks & Wheeler, and as York Manufacturing Company, and P. H. Glatfeller, are residents and citizens of the State of Pennsylvania; that the defendant is a corporation, organized and existing under the laws of the State of Connecticut, and is a citizen and resident of said State, and not a citizen or resident of the State of North Carolina; that plaintiff had issued from the Superior Court of Durham County, in the State of North Carolina, a summons, citing the defendant to appear in said court on the sixth Monday after the first Monday in September, 1889, it being 14 October, 1889; that plaintiffs have filed their complaint, setting forth a cause of action against the defendant upon a policy of insurance against loss by fire, issued to the plaintiff C. M. Herndon and one R. H. Atwater as partners, and subsequently assigned to the plaintiff C. M. Herndon, upon which policy, the property therein insured alleged to be destroyed by fire, the plaintiffs sue to recover in said State court of the defendant in the sum of $2,500, principal money, exclusive of interest and costs.

"Wherefore, defendant petitions and prays that said cause be removed to the Circuit Court of the United States for the Western District of North Carolina, according to law."

This petition signed by counsel and sworn by petitioner's agent.

The court denied the motion for an order of removal, and the defendant, having excepted, appealed to this Court.

W. W. Fuller for plaintiff.

J. W. Hinsdale and J. S. Manning for defendant.

MERRIMON, C. J., after stating the facts: It is settled by many (193) authoritative adjudications that a civil action pending in a State court, as to which the jurisdiction of the Circuit Court of the United States cannot arise or attach unless the parties, plaintiff and defendant therein, respectively, are citizens of different States, is not removable into such circuit court unless such diverse citizenship shall distinctly appear to have existed at the time when the action began, as well as when the removal was applied for, and it must appear affirmatively from positive averments in the petition for removal, or likewise affirmatively and with equal distinctness in the record, or it may appear from

what appears in the petition and the record taken together. *Gibson v. Bruce,* 108 U. S., 561; *Grove v. Ins. Co.,* 109 U. S., 278; *Railway v. Snow,* 111 U. S., 379; *Steamship Co. v. Tugman,* 106 U. S., 118; *Akers v. Akers,* 117 U. S., 197; *Hancock v. Holbrook,* 112 U. S., 229; *Stevens v. Nichols,* 130 U. S., 230; *Cuhose v. R. R.,* 131 U. S., 240; *Jackson v. Allen,* 132 U. S., 27; *Blackwell v. R. R., post,* 217.

It does not appear from the petition that the diverse citizenship of the parties therein alleged existed at the time the action began—it was simply alleged as existing at the time the petition was filed. This is not sufficient. *Stevens v. Nichols, supra; Blackwell v. Moorman, supra.* Nor does such diverse citizenship appear from the record. It is alleged in the complaint simply that the plaintiffs are *residents* of the States mentioned. But this does not imply that they are *citizens* of those States, and *citizenship* thereof must be alleged or appear in some way sufficiently. The petition alleges citizenship at the time the petition was filed. But it may be that the parties acquired such citizenship after the action began and with the view to raise the jurisdiction of the circuit court. Nor can the positive affirmative allegation of citizenship in the petition for removal help or enlarge the allegation of mere resi-
(194) dence in the complaint, because residence does not imply citizenship for the purpose of giving such jurisdiction. Moreover, the allegation of the residence of the parties in the complaint was not necessary in the pleading in the State court, nor was it intended to thereby allege citizenship—it was merely descriptive of the parties and intended to identify them—it might have been omitted altogether. It cannot be inferred that the purpose was to allege citizenship and not mere residence. *Parker v. Overman,* 18 Howard (U. S.), 137; *Robertson v. Cease,* 97 U. S., 646; *Grose v. Central Ins. Co.,* 109 U. S., 278.

Inasmuch as it did not appear from the petition for removal of the action, nor from the record of the latter, that the diverse citizenship of the parties necessary to give the Circuit Court of the United States jurisdiction thereof existed at the time the action began, the court properly denied the petitioner's motion. There is no error.

Affirmed.

Cited: S. c., 108 N. C., 649.

C. M. HERNDON v. THE ÆTNA INSURANCE COMPANY.

Removal of Causes—Residence—Citizenship—Foreign Corporation—United States Circuit Court.

1. The fact that the coplaintiffs, *residents* of different States, have sued a foreign corporation, resident of Great Britain, does not render unnecessary the allegation of citizenship in different States in order to secure a removal to the United States Circuit Court.

2. This case is in all material respects like that of *Herndon v. The Lancashire Ins. Co., ante,* 191, and must be governed by it.

MOTION for the removal of cause to United States Circuit Court, heard by *Graves, J.,* at October Term, 1889, of DURHAM.

The plaintiffs are C. M. Herndon, a resident of North Caro- (195) lina, and George S. Loucks and W. H. Wheeler and P. H. Glatfeller, residents of Pennsylvania. The defendant is a corporation, organized and existing under the laws of Great Britain. The plaintiffs have sued the defendant on an insurance policy, demanding the sum of $2,500, exclusive of interest and costs.

At the appearance term of Durham Superior Court, to which this suit was brought, the defendant filed its petition for removal to the United States Circuit Court for the Western District of North Carolina, setting forth the foregoing facts, and also filed bond in the sum of $250, in form as prescribed by law. The petition was duly verified and the bond justified. His Honor refused to make an order for removal, and directed the case to be proceeded with in the State court.

From this ruling the defendant appealed.

W. W. Fuller for plaintiff.
John W. Hinsdale (by brief) and J. S. Manning for defendant.

MERRIMON, C. J. This case is in all material respects, for the present purpose, like that of *Herndon v. Ins. Co., ante,* 183, and must be governed by it. The defendant here is a corporation of Great Britain, in a sense a foreign subject, but this does not render unnecessary the allegation of the citizenship of the plaintiffs. *Massman v. Higginson,* 4 Dal., 12; *Hodgson v. Benderbank,* 5 Cran., 303; *Damil v. Wentyman,* 2 Pet., 136; *Curtis v. Jones,* U. S., 111; *Steamship Co. v. Tugman,* 106 U. S., 118.

Affirmed.

Cited: S. c., 108 N. C., 649.

(196)

S. H. HAWES v. J. W. BLACKWELL.

Bank Checks—Presentation Check—Holder—Assignment—Priority—General Fund—Creditors—Deposit—Depositor.

1. The holder of a check upon a bank, drawn before, but presented after, the bank's assignment for the benefit of creditors, is not entitled to the amount thereof as against the assignee to the extent of the fund so held.

2. A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank and subject to assignment by the owners of the bank.

3. A check holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of his check.

4. The payee or holder of a check has an *interest* in the deposit as against the drawer, subject to the bank's right to pay outstanding checks before notice.

5. The plaintiff, as against the trustees of the bank, will be entitled to judgment for his *pro rata* share of the fund left after paying the preferred creditors.

6. As against the *drawer*, the plaintiff is entitled to have so much of the deposit as was devoted by him to the payment of the check set apart for that purpose.

APPEAL from *Armfield, J.*, at the January Term, 1890, of DURHAM.

The plaintiff is holder for value of the check specified in the complaint, whereof the following is a copy:

"508.80. DURHAM, N. C., 10 Nov., 1888.

The bank of Durham, pay to S. H. Hawes or order five hundred and eight and 80/100 dollars.

No. 1,632. J. W. BLACKWELL."

The defendant J. W. Blackwell is the drawer of the check, and the defendants M. W. Hicks and S. E. Watts are trustees in the
(197) deed of trust executed by him, presently to be mentioned, to secure his creditors therein mentioned; the defendant W. T. Blackwell was president and owner of "The Bank of Durham," and the defendants W. S. Halliburton and V. Ballard are trustees in the deed, presently to be mentioned, executed by him to secure his creditors therein named.

The case was submitted to the court for its judgment upon the following state of facts, agreed upon by the parties:

"The check referred to in article 1 of the complaint was forwarded by defendant J. W. Blackwell to plaintiff S. H. Hawes at Richmond, Virginia, on Saturday, 10 November, 1888, and reached plaintiff on Monday, 12 November, 1888; it was presented on 16 November, 1888, to the Bank of Durham, and not being paid was protested; that said check was received by the First National Bank of Durham, at Durham, in November, 1888; that J. W. Blackwell was promptly notified of the nonpayment of said check and its protest; that W. T. Blackwell conducted a banking house and business in the town of Durham; that J. W. Blackwell, a resident of the town of Durham, was a depositor of the Bank of Durham, and had on deposit to his credit in the Bank of Durham on 10 November, 1888, a large sum of money—more than enough to pay the check for $508.80 forwarded by him to plaintiff; that on 13 November, 1888, W. T. Blackwell made and delivered to defendants Ballard and Halliburton a deed in trust for the benefit of creditors, which was duly registered in the county of Durham on 15 November, 1888, at 6 o'clock a. m.; that J. W. Blackwell, on 14 November, 1888, executed and delivered to defendants Hicks and Watts a deed in trust for the benefit of his creditors, which said deed was registered in the county of Durham on 15 November, 1888, before 9 o'clock of said day; that both said deeds were sufficient in form to convey all the real and personal estate of the respective grantors, and all their real and personal estate, all notes, accounts, books, debts, money and choses in action, and all other personal property of every kind (198) and nature whatever, and wheresoever situate, were conveyed in said deed; copies of said deeds attached as a part of this agreement; that at the time said check was presented for payment the account of J. W. Blackwell stood in credit at the Bank of Durham in a sum more than sufficient to pay the check of plaintiff; that in the deed of W. T. Blackwell the depositors of the Bank of Durham were in the class of fifth preferred creditors, who were directed by said deed to be paid in full before any succeeding class of creditors, and the estate of said W. T. Blackwell is sufficient to pay in full the depositors of the Bank of Durham; that the check given to plaintiff by defendant Blackwell is not preferred in the said J. W. Blackwell's deed of trust, and the said J. W. Blackwell's property is probably not sufficient to pay any part of said check; that the trustees of W. T. Blackwell have paid the depositors of the Bank of Durham the sum of 70 per cent of each deposit, 50 per cent of which was paid before this action was brought, and 20 per cent of which has been paid since the bringing of this action; that the remaining 30 per cent now due by the trustees of the Bank of Durham, or W. T. Blackwell, the amount of J. W. Blackwell's deposit is sufficient to pay said check; that protest fees for pro-

testing said check are $2.75, which has been paid by plaintiff; that no part of said check or the protest fees have been paid the plaintiff, though he has demanded payment of the defendant; that the defendants Ballard and Halliburton took possession of the property conveyed to them in the deed of trust of W. T. Blackwell on 15 November, 1888, immediately after the registration of the said deed on said day, and had then no notice of the existence of plaintiff's check; that the defendants Hicks and Watts took possession of the property conveyed to them in the deed of J. W. Blackwell on 15 November, 1888, immedi-
(199) ately after the registration of said deed, and had no notice, at that time, of the existence of plaintiff's check. J. W. Blackwell's trustees had knowledge of the assignment of W. T. Blackwell and the Bank of Durham before the presentment of said check, and before they or W. T. Blackwell's trustees had notice of its existence, and W. T. Blackwell's trustees had knowledge of J. W. Blackwell's assignment before the said check was presented, and before they had notice of its existence. Plaintiff lived in Richmond, Virginia, in November, 1888. There were two daily mails each way between Durham and Richmond, and several banks in both places. Plaintiff sent J. W. Blackwell a receipt for the money paid by check, which receipt he received 13 November, 1888."

The court "adjudged that the plaintiff recover of the defendants the sum of $511.55, and interest thereon from 16 November, 1888, until paid, to be paid out of the funds of the Bank of Durham, or W. T. Blackwell, due to the account of J. W. Blackwell, as a depositor of said Bank of Durham; and that the plaintiff recover his costs, to be taxed by the clerk."

The defendants excepted, and appealed to this Court.

J. S. Manning for plaintiff.
W. W. Fuller for defendants.

MERRIMON, C. J., after stating the facts: When a bank, in the course of its business, receives deposits of money in the absence of any agreement to the contrary, the money deposited with it at once becomes that of the bank, part of its general funds, and can be used by it for any purpose, just as it uses, or may use, its moneys otherwise acquired. The depositor, when, and as soon as he so makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders the depositor may, from time to time, draw upon it, when presented, not exceeding the
(200) amount deposited. The relation of the bank and depositor is sim-

ply that of debtor and creditor, the debt to be discharged punctually, in the way just indicated. The contract between them, whether express or implied, is legal in its nature, and there is no element or quality in it different from the same in ordinary agreements or promises, founded upon a valuable consideration to pay a sum of money, specified or implied, to another party. There are none of the elements of a trust in it. The bank does not assume or become a fiduciary as to the money deposited for the depositor, nor does it agree to hold a like sum in trust for him. *Boyden v. Bank,* 65 N. C., 13; *Bank v. Millard,* 10 Wall., 152; *Bank v. Schuler,* 120 U. S., 511.

Hence, if the bank should fail to pay its depositor, when called upon to do so, the latter would have his remedy by proper action, just as in the ordinary case where the debtor refused to pay his creditor the debt he owed him. If the depositor should draw his check on the bank for some part of his deposit—the debt the bank owed him—the payee, or holder of such check, could not maintain his separate action against the bank for nonpayment of the check, on presentation of the same for payment—it could not, until the bank accepted the check, or agreed to pay it. Then, and not till then, would the bank become his debtor in his sole right as against it. The check, however, in the hands of the payee thereon, or the holder thereof, would have an interest in the deposit, as against the drawer, to the amount specified in the check, subject to the right of the bank to pay all outstanding checks of the depositor, and such as he might subsequently draw, and which might be paid before it had notice of the check in question, and subject to the right of the bank to set off debts due which the depositor might owe at the time such check should be presented. The check, as to drawer thereof, is, in effect, an assignment to the holder thereof (201) to the amount specified in the check; and under the method of civil procedure in this State, the depositor and the holder of the check might jointly maintain an action against the bank for the deposit, in case it failed to pay the same when called upon, and they might recover, subject to the rights of the bank, as above explained. And so, also, if the depositor had given his check for the *whole* of his deposit, the holder might maintain his separate action against the bank, if it refused to pay the same, subject to its rights as to checks on the deposit paid before notice of such check, and likewise subject to its rights of set-off. This is so, because the check for the whole deposit would be, in effect, an assignment of the depositor's whole debt against the bank to the holder of such check. He, being the real owner of the deposit—the debt—might sue for it in his own name. And a holder of a check for a *part* of the deposit might, in some cases, have appropriate equitable relief, as against the depositor and the bank, if they should seek

to impair his rights as the equitable owner, against the drawer of part of the deposit. Such check makes the holder thereof part owner of the deposit, as against the drawer, subject to the rights of the bank. The depositor agrees, in effect, by implication of law, to set apart so much of his deposit as is specified in the check for the holder thereof. As against the drawer, that much of the deposit belongs to the drawee. If, however, it turns out that the check is not paid by the bank, on due presentation for payment, the holder of the check will have his remedy against the drawer. The depositor—the drawer—agrees that the check will be paid by the bank when it shall be duly presented to it for payment, and if it shall not be, then there will be a breach of the drawer's contract with the holder of the check. *Kahnweiler v. Anderson,* 78 N. C., 133; *Nimocks v. Woody,* 97 N. C., 1; *Brem v. Covington,* 104 N. C., 589; *Spain v. Hamilton,* 1 Wall., 604, 624; *Bank v.* (202) *Schuler,* 120 U. S., 511; Morse Banking, sec. 496.

Now, in the present case, the depositor of the Bank of Durham, James W. Blackwell, was the simple creditor of that bank to the amount of his deposit—it owed him a debt for that sum, just as it owed its creditors other than its depositors; it did not hold the money he deposited, or any part of its moneys, in special trust for him, or for any person to whom he gave checks on the bank. The owner of the bank, the defendant William T. Blackwell, might sell, assign and transfer all his property, including all the assets of the bank, as he did do, to the defendant's trustees for his creditors, including the deposits of general depositors in the bank, and the latter were on the same footing with other creditors, except as he classified them, and preferred certain classes over others in the trust created for their benefit. The depositor, James W. Blackwell, might have maintained his action against the bank to recover from it the amount of his deposit therein when and as soon as it failed and refused to pay him the same. The present plaintiff might have joined him in such action, because he had, in effect, assigned to the plaintiff part of the deposit, a part equal to the amount of the check. But the plaintiff could not have maintained a separate action against the bank for the amount of the check, because the bank did not accept and agree to pay it, nor did the plaintiff have any equitable or other lien upon the assets of the bank. It was not charged with a particular trust in favor of the plaintiff. He was on no better footing than any other creditor of the bank. The plaintiff might have maintained his action against the drawer of the check, the subject of the action, because the drawer, in legal effect, contracted with him that the check would be paid on presentation to the bank, and it was not so paid. He can maintain this action against the defendant

drawer of the check because of such breach of contract. More- (203) over, such drawer when he drew the check in favor of the plaintiff, in effect sold and assigned to him a part of his particular deposit—his debt against the bank — equal to the sum of money specified in the check. Hence, if the plaintiff shall recover against the drawer of the check in question, he will be entitled in equity to share in whatever sum shall be paid to such drawer, or the defendant's trustees for his creditors, on account of his deposit in the Bank of Durham by the trustees of William T. Blackwell. This is so, because the drawer, James W. Blackwell, as we have seen, in legal effect specially set apart so much of his deposit as was equal to the amount of the check drawn in favor of the plaintiff to pay it. The ground of the plaintiff's recovery from the defendant James W. Blackwell, is that the latter drew the check on the bank in favor of the plaintiff, and thereby agreed that the bank would pay the same when presented for payment. But the bank did not pay the check, and the plaintiff's action at once accrued against the drawer, as we have seen, upon such breach of contract. The plaintiff may recover, for such breach, the amount of the check, and he has a right to have so much of the drawer's deposit as was specially set apart to pay the check applied to the payment of his judgment against the drawer, because that part of the deposit was devoted to the purpose of paying the check.

For the reasons stated, the plaintiff is not entitled to recover judgment against William T. Blackwell and the defendant's trustees for his creditors on account of the plaintiff's check, nor against the defendant's trustees for the creditors of James W. Blackwell. He is entitled to recover judgment against James W. Blackwell for the amount of his check, and to have it adjudged that so much of the dividends in the hands of the defendant's trustees for the creditors of William T. Blackwell as shall be paid on account of the deposit of James W. Blackwell, as will be equal to the *pro rata* share thereof in favor of the check of the plaintiff, be applied to the payment of the plaintiff's judgment, so far as the same may be adequate; and to have it further (204) adjudged that the defendant trustees of the creditors of the defendant James W. Blackwell shall allow such judgment to share in the assets in their hands in the class of creditors to which it shall belong by the terms of the deed of trust, whose provisions they are charged to execute; and further, to pay out of the dividends they have received from the defendant's trustees for the creditors of William T. Blackwell, on account of such deposit of the defendant James W. Blackwell, the *pro rata* share of the check of the plaintiff in such dividends to the credit of the plaintiff's judgment, so far as the same may be adequate.

The judgment must be corrected, as directed in this opinion, and, when so corrected, affirmed.

Corrected and affirmed.

Cited: Howell v. Mfg. Co., 116 N. C., 813; *Bank v. Bank,* 118 N. C., 786; *Trust Co. v. Bank,* 166 N. C., 120.

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*EVERETT, WALL & COMPANY v. J. H. WILLIAMSON, TRUSTEE.

Appeal—Exceptions—Judge's Charge—Issues—Lease.

1. When an exception to evidence is so vague as not to point out the nature of the error complained of, it will not be considered. *Allred v. Burns,* 106 N. C., 247, approved.

2. An exception for "misdirection in the charge," without specifying any particulars, is too general. *McKinnon v. Morrison,* 104 N. C., 354, cited and approved.

3. When there is a motion for a new trial below for a refusal to give instructions asked, this is sufficient assignment of error. *Taylor v. Plummer,* 105 N. C., 56, cited and distinguished.

4. A prayer for instruction need not be given in the very words asked, if charged in substance.

5. When the surrender of a lease, before its expiration, is unconditionally accepted by the lessor, without any reservation, he has no claim against the lessee for damages by reason of the diminished rent paid thereafter by the new lessee.

6. The frame of the issues is largely left to the discretion of the presiding judge, if they are such as arise upon the pleadings. *Emery v. R. R.,* 102 N. C., 209.

(205) CLAIM AND DELIVERY tried before *Shipp, J.,* at September Term, 1889, of RICHMOND.

The plaintiffs and defendant both claimed the property in dispute under one Travis Quick, who, it is admitted, was the owner of it.

The plaintiffs claim the crop and the live stock sued for under an agricultural lien and chattel mortgage combined, dated 1 January, 1885, and they claim the engine, etc., under chattel mortgage and conditional sale made in 1881.

*Head notes by CLARK, J.

The defendants claimed the crop, and live stock and engine all under the stipulations of a lease, dated 6 October, 1883, the conditions of which defendant alleged had been broken. The plaintiffs seized the property under claim and delivery, and they sold the same and held the proceeds of sale at time of trial. It was admitted that the property brought a fair price, and there was no issue and no contention as to its value.

The plaintiffs introduced liens and chattel mortgages made by Travis Quick, due 1 January, 1885; also chattel mortgage executed by the said Quick to Leak, Everett & Co., dated 27 August, 1881.

A witness, Everett, one of the plaintiffs, testified as to the partnership of Everett, Wall & Co. Objection was made to effect of chattel mortgage. Overruled. Everett testified that there was $3,009.21 due on the mortgages and crop liens introduced, etc.

Defendant introduced a paper purporting to be a lease and (206) mortgage of the personal property of his tenant, as alleged, Travis Quick. There was no dispute as to the execution of this paper.

Defendant Williamson was examined as a witness for himself. He testified that he lived in Alabama in the fall of 1885. In that time he received letters from Travis Quick, saying that he could not carry out his lease. He came out from Alabama in January, 1886. Quick said he could not carry out his contract, and wanted to surrender everything —property and all things conveyed—everything. Witness objected to giving up the lease. Quick had not paid the annuity mentioned in the contract of lease; he had paid the rents for the two years 1884 and 1885; that he claimed that injury had been done to the land, or that the ditches had been neglected—hillside ditches; that there was a claim for inferiority, or the want of proper grades; amount could not be determined; something due on transportation, etc.; that Quick surrendered all the property, and he took it as compensation for breaches of covenant in the lease; that Quick paid him thirty-five bales of cotton in 1884, and the same in 1885; that he had not paid amount due on the lease, and owed him $105, balance due, according to terms of lease; that after Quick gave up the property and premises he tried to rent the land and could not get more than twenty-five bales of cotton per annum; leased for the year 1886 to John Broach for twenty-five bales; at the end of the year leased again to Broach for two years, at twenty bales per annum; Broach was to build some houses and pay taxes; he could not lease the property for more than twenty bales cotton; that he told the sheriff that he would surrender all but the eight mules, which he (Quick) had when the lease was made; that he did not get a letter from Everett in reference to this matter in the fall of 1885; Quick turned over the property to him on the 19th of January, or perhaps the 18th. He may

(207) have said something to him about surrendering the lease on the streets of Rockingham. The property was turned over on that day and the suit began on the next.

Broach, a witness, testified that he was a son-in-law of Quick's. Williamson called him across the street in Rockingham, where he and Quick were, and also Terry. He said that "he had called me over to witness that old man Quick had given up."

He further testified that the ditches were not kept open; that the hillsides were so steep that the ditches would have caused more washing, etc., than if the same had not been made. There were two places cultivated, and the cotton was ginned at the same machine.

There were objections to the evidence in reference to this matter. Overruled.

The plaintiffs, at this point, asked leave to amend the complaint. This was objected to, but allowed, upon terms, all of which was made a part of the record.

The plaintiffs then introduced Quick, who testified that he cultivated both places in 1885, twelve horses on the Mary Hall place, and fifteen on Williamson's place; cotton seed mixed; sheriff seized cotton on both places; mules were same as those mortgaged to plaintiff; bought an engine in 1881; was to be Everett's until paid for; that he had paid all the rents for the two years, but had not paid the annuity of 1885; property had not gone down in 1884 and 1885; he turned it all over because defendant said he was going to hold under older papers; the Williamson place was in better condition in 1886 than 1883. Witness said that they might fight it out; he would have nothing more to do with it, he could not pay the rent; cultivated two places.

Everett, recalled, stated that he had written letters to Williamson, while in Alabama, in reference to this matter; that he had a conversation with Williamson; that, as he understood, he made no claim to the property. Cynthia Cole died in 1887. There was other evidence as to the damage to the land.

(208) Williamson and Quick each swore that the annuity, so-called, had not been paid to annuitant Miss Cole; not paid by Quick, nor by Williamson.

The deputy sheriff was examined, and said he seized the property under process in his hands, and that it was sold, and brought a fair price. His seizure was on the 19th of January, 1886; while he had charge of the property he gathered some cotton from the Hall place; all carried to Williamson's gin and cotton ginned together.

The plaintiffs and defendant each tendered issues.

The court, after hearing the parties, adopted those suggested by the plaintiffs, which were as follows (the responses of the jury being added):

1. Are the plaintiffs entitled to the possession of the property described in the complaint or any part thereof? Answer: "Yes."

2. Did defendant unlawfully withhold possession of said property, or any part thereof? Answer: "Yes."

3. Did Travis Quick comply with the covenants and stipulations contained in the lease and made by him to J. H. Williamson, trustee, during the continuance of the lease? Answer: "Yes."

4. What damage, if any, did defendant sustain by reason of said breach? Answer: "Nothing."

5. What amount of rent, if any, was due defendant by T. Quick at end of lease? Answer: "No amount."

Defendant excepted to these issues and tendered others, four in number.

1. Are the plaintiffs the owners of the property described, and entitled to possession?

2. Did the defendant wrongfully withhold the same?

3. What damage have plaintiffs sustained by the wrongful withholding the property, etc.?

4. Value of the property?

There was no dispute as to the value of the property. The plaintiffs requested specific instructions to the jury.

Defendant requested the following:

1. There is no evidence that Williamson procured the aban- (209) donment by Quick of the lease, or in any way caused him to fail to perform any condition of the lease.

2. That if Quick did not pay the annuity stipulated in the lease, then the jury will find third issue, No.

3. That if they believe Quick, that he did not pay annuity for 1885, they will answer third issue, No.

4. That if they believe the evidence, they will answer fifth issue, forty-five bales of cotton weighing five hundred pounds.

5. If they believe the whole they will answer the third issue, No.

6. That if they believe the evidence, they will find, as damages the defendant sustained, at least the value of fifteen bales per annum for the three years of lease unperformed by Quick and the unpaid annuity of $48.

The court charged the jury, in substance, as follows:

The testimony was recapitulated. The lease under which the defendant claimed was carefully read to the jury, and their attention called to the breaches assigned by the defendant under which he claimed the property. They were told that, so far as the annuity due to Miss Cole, there was only the testimony of Williamson and Quick, each of whom said that the annuity due in 1885 had not been paid by either of them.

Their attention was called to the facts generally, and, specially, that, if the covenants in the lease had been violated, the defendant had a right to retain the property in controversy.

The court further told the jury that there was evidence tending to show that the lease made by Quick had been surrendered to the defendant and had been accepted; that they must judge from all the evidence whether or not such was the fact; that counsel had debated the matter fully.

(210) The court further told the jury that if the conditions of the lease had been performed by Quick, and that if the lease had been surrendered with the understanding that it should be canceled, then the claim of the defendant could not be sustained, and that such a surrender and acceptance would end the matter, or equivalent words.

The jury returned a verdict as above. Motion for new trial for refusal and misdirection.

Motion overruled. Judgment in favor of plaintiffs. Appeal by defendant.

J. D. Shaw and C. W. Tillett (by brief) for plaintiffs.

J. A. Lockhart for defendant.

CLARK, J. The defendant excepted to the issues adopted by the court, and to the refusal to submit those tendered by himself. We think the issues submitted by the court were proper and better adapted to settle the controverted matters of fact raised by the pleadings. The court certainly did not exceed the discretion allowed in framing issues. *Emery v. R. R.,* 102 N. C., 209.

It appears, in the statement of the case, that two objections were made to the evidence and overruled. But it is not clear by whom the objections were made, and they are so stated that it is impossible to see the nature or purport of the objections. *Allred v. Burns,* 106 N. C., 247. Besides, the party objecting seems to have acquiesced in the action of the court, as no exception was taken to the overruling of the objections, as required by The Code, sec. 412 (2).

The defendant, after verdict, moved for a new trial for refusal to give certain instructions asked for by him, and for misdirection, which motion the court refused. The exception to the charge in this wholesale manner, for "misdirection," without indicating in what particulars, is sufficient to point out to the judge what should be sent up, or to put the appellee on notice of the points to be argued in this Court. It is, therefore, too general to be considered. *McKinnon v. Morrison,* 104 N. C., 354. It is otherwise as to the refusal to give the specific

(211) instructions asked. This case differs from *Taylor v. Plummer,*

105 N. C., 56. There, though the appellant's prayers for instructions were refused, there was "nothing to show that the appellant was dissatisfied with anything that occurred on the trial beyond the fact that he appealed"—neither exceptions to the refusal to grant the prayers for instructions, nor assignment of error therefor. Here, the appellant moved for a new trial, and assigned as error for which it should be granted, the refusal to give the instructions which had been asked by him. This was sufficiently specific to cause everything bearing on those points to be included in the case on appeal, and was fair notice to the appellee that the right of the appellant to have the instructions granted would be insisted on in this Court.

The defendant requested the court to charge as follows:

1. That there is no evidence that Williamson procured the abandonment of Quick of the lease, or in any way caused him to fail to perform any condition of the lease.

This was immaterial, and ought not to have been given. It was not pertinent to any issue. The question at issue was not whether Williamson had "*procured* the abandonment" or "caused him to fail," but did Quick surrender up the lease to be canceled, and was the same accepted by Williamson? That was the question, and the defendant did not ask the court to charge the jury that there was no evidence of this, and did not except to the charge of the court, as given, on this point. Indeed, there was evidence to show the surrender and cancellation of the lease, and the verdict, in effect, finds that the defendant canceled and surrendered the lease, as contended by the plaintiffs.

The third issue was, "Did Travis Quick comply with the covenants and stipulations contained in the lease made by him to J. H. Williamson, trustee, during the continuance of the lease?" To which the jury responded, "Yes."

The defendant's 2d, 3d and 5th prayers were: (212)

2. That if Quick did not pay the annuity stipulated in the lease, then the jury will find third issue, "No."

3. That if they believe Quick, that he did not pay annuity for 1885, they will answer third issue, "No."

5. That if they believe the whole, they will answer third issue, "No."

In this connection, his Honor charged the jury as follows:

"They were told that, so far as the annuity due to Miss Cole, there was only the testimony of Williamson and Quick, each of whom said that the annuity due in 1885 had not been paid by either of them. Their attention was called to the facts generally, and, specially, that if the covenants in the lease had been violated, the defendant had a right to retain the property in controversy." This was a *substantial compliance* with the prayer. It would seem that upon this charge the jury might

have well found in response to the third issue, that the stipulations of the lease had not been complied with, at least to the extent of the $48 due on the annuity for 1885. That the jury did not so find when thus instructed, was ground to move the court below for a new trial, in its discretion, but it is not sufficient to justify an exception for not giving an instruction which the court, in substance, gave, though not in the identical words asked. Moreover, it must be noted that Quick testified that the land was in an improved condition when he gave it up, and Everett testified that Williamson, at that time, made no claim to the property. It may be, therefore, that upon the whole evidence the jury found that the surrender and cancellation of the lease between Quick and Williamson were absolute and unconditional, including a release of the $48 annuity due for 1885."

The other prayers were:

"4. That if they believe the evidence, they will answer fifth issue, forty-five bales of cotton weighing five hundred pounds.

(213) "6. That if they believe the evidence, they will find, as damages the defendant sustained, at least the value of the fifteen bales *per annum* for the three years of lease unperformed by Quick, and the unpaid annuity of $48."

The fifth issue was, "What amount, if any, was due defendant T. Quick at end of lease?" There was evidence tending to show that defendant voluntarily canceled and accepted the surrender of the lease from Quick three years before it would have expired, and rented the premises to another party for those years. It appeared from defendant's testimony that he was careful to call some one across the street to witness that Quick had given up. Williamson's conduct and language tend to show that he was himself anxious to have it established by a witness that Quick had surrendered, in order to rent to Broach, and he did rent to Broach that same year. The principal contention was whether the defendant accepted the surrender of the lease or not. If he did, unless there was a reservation of the right to hold Quick liable for rent thereafter, the defendant lost the right to claim damages by reason of the diminished rent paid by his new tenant. *Deane v. Caldwell,* 127 Mass., 242.

"The effect of a surrender is to terminate the relation of landlord and tenant, with all the obligations of the parties to that relation." Taylor's Land. & Tenant, sec. 518.

"So, where, before the expiration of a lease under seal, the lessee actually surrendered possession of the premises to his lessor, who accepted the same and leased them to another, it was held to be in effect a surrender." 1 Wash. Real Prop., p. 477, ch. 10, sec. 7 (6).

"When the tenant abandons the premises, and the landlord enters, he cannot recover for rent accruing subsequently." *Schuisler v. Ames,* 50 Am. Dec., 168; *Terstegge v. German Benevolent Society,* 47 Am. Rep., 135; *Jones v. Carter,* 15 Mees. & W., 718.

The court, therefore, properly declined to give these prayers, (214) and in lieu thereof told the jury that if "the conditions of the lease had been performed by Quick, and that if the lease had been surrendered with the understanding that it should be canceled, then the claim of the defendant could not be sustained, and that such a surrender and acceptance would end the matter," or equivalent words.

Per Curiam. No error.

Cited: Scheelky v. Koch, 119 N. C., 81.

G. G. CARDEN v. JAMES J. CARDEN.

Attachment—Nonresidents—What is residence in this State—Animus Revertendi—General Intention of Returning.

1. When one voluntarily removes from this to another State, for the purpose of discharging the duties of his office, of indefinite duration, which required his continued presence there for an unlimited time, such a one is a nonresident of this State for the purposes of an attachment, and that notwithstanding he may occasionally visit the State, and may have the intent to return at some uncertain future time.
2. The prominent idea is, that the debtor must be a nonresident of the State where the attachment is sued out—not that he must be a resident elsewhere.
3. His property is attachable if his residence is not such as to subject him *personally* to the jurisdiction of the court and place him upon an equality with other residents in this respect.

APPEAL from *Armfield, J.,* at March Term, 1890, of ORANGE.

At the time of issuing the summons, the plaintiff caused an attachment to issue, and had the same levied upon the lands of defendant, in Orange.

Upon the trial of the cause the jury rendered a verdict in favor of plaintiff, and, after verdict, but before judgment, defendant entered a motion to vacate said attachment, and in support of said motion, filed his affidavit that he was a resident of the State of North Carolina and entitled to a homestead in said land. (215)

Plaintiff demanded a jury to try the issue as to whether defendant was a resident of this State. His Honor declined to submit the issue to a jury. Plaintiff excepted.

Plaintiff filed counter-affidavits.

His Honor found as a fact that defendant was temporarily absent from the State in the discharge of his clerical duties, but was still a resident of this State, and ordered that said attachment be vacated.

Plaintiff excepted to both the findings of fact and the order of his Honor, and appealed to the Supreme Court.

The material parts of plaintiff's affidavit are as follows:

That he is a citizen of Orange County, North Carolina, a resident of the State and county, and owns a small tract of about seventy-five acres of land in said county; that said land is of less value than $1,000, and this affiant owns no other land in the State of North Carolina, and that he occupies the said land, with his family, as a homestead; that affiant is a preacher of the Methodist denomination; up to 1884 the defendant, with the exception of a few years prior to 1874, lived and resided in said State of North Carolina, preaching the gospel at such places as he was assigned by the bishops of his church; that in March, 1884, a bishop of his church transferred this affiant to the Baltimore Conference of his church, for pastoral work therein; that such transfer was only for a short time, as then contemplated by affiant; that affiant always intended to return to the State of North Carolina, and always regarded the said State of North Carolina as his home; that affiant did return to said State several times, at least as often as once a year, from March, 1884, until the spring of 1889; that in the spring of 1889 defendant returned to said State and county of Orange, and has continuously remained therein; that affiant is informed that the publication of the lien of attachment was not made for the time, nor in the

(216) manner, required by law.

R. W. Winston for plaintiff.
J. S. Manning for defendant.

SHEPHERD, J. The single question presented by this appeal is whether, upon the facts found, the attachment should have been dissolved.

We are unable to distinguish this case from *Wheeler v. Cobb,* 75 N. C., 21. It is there said that, "without deciding who, in law, is a nonresident in other respects, but confining the decision to the construction of this statute, the conclusion is, that where one voluntarily removes from this to another State, for the purpose of discharging the duties of an office of indefinite duration, which required his continued presence there for an unlimited time, such a one is a nonresident of this

State for the purposes of an attachment, and that notwithstanding he may occasionally visit this State, and may have the intent to return at some uncertain future time."

The prominent idea is, "that the debtor must be a nonresident of this State, where the attachment is sued out, not that he must be a resident elsewhere. . . . The essential charge is, that he is not residing or living in the State, that is, he has no abode or home within it *where process may be served so as effectually to reach him.* In other words, his property is attachable, if his residence is not such as to subject him *personally to the jurisdiction of the court, and place him upon equality with other residents in this respect.*" Wapples Attachment, 35. We cannot understand how these latter conditions could have existed when the defendant was living in Maryland, visiting this State only once or twice a year, and with only a general intention of returning at some indefinite time and making his home here. Nonresidence, within the meaning of the attachment law, means the "actual cessation (217) to dwell within a State for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist." *Weitkamp v. Loehr,* 53 N. Y. Super. Ct., 83.

Reversed.

Cited: Fulton v. Roberts, 113 N. C., 428; *Chitty v. Chitty,* 118 N. C., 651; *Mahoney v. Tyler,* 136 N. C., 42.

ALEX. BLACKWELL, ADMR., v. THE LYNCHBURG AND DURHAM RAILROAD COMPANY ET AL.

Removal of Causes to the United States Circuit Court—Citizens—Residents—Petition—Effect of Allegation not Required by the Statute—Land—Prejudice—State Courts.

1. In order to give a party to an action commenced in the State courts a right of removal to the United States Circuit Court, it must distinctly appear by positive averments that the parties are *citizens* of different States, and were, at the commencement of the action. Such allegations as to *residence* are not sufficient.
2. An allegation in the petition for such removal, that the party making it believes that, from local prejudice, they will not be able to obtain justice in the State courts, has no pertinency or force in this application.

MOTION to remove cause to United States Circuit Court, heard upon petition, by *Armfield, J.,* at April Term, 1890, of PERSON.

At the appearance term, after the plaintiff had filed his complaint, the defendants filed their petition, whereof the following is a copy:

"The petition of E. S. Moorman, C. R. Moorman and M. N. Moorman respectfully shows that they are members of the firm of E. S. Moorman & Co., defendants in this action, and that they are nonresi-

dents of the State and residents of Lynchburg, in the State of (218) Virginia, and the amount sued for in this action is $15,000, and the plaintiff is a resident of the State of North Carolina, and that M. N. Moorman makes this affidavit for himself and his said co-defendants, partners of E. S. Moorman & Co.; that he has reason to believe, and does believe, that from local influence they will not be able to obtain justice in the State courts, and this suit can be wholly determined between the plaintiff and these defendants, and avers that they only are actually interested in this controversy. Wherefore, the said defendants ask that this suit be removed to the Circuit Court of the United States next to be held for the Western District of North Carolina, at Greensboro, on the second Monday of October, 1890, and they have filed the bond required by law for such removal."

The petition was signed by the parties, and sworn. Thereupon, the court made an order, of which the following is a copy:

"Upon the application made by the defendants E. S. Moorman & Co. for the removal of this cause into the Circuit Court of the United States upon the grounds stated, the said motion is refused."

The defendants excepted, and appealed to this Court, assigning as grounds of their exception, "that under the Act of Congress, approved 3 March, 1887, they were entitled to such removal, and that, in fact, at the time the motion was made there was no controversy pending except between the plaintiff and these defendants. That having complied with the Act of Congress by filing the affidavit and bond required, these defendants, as a matter of law, had a right to such removal."

June Parker for plaintiff.
J. W. Graham for defendants.

(219) MERRIMON, C. J., after stating the facts: The alleged ground of the application for the removal of this action into the Circuit Court of the United States, as allowed by the statute (25 U. S., Stats. at Large, chap. 866, sec. 23), is that the plaintiff is a citizen of this State and the defendants are citizens of the State of Virginia. To give the circuit court jurisdiction in cases where it depends upon the citizenship of the parties, as in this case, such citizenship must distinctly appear from positive averments in the pleadings, or affirmatively, and with equal clearness, in other parts of the record, and to have existed

at the time the action began. And so, where cases are removed from a State court, such citizenship must likewise clearly appear from the petition for removal, or elsewhere in the record, and that the same existed at the time of the commencement of the action, as well as when the application for removal was made. Otherwise, the circuit court could not have jurisdiction, and the action would be remanded to the State court, there to be disposed of according to law. This is clearly settled by many decisions of the Supreme Court of the United States, and they are authoritative. *Gibson v. Bruce,* 108 U. S., 501; *R. R. v. Snow,* 111 U. S., 379; *Cuhose v. R. R.,* 131 U. S., 240; *Stevens v. Nubals,* 130 U. S., 230; *Jackson v. Allen,* 132 U. S., 27.

The diverse citizenship of the parties at the time the action began is not alleged in the petition, nor does it at all appear in any part of the record. It is essential that it should so appear. The motion was, therefore, properly denied.

The allegation in the petition that the defendants "believe that, from local prejudice, they will not be able to obtain justice in the State courts," etc., has no pertinency or force in this application. Applications to remove actions for that cause should be made in the appropriate Circuit Court of the United States. 25 U. S. Stats. at Large, ch. 866, sec. 2. (220)

Affirmed.

Cited: Herndon v. Ins. Co., ante, 193; *Williams v. Tel. Co.,* 116 N. C., 560.

W. R. BLAKE ET AL. V. J. M. BROUGHTON ET AL.

Foreclosure of Mortgage—Evidence—Witness—Objection—Transfer of Mortgage—Charge—Conversations, when Competent—Corroboration—Question and Answer—Deed—Mortgage—Cancellation of Record—Warranty.

1. Conversation between a witness and defendant—the plaintiff not being present—is competent as affecting the credibility or accuracy of the witness.

2. Objection should be made to the *question*—not to the *answer*—of a witness.

3. A mortgagor, whose bond and mortgage (made to secure it) was transferred by the mortgagor to other persons, testified that he never assented to the transfer, and did not know anything about it. The court charged,

that the mortgagor's assent to the transfer was not necessary, as he had parted with his interest: *Held*, that evidence, if incompetent, was harmless under such charge.

4. In an action to foreclose two mortgages, brought by the assignee of the mortgagee, both being executed by the same mortgagors, the defendants, who claimed title under conveyance from the mortgagors, allege as defense that the mortgages had been satisfied. In support of this, they offered evidence of conversations between one of the defendants and one of the mortgagors, the plaintiffs not being present. There was evidence of an agreement between the plaintiffs and the agent of one of the defendants, who was also purchaser of the interest of the mortgagors, to pay off the mortgages. There was a conflict of testimony between the plaintiffs and one of the defendants as to whether the mortgages were paid off, and as to their conversations on this subject: *Held*, (1) that the evidence offered was competent in corroboration; (2) the objection to the *answer*, and not to the *question*, even if valid, came too late, there being no motion to withdraw it from the jury.

5. Where the contents of a deed are admitted, without objection, the deed itself is competent. At most, it works no harm of which the adverse party can complain.

6. When a mortgage debt has been discharged, the mortgage is no longer operative, though not marked "satisfied of record."

7. A defendant who has made conveyance of land to her codefendants before suit commenced, with warranty of title and covenants of seizin, and against incumbrances, has a right to defend in an action to foreclose a mortgage embracing the land brought against such codefendants.

(221) ACTION to foreclose two mortgages, set out in the complaint, tried before *MacRae, J.*, at February Term, 1890, of WAKE.

The record, with the evidence sent therewith, is voluminous, but we reproduce only so much thereof as is necessary to a full and clear understanding of the questions presented for our consideration.

The allegation of the complaint, so far as material to this appeal are, in substance, that on 15 May, 1884, D. H. Crawford and M. A. Crawford, his wife, executed a mortgage on certain real estate therein mentioned, to John Watson, guardian, etc., to secure payment of a bond, executed on the same day, for $270; that on 8 August, 1885, the said Crawford and wife executed a mortgage to B. F. Montague, on certain real estate mentioned therein, to secure the payment of a bond of $53.90, executed to the said Montague on the same day; that on the ..... day of ....., the said Watson, guardian, etc., by endorsement, transferred the bond made to him to B. F. Montague, for value, without recourse; that on 2 March, 1886, the said Montague, by endorsement, transferred both the said bonds, endorsed to him by the said Watson, and the bond made by Crawford and wife to himself, to the plaintiff, and neither of said bonds have been paid. That on 19 June, 1886, the said Crawford and

wife sold and conveyed their interest in the land and premises (222) contained in both of said mortgages to the defendant Flora Ann Wicker, who thereafter sold and conveyed the same to the defendants J. M. Broughton and W. N. Jones; that the said Broughton and Jones are in possession of the said lands and premises, collecting and appropriating the rents and profits to their own use; that the said Broughton is insolvent, and the said Jones is a man of small means, and they ask for the appointment of a receiver, etc., that the said premises be sold, etc.

The defendants Broughton and Jones filed answers, but without bond, as required, and for want of answers there was a judgment by default against the defendants, other than Flora A. Wicker.

The defendant Flora A. Wicker answered, denying so much of the complaint as alleges that there were incumbrances (other than for State, county and city taxes mentioned) on said property at the time she sold and conveyed to the defendants Broughton and Jones, and she averred that said debts and incumbrances set out, as claimed by the plaintiff, were fully paid off and satisfied by one W. N. Andrews, before his death, and that the sale and conveyance made by her to the said Broughton and Jones was in fee simple, and free and discharged from any incumbrances, except the taxes mentioned, and she asks judgment that the incumbrances set up by the plaintiff in his complaint be surrendered for cancellation, and for such other relief, etc.

At the February Term, 1890, the following issues were submitted by consent:

"1. Have the mortgages described in the complaint, or any part thereof, been satisfied?

"2. What amount, if any, is now due?"

There was evidence tending to show that the bonds had been discharged; that the plaintiff purchased of W. N. Andrews certain property mentioned in the pleadings, at the price of $1,750; that Andrews purchased for the defendant Flora Ann Wicker the property in (223) controversy, subject to the two mortgages, and that it was the agreement that the plaintiff Blake should pay off and discharge the mortgages out of the purchase-money of the property sold to him by Andrews, and that he did pay off and discharge the same at and in accordance with the request of said Andrews; that, afterwards, the said Blake loaned money to Andrews, and held the uncanceled bonds and mortgages as a security therefor.

There was evidence tending to controvert this, and to show that the mortgage debts had not been paid off and discharged. It was admitted that the mortgages were never marked "satisfied" on the register's books.

B. F. Montague testified for the plaintiff: "These notes were endorsed by me in my handwriting. I have no recollection about it, except that Andrews settled. These figures ($367.03) are mine. I suppose they represent the calculation of what is due. I was slightly acquainted with Mr. Andrews. The credit of $21.60 endorsed is in Watson's handwriting."

Cross-examined.—"I remember Mr. Jones coming to my office, but don't recollect the time. I had some conversation with him about this matter. He asked me if I had my money. I told him I had. He asked me would I cancel the mortgages—that he had found they were unsatisfied. I told him I did not know that I would have any objection to cancel them. Some time afterwards—perhaps the same day—I saw Mr. Devereux, and he showed me this endorsement, which I had forgotten; then I declined to cancel."

The testimony of this witness, as to his conversation with defendant Jones, is objected to by plaintiff. Objection overruled, and plaintiff excepted. This was the first exception.

The presiding judge told the jury that this testimony as to what Mr. Montague said could not bind the parties plaintiff, as it was not said in their presence; that it was only admitted on cross-examination (224) as affecting the credibility or accuracy of the witness.

Witness Montague further stated on cross-examination: "I don't recollect stating to Mr. Jones that these mortgages were paid and I would cancel them. I think Jones said he had purchased." The same objection and exception as before is made by plaintiff. Testimony admitted, with the same explanation to the jury. This was the second exception.

Witness further testified: "I don't recollect that Crawford assented or dissented to the transfer of these mortgages. I have many transactions, and don't recollect much about this one."

The plaintiff closes; defendants resume.

D. H. Crawford testified that he was the mortgagor in the two mortgages; that he never assented to the transfer of the notes to W. R. Blake; that he did not know anything about it. (Plaintiff objects to the testimony. Objection overruled, and plaintiff excepts.) Third exception. Witness thinks that Mr. Jones came to him and asked him about these notes, and witness told him he thought they were all settled; witness did not know anything about it. When witness executed the deed to Flora Wicker, Mr. Montague told witness that the papers were all settled.

To all this testimony plaintiff objects. Objection overruled, and plaintiff excepts. Fourth exception.

The presiding judge told the jury, as to this testimony, that Mr. Crawford's assent to the transfer of the notes was not necessary, as he had parted with his interest in the property.

Cross-examined.—Mr. Montague told witness he had his money and the papers were all fixed. The land belonged to witness' wife. Witness sold his interest in it. The taxes were due on it when witness sold; $120, more or less. When Andrews bought the property he understood the taxes were not paid. Witness sold the property to (225) Andrews and wife and made the deed to Flora A. Wicker by Andrews' direction.

Re-direct.—Witness signed these notes. Witness has children by his wife.

Defendant closes.

Plaintiff recalls Mr. Montague, who testifies: Witness does not recollect any conversation with Crawford; knows he was there; witness could not have told him the mortgages were settled because the transfer was fresh in witness' mind; he did not object to the transfer of the notes; he was right there.

Cross-examined.—Blake was not there. Andrews, Crawford, and witness were all that were present.

Defendants offered a deed, W. N. Andrews and others to W. R. Blake, for the Cabarrus street property.

Plaintiff objects. Objection overruled. Plaintiff excepts. Fifth exception.

Also, defendants offered a deed, Crawford and wife to Flora A. Wicker.

Plaintiff closes.

The presiding judge instructed the jury, in response to defendants' prayers—

"1. If Blake, for a valuable consideration, contracted with Andrews to pay the mortgages set out in the complaint, and, in pursuance of said contract, paid the mortgages and had them assigned to him, such assignment of the mortgages, or the debts therein described, would operate as a discharge, and the plaintiff would not be entitled to recover."

Plaintiff excepted. Sixth exception.

"2. If the plaintiff Blake, at the time the mortgages were assigned to him, had in hand money belonging to W. N. Andrews, which he had agreed to apply to the mortgages, and, in pursuance of such agreement, he paid the mortgages and they were assigned to him, such (226) assignment would be a discharge."

Plaintiff excepted. Seventh exception.

The presiding judge further charged the jury: "The question is, whether the mortgages were paid. Did Blake agree to pay off the mort-

gages and give Andrews the money to pay them, and did Andrews go and pay off the debts to Montague? If this was the transaction, the mortgages have been satisfied, and, if satisfied, they could not revive the mortgages by any subsequent agreement."

Plaintiff excepted. Eighth exception.

"But if it was a distinct transaction between Andrews and Blake, by which Blake advanced money, $367.03, to Andrews, and to secure the payment of the money so advanced, Andrews had the notes and mortgages assigned to Blake, it was not a payment and satisfaction of the mortgage, and they should answer 'No.'"

Plaintiff excepted. Ninth exception.

Plaintiff filed the following exceptions in writing:

The plaintiff excepts to the charge of his Honor —

1. In that his Honor charged the jury, that if Blake agreed to pay the mortgages, and gave Andrews the money to pay them, and Andrews did go and pay off the debts, the mortgages have been satisfied.

2. But if it was a distinct transaction between Andrews and Blake, by which Blake advanced money, $367.03, to Andrews, and to secure the payment of the money so advanced, Andrews had the notes and mortgages assigned to Blake, it was not a payment and satisfaction of the mortgage and your answer will be "No."

3. To each and every one of the special instructions asked and given by the defendants. These three were the tenth, eleventh and twelfth exceptions.

The jury responded to the first issue, "Yes."

(227) The plaintiff moved for judgment, nothwithstanding the verdict, on the ground that judgment having been taken against all other defendants except Flora A. Wicker, at October Term, 1889, and it appearing from the pleadings that she had conveyed the lot in fee simple to W. N. Jones and J. M. Broughton on the ....day of....., 1889, and before this action was commenced, she had no interest in the controversy, and the issue should not have been submitted to the jury. Motion denied, and plaintiff excepted. Thirteenth exception.

The judgment rendered against the defendants Broughton and Jones, at October Term, 1889, was, upon motion of counsel for Flora A. Wicker, vacated and annulled. There was a verdict and judgment thereon for the defendants, and plaintiff appealed.

John Devereux, Jr., for plaintiffs.
J. N. Holding for defendants.

DAVIS, J. The first and second exceptions relate to the testimony elicited, upon cross-examination, in regard to the conversation of Mr.

Montague with Mr. Jones. His Honor stated that it was only admitted on *cross-examination* as affecting the credibility or accuracy of the witness. No citation of authority is needed to show that it was competent for the purpose stated. Besides, the objection does not appear to have been taken to the *question,* but to the *answer,* and "it is not admissible for counsel to be quiet and allow the evidence to come out, and take advantage of it if favorable, and if not, ask that it be stricken out and not considered." *Wiggins v. Guthrie,* 101 N. C., 661, and cases cited; 1 Greenleaf Ev., secs. 459-461. The exceptions cannot be sustained.

The third and fourth exceptions relate to the testimony of (228) D. H. Crawford. His Honor told the jury, as to this testimony, that Mr. Crawford's assent to the transfer of the notes was not necessary, as he had parted with his interest in the property, and the testimony objected to in the third exception, even if incompetent, and if the objection had been taken in time, was cured by this charge. *Bridgers v. Dill,* 97 N. C., 222.

As to the fourth exception, there was evidence tending to show that, prior to the alleged endorsement to the plaintiff, one W. N. Andrews had agreed to buy from Crawford (the witness) and his wife, for the defendant, Flora Wicker, the property embraced in the mortgages, and pay off and discharge the mortgage debt. The defendant Broughton had testified, in substance, that the plaintiff Blake had told him that he, plaintiff, had paid off the mortgage at the request of said Andrews, and that he still owed Andrews on the property purchased of him; that some time after that Andrews came to him and told him he wanted $300. He replied, "I don't owe you that much. I have paid off the mortgages, as you requested." That Andrews replied, he must have $300; to let him have it and he would make it all right with him; that he let him have $300, and told him that he, Andrews, would owe him a balance, and that he could not cancel those mortgages; that Andrews died still owing him a balance, and that was how he came in possession of the mortgages and did not cancel them.

The plaintiff Blake testified, in substance, that he never told Broughton that he had paid off the mortgages, but he told him he had given Andrews the money to pay them off. He says: "I never spoke to Montague. I owed Andrews some $500 or $600 at the time, and I let him have $367.03 to take up the mortgages. He went off and returned with these papers (notes and mortgages) endorsed to me. I understood he was going to pay the money and give me credit for the money; he did not do that, but had the mortgages transferred to me and (229) held me for the $500 or $600, and I paid it afterwards, and the notes secured by the mortgages have never been paid." Andrews, with whom this conversation was had, is dead, but the evidence was admitted

without objection. Montague, the assignee of one of the notes and payee of the other, had testified, for the plaintiff, that he had no recollection about the matter, "except that Andrews settled," and, upon cross-examination, to what occurred between him and the defendant Jones. There was a conflict between the testimony of the defendant Broughton and the plaintiff Blake in regard to the satisfaction of the mortgages. The witness Crawford was the obligor and mortgagor interested in having the notes paid before he executed the deed, free from incumbrance, to the defendant Wicker, and what Montague, the mortgagee and assignee, had told him, taken in connection with the evidence in regard to the agreement with Andrews to discharge the mortgage, made his testimony competent as corroborative, if not independent, evidence. At all events, the objection was to the answer and not to the question, and came too late, and there was no motion to withdraw it from the jury. *McRae v. Malloy,* 93 N. C., 154; *Wiggins v. Guthrie, supra.*

The fifth exception was to the admission of the deed from Andrews and others to the plaintiff Blake. This was the deed for the property for which Blake himself testified that he was to pay $1,750, from the proceeds of which, according to the testimony for the defendants, Blake was to pay, and did pay, off and discharge the incumbrance upon the land in controversy, and the plaintiff Blake himself had testified in regard to the deed and its contents, and this evidence was before the jury, without objection, and if it was competent to admit its contents, which was without objection, we are unable to see why the deed itself was not competent. It certainly could work no harm to the appellant, for he had produced the deed himself, and testified in regard to (230) it, and the exception was properly overruled.

The sixth, seventh, and eighth exceptions are to the charge of his Honor. He charged the jury that "if Blake, for a valuable consideration, contracted with Andrews to pay the mortgages set out in the complaint, and in pursuance of said contract, paid the mortgages and had them assigned to him, such assignment of the mortgages, or the debts therein described, would operate as a discharge." The appellant relies upon the fact that the mortgages were not discharged and entry of satisfaction made upon the record in the office of the register of deeds, as prescribed by The Code, sec. 1271. There was evidence tending to show that the mortgage debts had been discharged, and if so, though the mortgages were not marked "satisfied" on the register's books, they were no longer operative. After their satisfaction, though not so marked on the record, they certainly could not be held as a security for money loaned or advanced, to the prejudice of a purchaser for value from the mortgagor or his assigns. Having been paid off and discharged, the want of cancellation could not have the effect to revive

them and give them new life and vitality to defeat such a purchaser. *Walker v. Mebane,* 90 N. C., 259; *Ballard v. Williams,* 95 N. C., 126, and the cases cited therein. This disposes of the sixth, seventh, and eighth exceptions.

The ninth exception could not possibly harm the plaintiff, as it was manifestly in his favor.

The tenth, eleventh, and twelfth exceptions are but repetitions and have already been disposed of.

The thirteenth exception is to the refusal of his Honor to give judgment for the plaintiff *non obstante veredicto.* By reference to the deed from the defendant Wicker to her codefendants, Broughton and Jones, it will be seen that she "covenants to and with the said parties of the second part (Broughton and Jones), and their heirs, that she is seized of said premises in fee and has a right to convey the same (231) in fee simple; that the said premises are free from any incumbrance, and that she will warrant and defend the title made herein against all lawful claims." The defendant Flora A. Wicker, having been made a party defendant by the plaintiff, and having conveyed the land to her codefendants, Broughton and Jones, with covenants of warranty, had a right to defend the title which she had so conveyed, and she was clearly entitled to the judgment given. There is

No error.

Cited: S. v. Crane, 110 N. C., 534; *Beaman v. Ward,* 132 N. C., 69; *Hodges v. Wilson,* 165 N. C., 327; *Burnett v. Supply Co.,* 180 N. C., 118.

W. A. BROWNING v. JOHN BERRY ET AL.

Action for Damages — Contract — Stipulations for Repairs — Allegations—Proofs—Variance—Statute of Frauds—Lease for More Than Three Years—Parol and Written Leases—Evidence—Complaint and Answer.

1. The plaintiff, in an action for damages for not making repairs according to contract, *alleged* that he leased a mill for one year, with privilege of five. On trial he *proved* that he leased for five years, without other qualification as to time: *Held,* he was not entitled to recover.
2. When the defendant declares upon a verbal contract, void under the statute of frauds, and the defendant either denies the contract or sets up another, or admits oral agreement and pleads specially the statute, testimony offered to prove the parol contract is incompetent and should be excluded on objection.

3. An absolute denial in the answer to the allegation in the complaint, which embodies the agreement sued on, draws in question and puts in issue not only its validity, but its legal existence.

4. The contention of plaintiff's counsel that the parol contract, proved without objection, is binding, cannot be sustained. There is a variation between the allegation and the proof.

5. The plaintiff is not entitled to the consideration of the view that he is a tenant holding over after the first year, and therefore entitled to the benefit of mutual stipulations for repairs, because, among other reasons, he made no such allegation in his complaint.

6. An amendment allowed, that plaintiff entered under a void verbal lease, could not avail if the defendants allowed their denial of the old contract to stand, or if they chose not to deny it and plead the statute.

(232) APPEAL at Special March Term of ORANGE, from *Armfield, J.*

The plaintiff alleged in his complaint that the defendants, as tenants in common, were the owners of a certain grist and saw mill on Eno River, which they leased to him for the term of one year, with the privilege of keeping it for five years if he should be disposed to do so. The defendants, in their answer, denied that they had entered into such a contract with plaintiff.

The plaintiff further alleged that the defendants, on their part, stipulated to make such repairs from time to time as might be needed, but that the water-house washed away and the machinery was in bad condition, and in consequence of the failure and refusal of defendants to make needful repairs, as they had contracted to do, he had suffered great damage.

Plaintiff was introduced as a witness in his own behalf, and testified: That the defendants were the owners, as tenants in common, of a certain mill property on Eno river, in said county, consisting of grist mills (flour and corn), sawmill and wool-carding machinery; that in September, 1885, he saw the defendants together, and rented or leased said property from them—as rental, a proportion of the tolls from the mills and carding machine—and they were to have certain repairs made, which he detailed at length; that his term of lease was to begin on 1 January, 1886; that one Jackson had the property rented up to 1 January, 1886, and was in possession; that Jackson did not (233) occupy the dwelling upon the premises, known as the miller's house, which he (Jackson) had rented, and that he, by the permission of Jackson and the defendant John Berry, moved into it in November, 1885, and on 1 January, 1886, Jackson gave him full possession of the entire property; that the mills and carding machine were much out of repair; that defendants saw him there several times, and that he paid them rents monthly, and that he repeatedly requested that

they make the repairs they had agreed to make, but they failed to do so; that he remained in possession of the property during the year 1886, and at the end of the year he was dispossessed by legal process before a justice of the peace; that he talked with defendant John Berry in February, 1886, and again soon after, about the repairs, and he said he could make none, as he owned only a small interest. He also called defendant Maria Berry's attention to the needed repairs twice, and she promised to have them made, but in April, 1886, she said she would not have repairs made, as the property would soon change hands, and it was sold for partition in August afterwards, and defendants Maria Berry and Lizzie Berry bought it; that by reason of the failure of defendants to make the repairs they had agreed to make, he lost custom and work that he otherwise would have done at said mills and carding machine, and thereby suffered loss to the amount of $300. He testified in detail as to loss of custom because the repairs had not been made. He further testified that the contract of lease or rental was not reduced to writing.

On cross-examination by defendants' counsel he testified that the contract of lease or rental of said property was not in writing; that he leased the property for five years; that he told defendants that he would not move to and take possession of the property for a less term than three or five years, and that thereupon the contract was made for five years, and that he was to call again, when the contract was (234) to be put in writing and signed by him and the defendants; that he did call twice for that purpose, but defendants were away from home each time, and that he never saw defendants Maria Berry and Lizzie Berry again till after he had moved to the mills, and that the contract of lease or rental was never reduced to writing.

The plaintiff's counsel insisted that the plaintiff did not understand the questions asked, and they were repeated, and the plaintiff deliberately and repeatedly answered that the lease or rental was for five years, without qualification or condition, and in response to a question from his own counsel he said the same.

The court then asked him if there was anything said in the contract about his renting the property for one year, with the privilege of a longer term if he should desire, and he said there was not, that he leased it for five years; that he told defendants that he would not lease for a less term than three or five years, and that the contract was for five years, to begin 1 January, 1886, and that it was not in writing. Thereupon, the court informed plaintiff's counsel that the instructions to the jury would be that plaintiff could not recover. In consequence, the plaintiff submitted to a nonsuit and appealed to the Supreme Court, and assigns for error the opinion of the court in holding that plaintiff was not entitled to recover, insisting that, although the contract of lease

might be void under the statute of frauds, yet he was entitled to recover for failure of defendants to make the repairs they had agreed to make.

R. W. Winston for plaintiff.
June Parker for defendants.

(235) AVERY, J., after stating the facts: Where the plaintiff declares upon a verbal contract, void under the statute of frauds, and the defendant either denies that he made the contract or sets up another and a different agreement, or admits the oral agreement and pleads specially the statute, testimony offered to prove parol contract is incompetent and should be excluded on objection. *Holler v. Richards,* 102 N. C., 545; *Morrison v. Baker,* 81 N. C., 76; *Bonham v. Craig,* 80 N. C., 224.

In the case last cited, *Chief Justice Smith* lays down the rule, substantially, that an absolute denial in an answer to the allegation in the complaint that embodies the agreement sued on, draws in question and puts at issue not only its validity, but its legal existence.

The plaintiff's counsel contends, however, that the testimony offered to establish the contract was admitted without exception, and the failure to object to its introduction places the defendant in the same position that he would have occupied had he admitted the making, as well as the binding force of the parol agreement sued on. Counsel insisted, also, that though the lease for five years was void, under the statute, the contract would be enforced as a lease for one year, becoming a tenancy from year to year, in case of holding over, after January, 1887, and the defendants could be compelled to perform the mutual stipulations for repairs on their part. If we admit, for the sake of argument only, that this position is tenable, we encounter immediately the insuperable barrier to the plaintiff's recovery on the supposed *prima facie* case on which he rested, that there is a variance between the allegation and the proof. The plaintiff testified, reiterating the statement more than once, that the parol agreement on the part of the defendants was, in terms, an unqualified lease of the premises for five years, and not for one year, with the privilege of five, as alleged in the complaint. So, if the contract alleged is not that proven, it was his Honor's duty to tell the jury that the plaintiff could not prove a cause of action essentially different from that declared upon, and ask a verdict upon such evidence,
(236) even conceding the correctness of the plaintiff's legal proposition.

If the plaintiff had amended the complaint here by leave of the court, he must have made it conform to the evidence by alleging that he entered under a void verbal lease for five years. If the defendants allow this denial of the old contract to stand as their defense to the new cause

of action, it cannot be maintained, or if they do not choose to deny the parol agreement and enter the plea of the statute, it would put an end to the action. It is unnecessary to pass upon the other question discussed by counsel. The judgment must be

Affirmed.

Cited: Vann v. Newsom, 110 N. C., 125; *Loughran v. Giles, ib.,* 425; *Hunt v. Vanderbilt,* 115 N. C., 563; *Haun v. Burrell,* 119 N. C., 547; *Winders v. Hill,* 144 N. C., 617; *Miller v. Monazite Co.,* 152 N. C., 609; *Henry v. Hilliard,* 155 N. C., 379.

AIKEN, LAMBERT & CO. v. S. F. GARDNER.

Homestead—Allotment—Appraisers—Levy—Equities of Judgment—Creditors and Mortgagees—Appeal from Allotment.

1. The homestead of a person against whom there was a docketed judgment and several subsequent mortgages of record, and a bond for title covering the homestead allotment and the excess above it levied on, was allotted to him by appraisers on 25 February, 1889, and exceptions thereto were filed on 19 March following. There were no exceptions that raised the question of the *value* of the homestead, whether or not it was worth more than $1,000: *Held,* (1) the exception was in apt time; (2) there was no issue presented which it was the duty of the court to pass upon in this proceeding.

2. The equities between the parties having liens on the lands cannot be passed upon in an appeal from the appraisers. Their duties extended no further than the valuation and allotment of the homestead.

ALLOTMENT OF HOMESTEAD, heard on objections filed before (237) *Bynum, J.,* at March Term, 1889, of DURHAM.

The case on appeal, as stated by the judge, is as follows:

1. It is admitted that the judgment under which the execution was issued and homestead allotted was docketed in Durham County, 22 February, 1886.

2. It is admitted that the mortgages to Wyatt, Womble and others were dated—Womble, 30 April, 1887; to Mrs. Gardner, August, 1887; Wyatt & Bowling, 7 December, 1887, covering the land levied on and included in homestead allotment.

3. The contract with Rhine was dated 20 April, 1885, and registered 27 March, 1889; and 7 February, 1888, another contract was made with the same party and registered 27 March, 1889.

4. The execution was issued 21 February, 1889; homestead allotment made 25 February, 1889; Rhine filed exceptions on 19 March, 1889.

5. Defendant purposes to file his exceptions 1 April, 1889.

6. The date of bond for title to Gardner was 20 April, 1885; deed made in pursuance to this, 9 May, 1887. This deed was registered.

The plaintiffs moved to dismiss the exceptions filed by Gardner and Rhine, upon the ground that Gardner's was not taken in apt time, and that Rhine had no such intent as to allow him to file exceptions, as shown by the exceptions themselves.

Defendant insisted that they were in apt time, as the return of the appraisers did not show when it was filed, and that there was no minute returned on the docket of the clerk showing the time of filing. Plaintiff admitted this to be so, and asked leave to examine the clerk and sheriff to prove the time of filing, and to have the record made *nunc pro tunc.*

(238) The court admitted the testimony. The clerk was sworn by the court, and testified that the return was filed in his office on 17 March, 1889, or either that he did not enter the same because his fees were not paid and he was not requested to do so by the plaintiff; that he made no transcript to be filed with the register, for same reason. Clerk further testified that no transcript was filed by the officer at all—only the original. Clerk further testifies that he made no entry of it at all—did not mark it "filed," but put the return in the box containing the judgment. The court allowed the clerk to make the record showing the date of filing. The court overruled the plaintiff's motion to dismiss. Plaintiff then moved to overrule the exceptions of the defendant Gardner and of Rhine, upon the ground that the exceptions did not show that the land actually allotted to the defendant was not worth $1,000, and that the question as to the equities of the parties could not be raised in this proceeding.

The defendant proposed to prove that the money alleged to be due on the mortgages was for part of the purchase-money of the land; that Mrs. Gardner had loaned her husband $300, 20 October, 1885; $400, 22 April, 1887, to pay for the land, and that then the deed was executed to her husband; it was turned over to her by her husband, to be held until she was reimbursed; that this money was her separate property. The defendant asked the court to submit the following issues: The allotment of homestead, the mortgage, the contract, the receipts of Mrs. Gardner, the bond for title, the deed, judgment and execution, and the exceptions filed with this statement to constitute case in Supreme Court.

The court excluded the evidence offered by defendant, refused to submit to the jury the issues tendered, and held as a matter of law:

(239) That the record by the clerk *nunc pro tunc* did not debar defendant Gardner of his right to file exceptions; that the only

inquiry in this proceeding was the actual value of the land allotted, and that in this proceeding the questions raised by defendant and Rhine could not be raised and passed upon, and as the exceptions did not allege the land actually allotted was not worth $1,000, the exceptions should be overruled, and defendant excepted.

J. C. L. Harris and R. W. York for plaintiffs.
W. W. Fuller and J. S. Manning for defendant.

AVERY, J., after stating the facts: There was no exception that raised the question whether the homestead allotted was worth more or less than $1,000. The judge below finds that the objections were filed in apt time, but holds that no issue was raised by them which it was his duty to submit in this proceeding. We concur with his Honor in the opinion that the equities set up by the parties cannot be passed upon on an appeal from the appraisers, whose duties extended no further than the valuation and allotment by bounds of the homestead. *Gulley v. Cole,* 102 N. C., 333; *Thornton v. Vanstory, post,* 331.

Affirmed.

Cited: Williams v. Whitaker, 110 N. C., 395.

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(240)

A. T. FOLLETTE v. THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, OF NEW YORK.

Insurance Policy — Suppression of Material Facts — Evidence — Contract — Application — Bodily Infirmity—Notice to Agent—Notice to Principal.

1. In an action upon an accident insurance policy, the defense was that the plaintiff had suppressed the fact of his deafness: *Held,* that evidence that the defendant's agent, who took the application of plaintiff, knew of this defect, was competent, although in his application the plaintiff stated he was free from any bodily infirmity.

2. Actual knowledge to the agent is constructive knowledge to the company; hence the latter is deemed to have waived all objection to deafness as a bodily infirmity.

APPEAL at January Term, 1890, of DURHAM, from *Armfield, J.*

The plaintiff gave evidence of his injury, which was shown to have been accidental and to have happened as set out in the complaint, and

that his hand was amputated above the wrist in consequence of said injury. He testified that he was partially deaf—had been so for thirty years to the same extent; that he was in good health, and his deafness did not interfere with the pursuit of his business; that he did not use any mechanical applications to enable him to hear conversation, though a person speaking to him had to elevate his voice above the ordinary conversational tone to enable him to hear; that when he took out his insurance, his deafness was just as it had been for years, and is now, and was at the time of his injury. In addressing the witness (plaintiff), judge and counsel had to raise their voices to loud pitch to enable witness to hear the questions; he could not hear questions asked in the tone used to other witnesses; that he was well acquainted with the local agent of defendant who took his application and solicited his
(241) insurance, and had often conversed with him; that the said agent had a chance to know the extent of his deafness when he applied for the policy; that no question was asked about deafness, and nothing said about it when he made his application or received his policy; that he did not think of his deafness as a bodily infirmity, and did not intend to suppress the fact of his deafness, as aforesaid.

Plaintiff introduced and read the following letter from the secretary and general manager of defendant's company, having explained that the said letter was a reply to one written on 10 September by himself under the assumed name of Samuel C. Moore:

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION,
320, 322 and 324 Broadway, New York.

P. O. Box 851. 17 September, 1889.

SAMUEL C. MOORE, ESQ., Asheville, N. C.

DEAR SIR:—I have your favor of 10th instant, and, in reply, beg to say that, from the description you give of your deafness, we do not think that it will debar you from becoming a member of the association. Fill out the inclosed application and forward it to us, together with your regular membership fee of $5, and, on receipt, we shall be pleased to issue a policy to you in this association.

Truly yours, JAMES R. PITCHER,
Secretary and General Manager.

J. J. Mackey, local agent of defendant, testified that he took plaintiff's application for membership in defendant's company and delivered him the certificate of policy. Plaintiff proposed to ask the witness if he knew the extent of plaintiff's deafness at the time of the application and of delivery of certificate or policy. This question was,
(242) under objection of defendant, excluded, and plaintiff excepted.

First Exception.—Plaintiff then asked said witness if he had frequently conversed with plaintiff prior to said application, and if any questions were asked plaintiff by him, at time of application, about deafness, or plaintiff's attention drawn to it in any way. This question was excluded, and plaintiff excepted.

Second Exception.—Plaintiff proved by his wife that one Frank, adjuster of defendant, who came to see plaintiff after his injury and the amputation of his hand, said that the company was satisfied no fraud or concealment was intended by plaintiff in not stating in his application that he was deaf.

Defendant introduced the certificate, or policy, and the application.

His Honor stated that he would instruct the jury that plaintiff was not entitled to recover anything, upon the ground that plaintiff's deafness was a "bodily infirmity," which he had not disclosed in his reply to the questions printed in the application, and that this was so, notwithstanding such suppression was not fraudulent or intended, and though his deafness did not contribute to his injury.

Third Exception.—To this ruling and intimation plaintiff excepted, and, in deference thereto, submitted to a judgment of nonsuit and appealed to the Supreme Court.

"This cause coming on to be heard before me, in deference to the court, plaintiff submits to a judgment of nonsuit, and it is adjudged that the plaintiff take nothing by his suit, and the defendant go without day, and recover of the plaintiff and his prosecution bond the costs of this action, to be taxed by the clerk."

The enclosed application is identical with the one signed in (243) this case and made by plaintiff, except that it is blank.

Section 12 of the application was as follows:

"12. I have never had, nor am I subject to, fits, disorders of the brain, rheumatism, or any bodily or mental infirmity, except as herein stated. Had an attack of rheumatism six years ago."

Two of the conditions of the policy were as follows:

"5. The application for membership, together with the classification risks endorsed hereon, are made a part of this certificate. Fraud or concealment in obtaining membership, or attempts by like means to obtain indemnity, shall make the membership and this insurance absolutely void. The association may cancel this insurance and membership at any time by refunding to the insured (member) herein named the membership fee, together with any balance to his credit deposited for assessments in advance. This membership and insurance, unless sooner terminated by forfeiture, cancellation, or resignation, shall cease and determine when the insured (member) reaches the age of 65 years.

"10. The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this certificate and insurance, are conditions precedent to the issuing of this certificate and to its validity, and no waiver shall be claimed by reason of the acts of any agent, unless such act or waiver shall be specially authorized in writing over the signature of the secretary of this association."

W. W. Fuller and R. B. Boone for plaintiff.
J. S. Manning and J. W. Hinsdale (by brief) for defendant.

AVERY, J., after stating the facts: It was competent to prove by the agent of the defendant, on his examination as a witness, that he knew, or had had abundant opportunity and good reason to know, the
(244) extent of plaintiff's deafness when he solicited him to take out a policy, or subsequently and before the application was signed.

Actual knowledge of the plaintiff's defective hearing on the part of the agent was constructive notice of it to his principal, and, hence, the latter is deemed to have waived the objection that the deafness of the former was a bodily infirmity, notwithstanding the fact that it was provided in the policy that the agents of the company should have no power to waive its conditions. *Hornthal v. Ins. Co.,* 88 N. C., 73; *Dupree v. Ins. Co.,* 93 N. C., 240; *ib.,* 92 N. C., 422; *Collins v. Ins. Co.,* 79 N. C., 284; *Ins. Co. v. Wilkerson,* 13 Wall., 222; *Ins. Co. v. Garfield,* 60 Ill., 124; *Witherill v. Ins. Co.,* 49 Me., 200; *Ins. Co. v. McVea,* 8 Lea, 513; Boon on Insurance, sec. 496; *Morrison v. Ins. Co.,* 59 Wis., 162; *Shafer v. Ins. Co.,* 53 Wis., 361; *Ins. Co. v. Earle,* 33 Mich., 143.

An application for insurance constitutes a part of the contract between the insurer and the insured, and the representations contained in it are presumptively inducements to the former to enter into it. But when it appears that an agent, through whom a corporation acts, himself examined and valued, or had an opportunity to estimate by examination actually made by him, the value of property insured against fire, or frequently conversed with a man partially deaf, had opportunity to test the extent of his infirmity, and afterwards solicited, or forwarded with favorable recommendation, his application for insurance against accident, the insured will not be absolutely precluded from showing the facts as evidence that the corporation assented to what subsequently appeared to be an over-valuation in the one case, or had knowledge of the defective hearing, and waived objection to the risk on account of it, in the other.

It was material that the jury, in passing upon and finding
(245) the facts upon which the liability of the defendant depended,

should hear any testimony that would aid them in determining whether the defendant company was induced, or might reasonably have been induced, by the false representation contained in the application, to enter into the contract, when it would not have done so had its agents had full knowledge of the facts. The representation in the application must be, in contemplation of law, falsely and fraudulently made, in order to prevent a recovery in case of loss; but, in the absence of any proof of knowledge of the misrepresentation complained of, or waiver of objection on account of it by the agents of the insurer, a false statement constituting an apparent inducement to the contract will be deemed to have been made with fraudulent intent. *Mace v. Ins. Co.*, 101 N. C., 133.

The courts of this country have differed widely as to the admissibility of testimony in cases like that before us. Some have held that parol testimony was not competent in a case to show a waiver of the requirements in the conditions of a policy, or of the warranty arising out of the application, while others have limited the power of agents to waive its requirements, in the face of a prohibitory provision in the policy, to matters not constituting essential and material portions of the contract, such as the stipulations as to proof of loss. There is a very general concurrence, of course, in the view that where the execution of a contract has been procured by the fraud of an agent of the insurer it may be declared void upon showing the acts of the agent inducing its execution.

This case is distinguishable from that of *Bobbitt v. Ins. Co.*, 66 N. C., 70, in that in the latter the plaintiff not only made a false statement, which was an apparent inducement to the defendant to issue the policy, but failed to rebut the presumption of fraudulent purpose by showing any actual knowledge of the true value of the property on the part of the corporation acting through its agent. (246)

In *Dupree v. Ins. Co.*, 93 N. C., 240, *Chief Justice Smith*, delivering the opinion of the Court, said: "It was certainly competent to show this source of information possessed by the agency firm, in regard to the property included in both policies when they issued the last, as tending to rebut the charge that it was solely brought about by the fraudulent statements contained in the plaintiff's application." The evidence referred to tended to show that a subagent of a general insurance agent had, the year before, inspected the same property for another company for which the general agent was acting, and had issued a policy upon the valuation then declared just by the subagent, and the general agent had, the next year, sent the insured the policy sued on, which was issued in the name of another company upon the property destroyed by fire, but based upon the same valuation.

Under the principle laid down, it was equally competent and material to show that Mackey, the agent of the defendant company, knew and could have informed his principal that the plaintiff was partially deaf, and, from the very nature of the case, could have communicated the extent of the infirmity. Being presumably in possession of the information acquired by its agent, the company is not deemed to have been induced to take the risk by the representation in the application that the plaintiff was not subject to any "bodily infirmity."

The principles announced by this Court in the cases already cited are supported by reason and sustained by authority. May on Insurance, secs. 131 and 132; 1 Phil. on Insurance, sec. 904.

In *Hornthal v. Ins. Co., supra,* the Court says that the policy "was issued and delivered to the plaintiff, with actual knowledge, on the part of the agent and constructive knowledge of his principal, and must be deemed to have been done with the full assent to the proposed
(247) increase." See, also, *Collins v. Ins. Co.,* 79 N. C., 279; *Argall v. Ins. Co.,* 84 N. C., 355; *Dupree v. Ins. Co.,* 92 N. C., 417. "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by the limitations not communicated to the person with whom he deals." *Ins. Co. v. Wilkerson,* 13 Wallace, 222.

So, in the case of *Cuthbertson v. Ins. Co.,* 96 N. C., 480 (cited by the defendant), the insured made a false representation as to the title of the property destroyed by fire, and offered no testimony to trace any actual knowledge of the facts to the defendant, or to rebut the presumption of a fraudulent intent by a waiver.

Justice Davis, in *Mace v. Ins. Co.,* 101 N. C., 133, says: "A false statement made in the application, when the application constitutes a part of the contract, will render the policy void, and so will any representation of a material fact by which the company is misled, if falsely and fraudulently made." But where there is a waiver, as in the cases of *Hornthal v. Ins. Co.* and *Dupree v. Ins. Co., supra,* though the false statement be made in the application itself, it does not mislead, and it cannot be considered an inducement to the contract.

New trial.

Cited: S. c., 110 N. C., 377; *Dibbrell v. Ins. Co., ib.,* 209; *Bergeron v. Ins. Co.,* 111 N. C., 47; *Bresee v. Crumpton,* 121 N. C., 125; *Horton v. Ins. Co.,* 122 N. C., 504.

(248)

E. D. JONES ET AL. v. THE COMMISSIONERS OF PERSON COUNTY.

Tax — State and County — Township—Municipal Corporation—Subscription to a Railroad—Elections—County Commissioners—Contribution—Cities—Towns—Necessary Expenses—Ordinary Purposes—Statute of Limitations.

1. An action was commenced by certain taxpayers in behalf of themselves and others, among other purposes, to declare void an election held to allow certain townships to subscribe stock to a railroad company, on account of irregularities: *Held*, (1) that action could be brought, being equitable in its nature, even though no remedy was given by statute; (2) while no statute of limitations is applicable, still such action should be brought within reasonable time and before the rights of innocent third parties have intervened.

2. The equation and limitation of taxation established by the Constitution (Art. V, sec. 1) applies only to taxes levied for ordinary purposes of the State and counties, and, as to levies of taxes for such purposes, it must be observed.

3. A county, when it contracts a debt, pledges its faith or loans its credit, as allowed by Article VII, section 7, of the Constitution, must levy taxes necessary to raise revenue for such purposes upon all the property in the same, except such property as is exempted from taxation.

4. A city, town, or other municipal corporation, "for the necessary expenses" thereof, must levy taxes upon all the property in the same, with the like exception.

5. A city, town, or other municipal corporation, when it contracts a debt, pledges its faith, or loans its credit, as allowed by Article VII, section 7, must levy taxes upon all property in the same, with the like exception.

6. The Constitution does not *require* that a capitation tax shall be levied, except when taxes are levied for ordinary State and county purposes.

7. Such ordinary purposes embrace the case when the county commissioners levy more than double the State tax "for a special purpose, with the approval of the General Assembly," as provided by Article V, section 6.

8. A township has corporate existence, and the Legislature may invest it with pertinent corporate powers as to subscribe for the capital stock of a railroad company.

9. There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held to ascertain the will of the majority of the qualified voters in a township relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time.

APPEAL from *Graves, J.*, at Fall Term, 1889, of PERSON.

(249) The statute (Laws 1885, ch. 342, secs. 8, 9, 10), entitled "An act to renew the charter of the Roxboro Railroad Company, and for other purposes," provides that the county of Person, or any township in that county, may subscribe for the capital stock of said railroad company—that townships respectively may subscribe for such stock not exceeding in its par value the sum of $10,000, and "if a majority of all the votes cast (at an election to be held) shall be 'For subscription,' as in the statute prescribed, and if such subscription shall be made, then the county commissioners of said county shall issue coupon bonds of the township so subscribing as prescribed, and shall, in addition to the other taxes, each year compute and levy upon *all property* in each of the townships so subscribing to the capital stock of said railroad company, a sufficient amount to pay the interest on the bonds issued on account of the subscription of said township, and provide a sum equal to one-tenth of said subscription for a sinking fund," etc.

In pursuance of the direction of this statute, an election was ordered and held in Holloway's Township, in said county, on 7 August, 1886, to ascertain whether a majority of the votes cast would be in favor of subscribing for such capital stock to the amount of $6,000. The said commissioners ascertained the result of such election, and declared that a majority of the qualified voters of that township had voted in favor of the subscription of the sum last mentioned, and thereupon and thereafter, on 15 December, 1886, they appointed an agent, as allowed by the statute, to so subscribe for such last mentioned amount of stock. Afterwards appropriate bonds were issued and taxes levied to pay the accruing interest thereon, and to provide a sinking fund.

The plaintiffs are citizens and taxpayers of the township mentioned, and bring this action, which began on 7 November, 1889, in behalf of themselves and all other like taxpayers, against the commissioners (250) of said county, to have the election mentioned declared void for irregularities specified and set forth in the complaint, for a perpetual injunction restraining the defendants from levying the taxes to pay the interest, etc., on said bonds, and for general relief.

The plaintiffs filed their complaint and an amended complaint, alleging, much in detail, irregularities in and about the election; that the same was void; that a majority of the qualified voters of the township did not vote in favor of "For subscription," etc.

The defendants filed answers, denying directly the material allegations of the complaint, and alleging specifically that the election was duly and regularly held as directed by the statute, and that a majority of the qualified voters of the township voted "For subscription," etc.

The plaintiffs moved for an injunction pending the action. The pleadings were used as affidavits at the hearing of the motion, and both parties produced numerous other affidavits, and also documentary evidence. The court granted the motion, and the defendants, having excepted, appealed from the order allowing the same, to this Court.

J. A. Long, A. W. Graham and W. W. Kitchin for plaintiffs.
John W. Daniel, A. C. Denniston, J. W. Graham, W. W. Fuller and W. A. Guthrie for defendants.

MERRIMON, C. J., after stating the facts: A chief purpose of this action is to contest the validity of the election mentioned in the pleadings, and if it should be adjudged valid and sufficient, then to contest the correctness of the result thereof as ascertained and declared by the defendants, and to this aspect of the case our attention is first directed.

It is not questioned that the statute (Laws 1885, ch. 342) authorized and required the defendants to cause such election to be held in the contingency provided for. It appears, we think, very clearly, from the evidence, that they purported to do so by proper orders (251) and action, substantially in all respects, in pursuance of, and as required by, that statute. The presumption is, nothing to the contrary appearing, that they exercised the authority and powers conferred upon them correctly, and hence, that the election was properly held and the result thereof correctly ascertained.

The plaintiffs contend, however, that they have the right to contest that election in this action, in the respects and for the causes and grounds alleged and specified in their complaint. Very certainly, an election like that in question might be contested by taxpayers affected by it for sufficient cause. *Perry v. Whitaker,* 71 N. C., 475, 477; *Smallwood v. New Bern,* 90 N. C., 36; *McCormac v. Comrs., ib.,* 441; *Caldwell v. Comrs., ib.,* 453; *Bradshaw v. Comrs.,* 92 N. C., 278; *McNair v. Comrs.,* 93 N. C., 370; *McDowell v. Construction Co.,* 96 N. C., 514; *Goforth v. Construction Co., ib.,* 536; *Wood v. Oxford,* 97 N. C., 227; *Riggsbee v. Durham,* 98 N. C., 81; *Riggsbee v. Durham,* 99 N. C., 341. But such contest must be begun within a reasonable period of time next after the result of the election has been declared, and, ordinarily, before any authorized action has been taken in pursuance of it, whereby rights of parties may have accrued. What may be such reasonable period must depend, to some extent, upon the circumstances of each case. Regularly, contest should be made promptly after the result of the election shall be ascertained. It is better that this should be done in all cases, but there might be causes that would excuse some delay, as where, in case like this, the commissioners at first mani-

fested a purpose not to take action in pursuance of the ascertained result, but after the lapse of time, longer or shorter, they fraudulently and collusively, with persons or corporations, seeking and intending to take benefit thereby, should proceed to take action. In such case, taxpayers might then promptly take action to contest the election
(252) for any proper cause, if rights of innocent parties had not accrued. Justice, fairness, and sound public policy alike suggest and require that such contests shall be made in good faith, with reasonable promptness and for just cause. The nature of such matters forbid intentional, careless or negligent delay.

The election in question was apparently sufficiently regular and valid. It was held in August, 1886. In December of that year a taxpayer of the township, suing in behalf of himself and all other taxpayers interested, brought his action in the proper court to contest the election as to its validity and the declared result thereof. In August of the year next thereafter that action was ended by a judgment of nonsuit. This action was begun on 4 November, 1889, after the agent of the township mentioned had subscribed for capital stock of the railroad company mentioned, after the bonds of the township had been issued in pursuance of the election, and after the defendants had levied the tax to pay accruing interest on such bonds and provide for the sinking fund required. No fraudulent conduct on the part of the defendants is charged, nor any collusion between them and the said railroad company, nor is any cause assigned for the long delay in bringing this action.

In view of these facts, we think it very clear that the plaintiffs ought not to be allowed to maintain the action. Familiar with the facts alleged by them, advertent to the fact that an action had been brought to contest the election, which was abandoned, as they must have been; that the railroad company was actively prosecuting the construction of its road, which the subscription for its capital stock was intended to promote; with the fact that an agent was appointed to subscribe for the stock, they delayed to bring their action for more than three years. No excuse whatever for such delay is alleged. Manifestly, the plaintiffs carelessly and negligently, and without the slightest
(253) cause, so far as appears, failed to bring their action within a reasonable period of time, and this, too, while important facts, of which they must have had knowledge, prompted them to do so, if they were dissatisfied with the election for any proper cause. There was not merely negligent delay, but as well important rights of parties had accrued who, so far as appears, were in no way chargeable with any fraudulent conduct as to such rights, or with notice of the alleged irregularities of the election. While the law is careful to protect the

rights of taxpayers in this and like cases, they must be diligent and invoke its aid in apt time. Elections are serious and important things, and not to be interfered with for slight causes, or at any and all times, at the pleasure of complaining parties. They are authorized by the law and serve important purposes in the economy of government, and, when apparently regular and valid, must be upheld in all connections, unless they shall be contested at the proper time and in the proper way.

The counsel for the appellees cited and relied in part upon *McDowell v. Construction Co., supra,* to show that this action was brought in apt time. That case is very different in material respects from the present one. In it the plaintiffs alleged facts and circumstances, and produced evidence going strongly to prove the same, to show excusable and not unreasonable delay in bringing the action; they alleged fraudulent combination of the defendants to have the defendant commissioners unlawfully declare the result of the election, and that the defendants, other than themselves, had notice and knowledge of their unlawful and fraudulent acts, etc. That case came before this Court by appeal from the order of the court below denying a motion for injunction pending the action—it was not here upon the merits. The court there said, among other things: "There is no statutory provision that requires such elections to be contested at once after they take place and in a particular manner. It was, therefore, sufficient for the (254) plaintiff to bring his action within a reasonable period and in the ordinary method."

The defendants pleaded "that, more than three years having elapsed since the result of the election was declared and announced," and insisted that, therefore, the plaintiff's right to maintain this action is barred by the statute of limitations (The Code, sec. 155). The plaintiffs contended that they had the right to bring their action at any time within ten years next after the result of the election was declared, and insisted that their cause of action was embraced by the statute (The Code, sec. 158).

We think the statute of limitations has no application in this and like cases. The action is peculiar and exceptional. The purpose is not to litigate, settle and administer any positive primary right of the plaintiffs, but simply to contest the validity of the election—to try and determine that it was or was not regular and valid, and the result thereof duly ascertained or otherwise, and to grant such relief in that respect as the nature and circumstances of the case may require. The rights of the plaintiffs are only secondary and incidental, dependent upon the election and its results. The matter in controversy, the real cause of action, concerns the public—all the taxpayers in the township, and in some cases possibly others; the plaintiffs, by reason of their

interest as such taxpayers—secondary and indirect in its nature—are allowed to maintain the action, not to litigate their several and particular liabilities to pay the taxes levied, but, as we have said, to contest the validity or invalidity of the election, and thus settle and conclude the general liability or nonliability created by it, as contemplated by the statute allowing the election to be held.

No statute gives this action, and actions in like cases, nor is there any statutory provision for contesting elections of the kind in question.

The Constitution (Art. VII, sec. 7) allows municipal corpora-
(255) tions, as prescribed, to contract debts, pledge their faith, or to loan their credit, "by a vote of the majority of the qualified voters therein." But this does not imply that the action of the county commissioners to order an election for such purpose, and ascertain the result thereof, shall be final and conclusive. Certainly not, in the absence of some positive legislative enactment so providing. Generally, the duties of persons charged with the conduct of such elections are largely ministerial, and they are not well qualified to decide the legal questions arising in and about the elections they superintend. It is intended that they shall observe statutory directions, hold the elections and ascertain the result of them by adding the votes cast together, and such result will prevail unless persons interested shall see fit, at the proper time, to contest the election in some aspect of it.

Such elections, not infrequently, are of very great moment to taxpayers, as well as those who are intended to take particular benefit by them. They may involve rights, liabilities and questions of law and fact very important and complex in their nature. The law does not contemplate or intend that the action of the persons who hold the election and ascertain its results in matters so serious shall be conclusive. They might, through ignorance, honest mistake, or corrupt purpose, decide improperly questions involving the validity or invalidity of the election, or they might falsely ascertain the result thereof. It cannot be that taxpayers, in such case, have no remedy, legal or equitable. Clearly, in the absence of any statutory remedy, the Superior Courts, in the exercise of their powers of general jurisdiction, both legal and equitable, may entertain actions brought by interested parties to contest such elections, and determine that they are valid or invalid, and as well, the true result of them; and, to that end, may make such orders and take such action as may be allowed by general principles of law and equity applicable. Such exceptional actions are equitable in their
(256) nature, and are allowed by the courts in the exercise of their chancery jurisdiction to prevent a failure of justice and give just effect to the will of the people. They have been sustained in many cases. See those cited, *supra;* see, also, *Calaveras County v. Brockway,*

30 Cal., 325; *Gibson v. Board Supervisors,* 80 Cal., 359; *Boren v. Smith,* 47 Ill., 482; *People v. Wiant,* 48 Ill., 263; *Dickey v. Reed,* 68 Ill., 262.

As we have seen, it is not the purpose of the plaintiffs by this action to enforce any direct positive private rights of their own, but to protect the taxpayers, whose rights are affected adversely, as is alleged, against an election unlawfully ordered and held, or, if it was lawful in form, then to give effect to the will of the people of the township, as expressed at and by it. To these ends they invoke the chancery authority of the Court, as above explained. But the Court will not grant its aid, so invoked, unless it appears that the plaintiffs have been reasonably diligent—this depending upon the facts and circumstances of the case—in bringing their action. Especially it will not, where they have negligently delayed to bring their action until the rights of innocent parties have accrued. Nor will the Court tolerate, much less encourage, merely captious or vexatious interference with such elections. It must appear that the action was prompted by good faith, reasonable diligence and a substantial cause of action. Otherwise, the plaintiffs cannot have the relief they demand, and the action will be dismissed. Their right to sue does not depend at all upon the statute of limitations, but upon the application of plain principles of equity, which require that a party seeking relief must, before he is entitled to have the same, do, as to the matter in question, what, in justice, fairness and good conscience, he should have done on his part. In cases like the present one, unless such constituent equitable element appears, no sufficient cause of action is alleged. *Vigilantibus non dormientibus æquitas subvenit.* Story Eq. Jur., 95*a,* 1284*a.* (257)

We are, therefore, of opinion that the plaintiffs have not alleged a cause of action that entitles them to contest the election mentioned in the pleading, as to its validity, or as to the ascertained result of the same. Hence, the motion for an injunction, pending the action on that account, should have been denied by the court below.

The plaintiffs further contended in the court below, and as well in this Court, that the statute first above cited, under which the election was held, the bonds in question were issued, and the tax complained of was levied, was void as to such bonds and tax "in that it authorizes a tax upon property alone, and not upon polls, thereby destroying the equation required by the Constitution for such purposes to be preserved in taxation." In our judgment, a proper and necessary interpretation of the several provisions of the Constitution pertinent and material to the question thus raised, does not warrant such contention of the plaintiffs. They insist that the Constitution (Art. V, secs. 1 and 3), prescribe, define and establish the several subjects of taxation,

and the necessary equation of the same as between tax on polls and the same on property of all kinds for the purposes contemplated by the statutory provision in question.

The article just cited is entitled "Revenue and Taxation," and the sections cited provide that "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

"Laws shall be passed taxing, by a uniform rule, all moneys,
(258) credits, investments in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property according to its true value in money. The General Assembly may also tax trades, professions, franchises and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed." Thus is established the equation of capitation and property taxation contended for by the plaintiffs. But it is settled by many decisions of this Court that it does not establish an exclusive system or scheme of taxation, applicable and to be observed in all cases and for all purposes; that, on the contrary, it applies only to the revenue and taxation necessary for the *ordinary purposes* of the State and the several counties thereof. Neither in terms, nor by implication or effect, does it apply to all purposes mentioned in the *article* cited; especially, it does not apply to the raising of revenue necessary to pay the debts of the State and of the several counties existing anterior to the adoption of the present Constitution, and other purposes specified. It is also important, in this connection, to observe that the *article* does not provide or declare that the equation so established shall be of universal and exclusive application—that in its terms it requires that the capitation tax shall be levied when property shall be taxed—that it expressly mentions only the State and counties in connection with the subjects of revenue and taxation, and does not mention cities, towns and other municipal corporations, or make any reference to or provide for or as to them. It does not provide or direct how the revenues for those purposes, ordinary or extraordinary, shall be raised. As it so expressly provides, much in detail, as to State and county revenue and taxation, it is singular that it fails to make some reference to municipal corporations in such respect if it was intended to embrace them. That it does not so intend is the more manifest, in that they are expressly pro-
vided for in such respects in another distinct article of the Con-
(259) stitution. Moreover, the State and counties, in their nature

as to their purposes and wants, are, in many important respects, very different, and on a different footing from ordinary municipal corporations as to revenue and taxation, and it is, therefore, appropriate and orderly that provision as to them is made in a separate *article. R. R. v. Holden,* 63 N. C., 410; *Haughton v. Comrs.,* 70 N. C., 466; *Street v. Comrs., ib.,* 644; *French v. Comrs.,* 74 N. C., 692, and there are numerous other cases to the like effect.

Article VII of the Constitution is entitled "Municipal Corporations," and is exclusively devoted to that subject. Particularly for the present purpose, it describes and establishes how they may create debts and the method of raising revenue for their purposes. The fourteenth section thereof provides that "the General Assembly shall have full power, by statute, to modify, change or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9 and 13." Sections 7 and 9, not subject to modification, change or abrogation, have express reference to debts and liabilities, such as municipal corporations may create or incur, and to taxation. They are material here, and provide that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

"All taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

It should be noticed that *counties* are embraced in these sections, as they are, also, in Article V, cited and considered above. As we have seen, in the latter *article,* the equation of taxation, as above explained, applies to the raising of revenue for their ordinary purposes, that is, their ordinary purposes as political subdivisions of the (260) State, but it does not apply in the levy of taxes to pay debts of counties contracted anterior to the adoption of the present Constitution. As simply such subdivisions of the State, they are not municipal corporations proper, but are constituent parts of the State, serving mainly its purposes in the administration of government in the localities where they are severally situate. In the sections above recited in Article VII, they are put on the footing of municipal corporations proper, as they may be, for some purposes, to a greater or less extent, particularly in the creation of debts and the like, as they may be allowed to create them by statute. It is not contemplated that counties, simply as such, shall, ordinarily, contract debts or create obligations in the nature of debts; it is intended that money shall be raised currently, by taxation, to serve their ordinary purposes and pay their ordinary expenses.

As we have already seen, counties must be governed by the equation and limitation of taxation in raising revenue to defray their ordinary expenses, as provided in Article V of the Constitution. But in raising revenue to discharge any debt or other obligation they may contract or assume, as allowed by section 7 of Article VII, they must be governed by and observe the method of taxation prescribed and established by that article. And other municipal corporations must be governed by that article, as to all taxes they may have authority or occasion to levy. This is so, because that article requires that "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same except property exempted by this Constitution." It is insisted, however, in this connection, that the last recited provision simply establishes the *method* of assessing property for taxation, and that it does not intend or purport to designate the subjects of taxation; that Article V, sections 1 and 3, establishes what
(261) shall be such subjects in all cases, and certainly by municipal corporations. This is a misapprehension: because, as we have already seen, the last cited *article* does not mention or apply to municipal corporations—does not mention or refer to them, except counties as to their *ordinary* expenses; nor does it purport, in terms or just implication, to prescribe and designate the subjects of taxation for purposes other than such as are mentioned and specified therein. It seems to us very clear that the last recited clause does not nor was it intended simply to establish the *method* of assessing property for taxation. It as well and further designates what shall be the subject of such taxation, to wit, "All property in the . . . county, city, town or township." It did and does not further provide for the levy of the capitation tax. If the purpose was simply to establish a method of assessing property, the appropriate phraseology would be, "All property shall be taxed by a uniform rule and *ad valorem.*" It was not necessary to designate the *situs* of the property.

Section 6 of Article VII (now abrogated) reflects some light upon the meaning of the clause under consideration. It provides that "the township board of trustees shall assess the taxable property of their township and make return to the county commissioners for revision, as may be prescribed by law." No provision was made in that, or any connection, for listing and reporting to the county commissioners the names of persons subject to capitation tax. Why such omission if it were intended to levy the capitation tax for municipal corporation purposes? Such omission is the more significant, as section 6 of Article V provides that "the taxes levied by the commissioners of the several counties for *county purposes* shall be levied in like manner with the State taxes," etc. This obviously implies levying taxes for ordinary

county purposes, though special, including the capitation tax. No (262) such or like provision appears in Article VII. This is singular, if the purpose was in the last-named *article* to provide for the capitation tax. Moreover, if Article V was intended to have general application and to include municipal corporations, as contended, and if section 9 of Article VII was intended simply to provide a method of assessment of property for taxation, as insisted, then the latter provision is unnecessary and nugatory, because such *method* of assessment is, in effect, provided in section 3 of Article V. It is not to be presumed that a section of the Constitution, and especially one so distinctive, was intended to serve no purpose. It must be interpreted as designating the *subject* of taxation upon which taxes shall be levied for municipal purposes. Moreover, the Constitution is a solemn instrument of the highest dignity and importance. It is intended that the whole, and every article, part and clause thereof, shall have effect in all proper connections and relations for the purposes expressed and intended therein. Its provisions are not presumed or intended to be inoperative or impracticable, nor must they be so taken and treated. On the contrary, they must receive such interpretation as will give them, each and all, practical effect, if this can be done. Now, the equation of taxation referred to, and on which the appellees rely in support of their view, necessarily implies *limitation* of taxation. If such equation and limitation are intended to and must be applied generally as to taxes levied, including those to meet the ordinary expenses and purposes of the State and counties, and also the like ordinary expenses of municipal corporations, then the provision (Article VII, section 7) allowing the latter to contract debts, pledge their faith and loan their credit, is practically inoperative and nugatory, because, in such case, the subjects of taxation (property and polls) in the State are inadequate to allow the levy of taxes for any such last mentioned purpose. This was so at and before the time of the adoption of the Constitution, and has been so ever since that time. This certainly appears from many statutory enactments, the legislative and financial history of the State, and as well from the common knowledge of the affairs of the State, its resources, wealth and population. (263) Indeed, such equation and limitation have scarcely allowed a levy of taxes adequate to meet the ordinary expenses of the State and counties, and it is altogether probable that it was not intended to apply to municipal corporations. This view is strengthened by Article VIII, section 4, which provides that "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to *restrict their power of taxation,* assessment, borrowing money, contracting debts and loaning their credit, so as to prevent

abuses in assessments and in contracting debts by such municipal corporation." This section, taken in connection with Article VII, of which it is in effect a part, makes manifest the purpose to give the Legislature control of the subject of municipal taxation, except as to the method and subject of taxation. It is not at all probable that its purpose was to give the Legislature control of such taxation simply within the equation and limitation of taxation as established in Article V, section 1. For such purpose, as we have seen, it would be nugatory.

We are, therefore, of opinion: 1. That the equation and limitation of taxation established by the Constitution (Article V, section 1) applies only to taxes levied for the ordinary purposes of the State and counties; and as to levies of taxes for such purposes it must be observed. 2. That a county, when it contracts a debt, pledges its faith or loans its credit, as allowed by Article VII, section 7, must levy taxes necessary to raise revenue for such purposes upon all the property in the same, except such property as is exempted from taxation. 3. That a city, town, or other municipal corporation, "for the necessary expenses" thereof, must levy taxes upon all the property in the same, with the like exception. 4. That a city, town, or other municipal corporation, when it contracts a debt, pledges its faith or loans its credit, as allowed by Article VII, section 7, must levy taxes upon all the property
(264) in the same, with the like exception. 5. That the Constitution does not *require* that a capitation tax shall be levied except when taxes are levied for the ordinary purposes of the State and counties. Such ordinary purposes embrace the case where county commissioners levy more than the double of the State tax "for a special purpose, with the approval of the General Assembly," as provided in Article V, section 6. Such "special purpose" must be of the ordinary purposes of the county, such as that to build a courthouse, a public jail, or an important bridge, as to which it may be deemed necessary to create a special fund.

We do not mean to say that the General Assembly has not power to require a capitation tax to be levied when taxes are levied upon property. We simply decide that it is not essential that it do so. We are not called upon here to decide that it may not require a capitation tax to be levied. It seems that it may. The power to do so has been frequently exercised.

Hence, we conclude that the statute in question is not void because it failed to require a capitation tax to be levied in observance of Article V, section 1 of the Constitution, or at all. A capitation tax was not necessary to the validity of the statute.

We think that the interpretation we have thus given the several articles and clauses of the Constitution bearing upon the important

question raised by the appellees is the true one; indeed, the only one consistent with their phraseology, terms and purposes, and that renders the whole in large measure harmonious. We know that it has been said, *obiter,* in several cases, that the *equation and limitation* of taxation referred to above must be observed in levying taxes for municipal purposes; but it has not been so decided, certainly not expressly decided, nor can it be, in our judgment, without defeating the true intent reasonably appearing.

The plaintiffs' counsel further contended that the township (265) mentioned in the pleading had no corporate existence, and therefore the statute as to it is void. This contention is unfounded. Townships have a distinctive existence for specified purposes created by statute (The Code, sec. 707, pars. 13 and 14), and the Legislature may confer upon and invest them with corporate powers for a particular pertinent purpose, as to subscribe for the capital stock of a railroad company, to issue its bonds to raise money to pay for the same, to levy taxes upon the property of the taxpayers therein to pay the accruing interest upon such bonds, and to pay the same at their maturity. And there is no reason why the statute may not require the county commissioners to order the election, ascertain the result thereof, issue bonds and levy taxes in the township, as was done in this case. Indeed, such provision was convenient and expedient. The townships are constituent parts of the county organization, and county officers may well be charged with duties and authority in respect to debts they may be allowed by statute to contract. It is settled that townships may subscribe for the capital stock of railroad companies when empowered for that purpose by statute. *Wood v. Oxford,* 97 N. C., 227; *Brown v. Comrs.,* 100 N. C., 92, and cases there cited.

The plaintiffs failed to allege a cause of action, and, therefore, the court should have denied the motion for an injunction pending the action. To entitle the plaintiffs to relief by injunction pending the action they must allege a cause of action that entitles them to have the same, whatever may be the result of the trial upon its merits. *Harrison v. Bray,* 92 N. C., 488; *Moore v. Mining Co.,* 104 N. C., 534; *R. R. v. R. R., ib.,* 658.

Reversed.

Cited: R. R. v. Comrs., 109 N. C., 163; *Claybrook v. Comrs.,* 114 N. C., 460; *Herring v. Dixon,* 122 N. C., 423; *Glenn v. Wray,* 126 N. C., 732; *Wingate v. Parker,* 136 N. C., 371; *Board Education v. Comrs.,* 137 N. C., 313, 314; *R. R. v. Comrs.,* 148 N. C., 226, 237, 252; *Perry v. Comrs., ib.,* 524; *Wittkowsky v. Comrs.,* 150 N. C., 95; *Trustees v. Webb,* 155 N. C., 385; *Moose v. Comrs.,* 172 N. C., 427, 450;

Comrs. v. State Treasurer, 174 N. C., 147, 164; *Comrs. v. Boring,* 175 N. C., 112; *R. R. v. Cherokee,* 177 N. C., 99; *Wagstaff v. Highway Commission, ib.,* 359; *R. R. v. Comrs.,* 178 N. C., 457, 460; *Davis v. Lenoir, ib.,* 670.

(266)

ELVADA BUNN ET AL. v. M. G. TODD, ADMR., ET AL.

Witness—The Code, Section 590—Evidence.

1. The Code, sec. 589, abolishes the common-law incompetency of witnesses on account of interest (with the restrictions contained in section 590), except in the special cases provided for by sections 580 and 588.

2. An interest in the thing in controversy does not disqualify a witness to testify as to a communication with one deceased. The disqualifying interest is an interest in the event of the action. *Mull v. Martin,* 85 N. C., 406, approved.

3. Discussion by CLARK, J., of The Code, sec. 590.

ACTION tried before *MacRae, J.,* at February Term, 1890, of WAKE.

The plaintiff seeks to recover of the estate of the defendant's intestate the value of her share of the crop belonging to her father, which she alleges her grandfather, defendant's intestate, had received and had agreed to hold in trust for her. Plaintiff's mother, who had received the other part of said crop, was offered as a witness to prove the admissions of the deceased as to the receipt of the property by him for and in behalf of the plaintiff. The evidence was ruled out. Plaintiff took a nonsuit, and appealed.

W. N. Jones and J. N. Holding for plaintiff.
No counsel contra.

CLARK, J. Section 589 of The Code broadly sweeps away the common-law incompetency of witnesses on account of interest. Section 590 contains the only restrictions in civil cases (except in the special cases provided for by sections 580 and 588) upon the compe-
(267) tency of witnesses. It disqualifies—

WHOM—1. Parties to the action.
2. Persons interested in the event of the action.
3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness, although belonging to one of these three classes, is incompetent only in the following cases:

WHEN—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative of a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

And the disqualification of such person, and even in such cases, is restricted to the following:

SUBJECT-MATTER—As to a personal transaction or communication between the witness and the person since deceased or lunatic.

And even as to those persons and in those cases there are the following:

EXCEPTIONS—When the representative of, or person claiming through or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. Burnett v. Savage, 92 N. C., 10; Sumner v. Candler, 92 N. C., 634.

Originally this section (then section 343 of the Code of Civil Procedure) disqualified a fourth class of persons, *i. e.*, those who have had an interest in the subject-matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section by the Code of 1883, except in the cases in which such persons still come under the third class of disqualified persons above stated.

To except a witness from the general rule of section 589, rendering witness competent, all these things must concur. If the witness does not belong to one of the three classes named or, when belonging to one of them, if the testimony is not in behalf of the living, against the representative of a dead man or lunatic (or one claiming under him), or if the subject-matter is not that made incompetent for such witness in such instances to testify in regard to—if either of (268) these circumstances is lacking, the evidence can be heard. And even when all these circumstances combine, and the witness belongs to one of the classes named, and the instance when and the subject-matter all come within the terms of the section (590), still the evidence can be heard if it comes within the exceptions mentioned in the section above stated.

Apply the above classification to the question asked the witness. The *instance* (against a dead person's representative and in behalf of the

living), and the *subject-matter* (a communication between the witness and a person deceased), all come within section 590. But the third element is wanting. The witness does not belong to any one of the three classes of persons disqualified to testify. She is not (1) a party to the suit, nor (2) is she shown to be interested in the event of the action, nor (3) does any person belonging to the above two classes claim title under or through her. That she had a claim to the other part of the crop of her husband than that the proceeds which the plaintiff claims the deceased held in trust for her does not disqualify. *Mull v. Martin,* 85 N. C., 406.

The witness was, therefore, competent to testify, and the evidence was improperly excluded.

Per Curiam. Reversed.

Cited: Hopkins v. Bowers, 108 N. C., 299; *Carey v. Carey, ib.,* 271; *Watts v. Warren, ib.,* 522; *Williams v. Cooper,* 113 N. C., 287; *Clark v. Hodge,* 116 N. C., 765; *Sutton v. Walters,* 118 N. C., 499; *Lyon v. Pender, ib.,* 150; *Presnell v. Garrison,* 121 N. C., 368; *Ledbetter v. Graham,* 122 N. C., 754; *Gupton v. Hawkins,* 126 N. C., 83; *Luton v. Badham,* 129 N. C., 8; *In re Worth's Will, ib.,* 226; *Wetherington v. Williams,* 134 N. C., 280; *McGowan v. Davenport, ib.,* 531, 535; *Hall v. Holloman,* 136 N. C., 35; *Johnson v. Cameron, ib.,* 245; *Yow v. Hamilton, ib.,* 362; *Deaver v. Deaver,* 137 N. C., 246; *Bonner v. Stotesbury,* 139 N. C., 7; *Bennett v. Best,* 142 N. C., 171; *Lemly v. Ellis,* 143 N. C., 212; *Medlin v. Simpson,* 144 N. C., 400; *Henderson v. McLain,* 146 N. C., 334; *Witty v. Barham,* 147 N. C., 481; *Knight v. Everett,* 152 N. C., 119; *Highsmith v. Page,* 161 N. C., 357; *Boney v. Boney, ib.,* 620; *Carroll v. Smith,* 163 N. C., 205; *Irvin v. R. R.,* 164 N. C., 15; *Coltrain v. Lumber Co.,* 165 N. C., 44; *Seals v. Seals, ib.,* 412; *Brantley v. Marshbourn,* 166 N. C., 531; *Linker v. Linker,* 167 N. C., 652; *Zollicoffer v. Zollicoffer,* 168 N. C., 329; *White v. Guynn, ib.,* 435; *Ins. Co. v. Woolen Mills,* 172 N. C., 537; *Brown v. Adams,* 174 N. C., 493, 502; *In re Chisman,* 175 N. C., 422; *Bissett v. Bailey,* 176 N. C., 46; *Pope v. Pope, ib.,* 286; *McEwan v. Brown, ib.,* 253; *Bank v. Wysong,* 177 N. C., 292; *Harris v. Harris,* 178 N. C., 9; *Sorrell v. McGhee, ib.,* 280; *Price v. Edwards, ib.,* 495; *In re Lowe,* 180 N. C., 149; *In re Hinton, ib.,* 211.

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J. R. GAY AND WIFE ET AL. v. A. L. DAVIS, ADMR., ET AL.

Commissioner to Sell Land—Costs—Expenses of Sale—Counsel Fees.

A commissioner appointed to make sale of lands under a decree of court will not be allowed any extra compensation for his attorney's fees, where it appears that his duties are simple and it is not made to appear that the services of counsel are necessary.

APPEAL from *Womack, J.*, at Spring Term, 1890, of GRANVILLE.

The case is, in substance, this:

A judgment in the action was entered against certain of the defendants, in which they were required, by a day designated, to pay the mortgage debt specified, and it was ordered further that if the same should not be paid on or before that day that the defendant, administrator of one of the deceased mortgagors, as commissioner appointed for the purpose, sell the land described in the pleadings and apply the funds from the sale to the payment of the mortgage debt, the payment of the costs of the action, the allowance to himself of $20 for making sale, etc., an allowance of *$25 to his counsel as commissioner,* and $5 allowance to Hicks for making his report of costs, etc. The land was twice sold—the last time for $652.39.

The appellants excepted to so much of the judgment as directs the commissioner to pay to his counsel $25 out of the fund raised by the sale of the land, and appealed to this Court.

R. W. Winston for plaintiffs.
J. B. Batchelor and L. C. Edwards for defendants.

MERRIMON, C. J., after stating the facts: There is no statu- (270) tory provision in this State that has been brought to our attention, or within our knowledge, that prescribes or authorizes an allowance of compensation directly to the counsel of commissioners charged with a particular duty by an order of court or otherwise, or to counsel of trustees, whatever may be the nature of the trusts wherewith they may be charged. Nor is there any general rule of practice prevailing in courts that permits such allowances to be made. In the absence of statutory provision, the courts, in the exercise of chancery powers, make allowances to commissioners and trustees in appropriate cases, and such allowances are sometimes enlarged, so as to embrace reasonable compensation to counsel of such commissioners or trustees in cases where counsel is necessary to a proper discharge of their duties, but in

such cases the courts are careful to see that the services were necessary, that the charges are reasonable and are charged against the proper parties.

In *Mordecai v. Devereux,* 74 N. C., 673, the late *Chief Justice Pearson,* a lawyer and judge of great experience and observation, said: "This Court has never interfered between attorney and client in making allowance for professional services, and we are not inclined, at this late day, to assume the power to do so. We make allowance to a clerk for stating an account, or to a commissioner for making sales, on the ground that the work is done by order of the court. But we have never supposed that we could be called on to settle fees between client and attorney, although there be a fund in the keeping of the Court."

The court has no authority to determine what compensation counsel shall demand or ought to have—it has authority to determine what are just and reasonable expenses of, and allowances to commissioners and trustees, when they come within its jurisdiction for appropriate purposes. In some cases they need and require the aid of legal
(271) counsel in the discharge of their duties. Such counsel is necessary for the just protection and advantage of all persons interested in the execution of the purposes of the commission or trust, but the court can only know and deal with the party over whom it has jurisdiction and control. As to them, unless otherwise provided by statute, it can determine the measure of charges and allowances, and who shall pay the same, and that the same shall, or shall not, be paid out of funds of which the court has control.

The court, therefore, erred in making the allowance to counsel and directing the commissioner to pay the same. It should simply have allowed the commissioner reasonable compensation for selling the land, disposing of the fund, and executing the deed to the purchaser, etc., as directed by the judgment.

What is such reasonable compensation or allowance must depend very largely upon the nature and circumstances of each case. Ordinarily, the duties of a commissioner appointed to sell a tract or tracts of land are very plain and simple—he does not need and ought not to require the aid of counsel, and in such cases no allowance on that account should be made to him; he simply incurred unnecessary costs. There may be exceptional cases in which a commissioner might not unreasonably require the aid of counsel, and he would be allowed to make a reasonable charge on that account, but the court will be very cautious in making such allowances, and very careful to prevent abuses. Indeed, it would be better, in cases where counsel may be required, that the court should, in advance, allow such aid to be employed.

It was suggested on the argument that the small allowance of twenty dollars to the commissioner was surely not intended to embrace the fees to counsel for preparing the deed for the purchaser. If this were so, it could not warrant the allowance made to counsel—the rule of practice above pointed out forbade it. But so far as we can (272) see, the duty of the commissioner was very simple, and he did not need the aid of counsel. The land did not sell for a great sum, and the allowance of the commissioner was considerably greater than the statutory allowance (The Code, sec. 1910) to commissioners appointed to sell land for partition for "selling such land and making title thereto." That statute provides that for such sales amounting to five hundred dollars or less the allowance shall not exceed ten dollars, and when the same amounts to more than that sum, and not exceeding two thousand dollars, it shall not exceed two *per centum* of the amount of the sale. The duties of such commissioners are very much alike, and not less burdensome than the duty of the commissioner in this case. The purpose of the Legislature is to make the sales of land for partition cost the parties interested as little as practicable, and we are unable to see why such purpose should not prevail as to like sales made under orders of the court for other purposes, having a proper regard as to the extent of the services rendered.

There is error. The judgment must be modified by striking from it the allowance to counsel.

Modified.

Cited: R. R. v. Goodwin, 110 N. C., 176; *Knights of Honor v. Selby,* 153 N. C., 207; *Banking Co. v. Leach,* 169 N. C., 711; *Durham v. Davis,* 171 N. C., 307; *In re Stone,* 176 N. C., 343.

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S. W. H. SMITH v. R. R. KING, TRUSTEE.

Deeds of Separation—Husband and Wife—Subsequent Cohabitation—Cancellation of Record.

1. A deed of separation between husband and wife will be canceled by a Court of Equity when it is made to appear that the parties, since its execution, have cohabited together as man and wife.

2. When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice.

3. The law of North Carolina, while it may allow, does not look with favor upon deeds of separation.

APPEAL from *Armfield, J.*, at February Term, 1890, of GUILFORD, in which the plaintiff sought the rescission and cancellation of a deed of trust mentioned in the pleadings and set out as an exhibit.

Defendants resisted this rescission and cancellation upon the grounds set forth in their answers. A jury was impaneled, and after the reading of the pleadings, and after certain admissions of fact were mutually made and accepted by the counsel for plaintiff and defendant, his Honor suggested that there was no matter disputed making it necessary for an issue to be submitted to the jury, and by consent of counsel on both sides the jury was dissolved, and it was agreed that the court should hear the case upon the pleadings and upon the admissions, all of which admissions appear in the judge's judgment, except that it was admitted that the defendant Mary A. M. Smith had lived separate and away from her husband for thirty months during the five years since the deed was made, and at the time of the trial had been living separate from her said husband for one month, though she was living with him, and supported by him, and cohabiting with him at the time the (274) action was brought. And it was further admitted by the parties that said deed of trust was made in consideration of the perpetual separation and living apart in the future of the plaintiff and the *feme* defendant—there being then a suit pending for divorce between them, in which the *feme* defendant was plaintiff, and this deed being made on a compromise of said suit, plaintiff and the *feme* defendant being, at the time the deed was made, actually living apart. In the course of the argument and consideration of the case, the defendant Mary A. M. Smith, by her counsel, in order to meet a probable conclusion of the judge adverse to her, on the ground of her return and cohabitation with her husband, asked the court to have an issue submitted to the jury as to whether her said return was voluntary or procured by the fraud of her husband.

To this suggestion the court remarked that she had stated in her answer that her return to her husband was voluntary, because she could not bear separation from her children, etc., and that she had not alleged in her answer that said return and cohabitation was procured by any fraud or solicitation of her husband.

There was no motion to amend the answer of defendant Mary A. M. Smith in this respect, nor any suggestion that it could be truthfully amended, and the judge declined to frame and submit the issue proposed.

The defendant assigned the following errors:

1. In adjudging that the deed in trust sought to be set aside became and was void and of no force and effect, from the fact of the wife's return and cohabitation with plaintiff as his wife for twelve months preceding the commencement of this action.

2. In adjudging the delivery of the deed and its cancellation by the clerk, and in ordering a marginal entry of satisfaction by the clerk as to said deed on the books of the register of deeds of (275) Guilford County.

3. In ruling and adjudging invalidity to the deed in trust, it being intended and induced upon considerations not contrary to public policy as recited in said deed, and on valuable consideration moving from the *cestui que trust* as appeared in said deed.

4. In failing to make a statement of the facts found on which his judgment was based, and particularly in failing to find the length of separation in the five years and six months, when they occurred, and the existing separation when the trial was had, and the manner and character of the wife's return, as to whether *bona fide* or fraudulently obtained.

5. In adjudging the invalidity of the deed without inquiry into the debts and liabilities of the trust fund in respect of advances by the trustee to the *cestui que trust,* or debts incurred by her to others and not paid within the limit of the annual sum of $120 per year as provided for in the deed.

6. In declaring the deed void without proper provision for the trustee for commissions, and for fees incurred for professional advice.

7. In adjudging costs against the wife.

8. In adjudging costs against the trustee for maintaining and insisting on his title as commanded in the deed and his legal duty therein.

The other facts are stated in the opinion.

John A. Barringer and J. N. Staples for plaintiff.
John H. Dillard and L. M. Scott for defendant.

CLARK, J. On grounds of public policy, deeds of separation between husband and wife were held invalid in this State. *Collins v. Collins,* 62 N. C., 153. There has been no statute since legalizing such deeds, but they seem incidentally to be recognized as valid by section 1831 of The Code. *Smith, C. J.,* in *Sparks v. Sparks,* 94 N. C., (276) 527, intimates that this section, to some extent, at least, renders valid articles of separation. But it is not necessary that we pass upon this question. For, conceding, for the argument, that such deeds, in proper

cases, will be upheld, we concur with his Honor below that, it being admitted that "at the commencement of this action the wife was, and had been, for twelve months next preceding said term, living and cohabiting with the plaintiff as his wife," the deed of separation became void and of no effect. It was alleged in the complaint, and admitted on the trial, as stated in the case on appeal, that, notwithstanding the consideration expressed on its face, the deed, in fact and in truth, was executed in consideration of the perpetual separation and living apart of the husband and wife, and to maintain the wife in such state while deprived of the support of her husband. When she returns to his roof, cohabits with him and is supported by him, this annuls all agreement for a separation and for the support rendered necessary thereby. Adams' Eq., 45; Shelford Marriage and Div., 629; 2 Roper Husband and Wife, 316; *Sheltar v. Gregory,* 2 Wendell, 422; 90 Am. Dec., 369. The law, if it recognizes, does not favor, articles of separation, and will not so construe them as to be valid after the parties have themselves canceled the agreement to separate by cohabiting together, unless it appear in the deed plainly that such separate support is to be continued, notwithstanding any future reconciliation and cohabitation. This was so considered by *Lord Eldon* in *Lord St. John v. Lady St. John,* 11 Vesey, 537, and by *Buller, J.,* in *Fletcher v. Fletcher,* 2 Cox Ch., 99.

The court properly ordered the deed to be canceled. There is no provision of the statute that, in such cases, an entry referring to the judgment of cancellation shall be made on the margin of the regis-
(277) tration of the deed. The court below did not adjudge the original deed void in its inception, but to have become so by matters subsequent, and the proper course was to have ordered a reconveyance of the legal title by the trustee, and that such judgment be regarded as a deed of reconveyance and registered. The Code, secs. 426, 427.

The reference on the margin of registration also is advisable and convenient in practice, and to be recommended, but of itself it does not reconvey the title. The statute giving such effect to the marginal entry of satisfaction applies only to the discharge of trust deeds and mortgages. The Code, sec. 1271. The judgment should be modified to comply with provisions of sections 426 and 427.

As to the fourth exception, it appears that the judgment is based solely upon the pleadings and admissions on the trial, and no facts were in dispute to be passed upon or found by the judge. *Brooks v. Brooks,* 90 N. C., 142.

There was no allegation in the pleadings that the return of the wife was procured by fraud or was other than *bona fide,* and the answer states that her return was of her own motion. It was not error to refuse

to submit to the jury an issue not raised by the pleadings, though the court, in its discretion, had power to submit the issue and permit an amendment of the pleadings.

On the trial the court suggested that it would order a reference to ascertain what debts and obligations were outstanding and chargeable upon the trust property, and whether anything was due the trustee, whereupon defendant trustee stated that "such reference was unnecessary, for that there were no debts or obligations chargeable upon the property, and nothing due the trustee, as all the transactions under the trust had been several years ago, and had been fully settled up." The defendant has nothing, therefore, it seems to us, on which to base his fifth and sixth exceptions.

It was erroneous to tax the wife and the trustee personally (278) with costs. By virtue of The Code, sec. 535, subsec. 1, the costs should be taxed against the estate in the hands of the trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement or bad faith in such action or defense. Such was not the case here, and the judgment for costs must be modified accordingly.

Per Curiam. Modified and affirmed.

Cited: Smith v. Smith, 108 N. C., 369; *Cram v. Cram,* 116 N. C., 294; *Hockoday v. Lawrence,* 156 N. C., 322; *Ellett v. Ellett,* 157 N. C., 164; *Archbell v. Archbell,* 158 N. C., 413; *Morris v. Patterson,* 180 N. C., 486.

LULA G. ALLEN v. JOHN H. ROYSTER, ADMR., AND W. A. BOBBITT ET AL.

Administration — Final Account — Vouchers Approved by Deputy Clerk — Return — Prima Facie Evidence — Counsel Fees — Next of Kin—Commissioners.

1. Where a final account of an administrator was examined and the vouchers passed upon by the deputy in the presence of the clerk of the Superior Court, who, immediately afterwards, and without special examination, signed a general approval: *Held,* that such return was competent as *prima facie* evidence against the plaintiff.

2. A defendant can take no benefit from the refusal of the court to dismiss plaintiff's action, upon motion, when he did not appeal from such refusal.

3. Where an action is brought within two years after qualification of administrator by the next of kin to enforce account and distribution of the estate,

and the defendant pleaded that he had fully administered and settled the estate: *Held*, it was not necessary to allege, to maintain such action, that two years had elapsed next after the qualification of administrator.

4. The administrator might consent to account sooner, and if there was no such consent, or any reasons why there should be delay, he could set them up as defense to the action.

5. It was not essential for the complaint to allege that there is "no necessity for retaining the funds," under section 1512 of The Code.

6. An administrator is not entitled to be allowed counsel fees for defending an action by next of kin to compel him to final settlement, when he unreasonably, willfully and dishonestly delays to account with them.

7. An administrator is not entitled to commissions on such sums as he ought to have accounted for and failed so to do.

(279) APPEAL at Spring Term, 1890, of GRANVILLE, from *Womack, J.*

This action is brought by the plaintiff, sole next of kin of the intestate of the defendant administrator, upon the bond of the latter and his sureties thereto. The plaintiff alleges that the defendant, as administrator, took into his possession considerable personal property of his intestate; that he failed and neglected to duly administer the same, etc., and especially failed and refused to account with and pay to her such sums of money, etc., as were due to her, etc., as such next of kin, whereby he committed breaches of the conditions of his said bond, etc. The defendant denies that he has committed such alleged breaches of his said bond, and alleges that he has duly administered and closed the estate in his hands, etc.

The plaintiff, on the trial, put in evidence the inventory of the defendant administrator of the property that went into his hands and which he filed in the proper office, and she also introduced evidence tending to show that he had not, in several respects, duly administered the estate. The defendant administrator then offered in evidence a paper-writing purporting to be his "final return" and settlement of the estate in his hands, made before the clerk of the Superior Court. The defendant objected to the admission of this paper-writing as evidence, and introduced the deputy clerk, who testified as follows: "I am a sworn deputy of my father, who is clerk of the Superior Court of this county.
(280) We held these respective positions on 26 January, 1889. On that day the administrator, accompanied by his attorney, produced the accounts before the clerk of the Superior Court in his office. My father and I were both present. The attorney asked something about the papers and account. My father said, 'Just turn them over to Robert,' meaning myself. The attorney asked father if it was upon his approval that I approved the vouchers. He answered, 'Yes.' We all sat down

to a table. The items in the account were called off. I took the vouchers and wrote on each, as it was reached, the word 'approved.' I examined the vouchers. The clerk of the Superior Court was present, and all was done in his hearing. He did not pass upon the separate vouchers, but approved my work. The signature to the general approval, which appears on the account, is in his handwriting. He signed it when we had concluded our work. Upon the conclusion of our work, I filed the account in the office and turned the vouchers over to the administrator, who carried them away with him."

The court found the facts thus stated to be true, and admitted the paper-writing in evidence, and the plaintiff excepted.

The defendant introduced two gentlemen of the bar to prove what would be reasonable compensation to his counsel for managing his defense in this action. The plaintiff objected. The court admitted the evidence, and the plaintiff excepted.

The court, among other things, instructed the jury that if, under its instructions, "they should find that the administrator should be charged with a greater sum for rents than that returned in his account and inventories, or that the horse (mentioned) was purchased for himself and was worth more than $31, they might give the administrator commissions on such additional sums, not to exceed 5 per cent." The plaintiff excepted.

The court further instructed the jury "that they might allow (281) the administrator reasonable counsel fees in defending the action, and on this point they would consider the testimony" of the lawyers introduced as witnesses as to that subject. The plaintiff excepted.

In this Court the counsel of the defendant moved to dismiss the action, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, "in that it fails to allege that there is no necessity for retaining the funds" until two years next after the qualification of the administrator (The Code, sec. 1512); that the action was brought within two years next after such qualification, and that the motion was made in the court below before the defendants answered, and was denied them, and the defendants excepted.

Verdict and judgment for the defendants, and the plaintiff appealed.

L. C. Edwards and J. B. Batchelor for plaintiff.
R. W. Winston for defendants.

MERRIMON, C. J., after stating the facts: The defendants can have no benefit of their exception to the refusal of the court below to grant their motion to dismiss the action, if the motion had merit, because they did not appeal.

The motion here to dismiss the action is without merit. The complaint alleges a cause of action. It need not necessarily allege that two years had elapsed next after the administrator qualified as such, and before the action began, because the administrator might consent to account fully or partially with the next of kin before such lapse of time, and if there existed valid reasons why he should not, he should set these up as matters of defense in a proper way. It might turn out that the court would require the administrator to account with the distributee in some measure, and stay the action as to the final account at the
(282) end of two years. *Clements v. Rogers,* 91 N. C., 68, and the cases there cited; *Godwin v. Watford, ante,* 168. Moreover, the defendant alleges that he has duly and fully administered the estate, and thus, in effect, admits that there is no substantial reason why he shall not be called to a final account with the next of kin by this action. The motion to dismiss the action must, therefore, be denied.

As to the first exception, we are of opinion that if it be granted that the clerk should have examined and approved the account filed by the defendant administrator, and which was read in evidence on the trial, the plaintiff objecting, he did so in effect. He was present, gave directions, saw what was done, heard what was said when and while the account was being examined in his presence, and he endorsed his approval thereon. The deputy clerk was simply acting as his servant, and aided him in the examination of the account. The clerk clearly intended to, and did, exercise his authority, although he may not have been as circumspect as he should have been, and did not scrutinize the several matters and items embraced by the account and the vouchers as thoroughly as he should have done. The statute (The Code, sec. 1399) makes such sworn account, thus examined, endorsed and filed in the office of the clerk of the court, *prima facie* evidence of its correctness. But it was not conclusive against the plaintiff, nor would it be against creditors or any person interested adversely. It simply shifted the burden of proof, as to the correctness of what it contained, to him who alleged the contrary. *Grant v. Hughes,* 94 N. C., 231; *Grant v. Reese, ib.,* 720. The court, therefore, properly admitted the account in evidence, not as at all conclusive, but subject to the plaintiff's right to contradict it by any proper evidence.

The other exceptions may be disposed of together. The defendant administrator was certainly entitled to be allowed a credit for reasonable compensation he may have paid to counsel who advised him
(283) in the due administration of the estate, including the bringing and prosecution of necessary actions brought by him, and in defending such as were brought against him, including that for a final

settlement of the estate. But an administrator should not be allowed credit for fees paid to counsel in the defense of an action to compel him to a final account with the next of kin, when he unreasonably, willfully and through dishonest and fraudulent motives refused to account to them. This is so because, in such case, the purpose is not to promote and secure the just administration, final settlement and distribution of the estate, but to promote selfish and sinister purposes of the administrator, personally. His purpose is not to promote, but to defeat, the right of those justly entitled to have the estate.

The case settled on appeal states that "there was evidence tending to show that the horse (sold by him) was purchased for the administrator, and he was worth, at the time of the sale, a larger sum than the sum returned by the administrator; and that the rents received, or that should have been received, by the administrator were of greater value than $40 (the amount he accounted for). There was also evidence tending to controvert these facts." Such being the evidence, and it so conflicting, the court should have further instructed the jury that the defendant could not be allowed fees paid by him to counsel for defending this action if he sought to cheat and defraud the estate and the plaintiff by buying the horse himself for less than his reasonable value, and by dishonestly failing and refusing to account for the rents received by him; and, further, that he would not in such case be entitled at all to commissions for such sums of money as he ought justly to have accounted for, but did not. An executor or administrator is not entitled to commissions if he fails to discharge his duties faithfully and honestly. *Grant v. Reese, supra,* and the cases there cited at pp. 731 and 732. Of course, it would be otherwise in this case if the defendant administered the estate in his hands faithfully and justly, and there was evidence tending to show that he did, as well as the contrary.

The evidence of the witnesses introduced to prove what was (284) reasonable compensation to the counsel of defendant for his services in this action was competent to be submitted to the jury, in the view that the defendant made defense in good faith, with a view to a just final account and distribution of the estate. We may add that, in allowing credit to the defendant on such account, regard should be had to compensation paid to counsel in the course of the administration, because the defendant should be allowed credit for reasonable counsel fees paid about the whole administration. He cannot, ordinarily, be allowed to pay counsel fees for particular services, when he should have counsel generally as administrator. He must observe a just and reasonable economy.

New trial.

Cited: Collins v. Smith, 109 N. C., 471; *Bean v. Bean,* 135 N. C., 94; *Caviness v. Fidelity Co.,* 140 N. C., 62; *Rich v. Morisey,* 149 N. C., 48; *Overman v. Lanier,* 157 N. C., 550; *Marler v. Golden,* 172 N. C., 825; *Williams v. Bailey,* 177 N. C., 40.

W. G. EGERTON, ADMR., v. NANNIE P. JONES ET AL.

Deed Absolute on Its Face Converted into a Mortgage—Correction—Equity—Fraud—Mistake — Ignorance — Undue Influence—Clerk—Jurisdiction—Sale of Land for Assets.

1. A deed absolute on its face will not be corrected and converted into a mortgage where it is not shown that a defeasance clause was contemplated by the parties and omitted by reason of ignorance, fraud, mistake, or undue influence.

2. The fact that a deed was drawn by one not familiar with legal forms does not meet the indispensable requirements of a Court of Equity for granting such relief.

3. An administrator petitioned to sell the lands of his intestate to pay a certain debt against the estate. The land was set apart to the intestate in his lifetime as a homestead, and then conveyed to one B., who reconveyed to the intestate's wife and children. It did not appear that either conveyance was in fraud of creditors: *Held,* (1) the lands were not subject to be sold for the debts against the estate; (2) the presumption of a resulting trust in favor of the intestate is met by the counter-presumption of advancement in favor of the wife and children; (3) the intestate having no legal or equitable interest, the clerk had no jurisdiction to sell.

(285) APPEAL from *Womack, J.,* at March Term, 1890, of WARREN.

(288) *T. C. Fuller for plaintiff.*
J. B. Batchelor for defendants.

(289) SHEPHERD, J. 1. We can see no error in the ruling of the court upon the trial of the issue submitted to the jury. It was very properly held that there was not sufficient evidence to show that the deed was not written as the parties intended. Indeed, the evidence does not at all suggest that a clause of defeasance was ever contemplated by the parties, and was omitted by reason of "ignorance, mistake, fraud or undue influence," and this it was necessary to prove before the deed could be corrected. See this case, reported in 102 N. C., 281, and the authorities cited.

The fact that the deed was drawn by one who was "not conversant with legal forms" does not meet the indispensable requirements of a Court of Equity in granting such relief, and this seems to be the only evidence, in addition to that which was introduced upon the former trial.

2. We are of the opinion, however, that his Honor should have allowed the motion to dismiss. This motion was not made at the former hearing, and was therefore not passed upon by the court.

The petitioner, as the administrator of Mark P. Jones, alleges that there is outstanding a judgment in favor of one Cheatham against his intestate; that the personal assets are insufficient to pay the same, and that a sale of the land is necessary. The land described in the complaint was set apart to the intestate as his homestead, and afterwards conveyed by him to John E. Boyd, who subsequently conveyed it to the widow and children of the said intestate. These facts appear upon the face of the petition, and it is not alleged that conveyance to Boyd and the conveyance by him to the defendants were made with intent to defraud the creditors of the intestate. Neither does it appear that the intestate had any equitable interest in the land at the time of his death; for, taking the answer to be true, that Boyd held the land in trust for him, and conveyed it, at his instance, to his wife and (290) children, the presumption of a resulting trust would be met— in the absence of any testimony rebutting it—by the counter presumption that the land was intended as a provision or advancement for his wife and children. Adams Eq., 35; Bispham Eq., 84.

It being manifest, then, that the intestate had no legal or equitable interest in the land at his death, it must follow that it could not be sold upon the petition of the administrator, and that the clerk had no jurisdiction. *Mauney v. Holmes,* 87 N. C., 428; and *Murchison v. Williams,* 71 N. C., 135, holding that judgment and mortgage liens should be enforced by proceedings in which the administrator is a party, in order that the land may be exonerated in favor of the heirs or devisees by the personal estate, have no application where the intestate had no interest in the land at the time of his death. It is only when land, or some interest therein, has descended or been devised, or where it has been conveyed with intent to defraud creditors, that the administrator can have it sold in order to make assets. Code, sec. 1446. This has been distinctly decided in *Heck v. Williams,* 79 N. C., 437, which is a case directly in point. In that case the land was subject to a lien of a judgment, and was conveyed by the intestate without fraudulent interest. The court held that, though the sale did not divest existing liens, "it divested the intestate of all title, legal and equitable in the land sold, and that the administrator, as to that, was *functus officio.*"

In *Lee v. Eure,* 93 N. C., 5, cited by the plaintiff, the conveyance of the land was alleged to be fraudulent, and the decision in that case is entirely consistent with the ruling in *Heck v. Williams, supra.* The repeal of sections 318 to 324, Code of Civil Procedure (Bat. Rev.) in no way affects the principle of the above case, as the said sections had reference only to cases where the debtor died without having disposed of his land.

Action dismissed.

Cited: Stainback v. Harris, 115 N. C., 104; *Porter v. White,* 128 N. C., 44; *Harrington v. Hatton,* 129 N. C., 147.

(291)

THE COMMISSIONERS OF VANCE COUNTY v. THE COMMISSIONERS OF GRANVILLE COUNTY.

Counties—County Commissioners—Division of Counties—Outstanding Indebtedness—Taxes—Sufficient Cause of Action—Necessary Parties.

1. The county of Vance was created by act of Assembly, passed 5 March, 1881, but it was expressly provided that the citizens and property taken from the counties of Granville and Franklin, for such purpose, should not be released from their proportions of the outstanding public debt of said counties contracted before the passage of the act, the proportions to be determined by the county commissioners of the three counties. In an action by the commissioners of Granville against the commissioners of Vance, it appeared that the former had, and the latter had not, appointed any commissioner or taken other steps to arrange a settlement, and the relief provided by statute was sought in court. The defendants denied that the outstanding debt was as large as alleged, and claimed that the proceeds of some real estate sold, after the passage of the act, by order of the county of Granville, ought to be applied in discharge of the debt: *Held,* (1) that these facts constitute a sufficient cause of action; (2) that the commissioners of Franklin were not necessary parties in an action to adjust the matters of difference between Granville and Vance; (3) the citizens of the new county created were, for the purpose of the collection of the said outstanding debt, citizens, respectively, of their old counties.

2. The outstanding debt should be reduced by the amount of taxes collected in 1880 (but paid after 5 March, 1881) above what was necessary for current county expenses, and also by the amount of such taxes as were a balance in the hands of the county treasurer on 1 September, 1881.

3. The taxes of the year 1880, collected for current county expenses and applied to that purpose between 5 March and 1 September, 1881, should not have been applied in reduction of the outstanding indebtedness.

4. *Quaere:* As to whether the proceeds of land not necessary for county purposes, sold *prior* to the creation of the new county, could be applied in discharge of the debt outstanding before division.

APPEAL at Spring Term, 1890, of VANCE, from *Boykin, J.* (292)

The county of Vance was created by, and organized under, and in pursuance of, the statute (Laws 1881, ch. 113), and, as to its territory, it is composed of detached parts of the counties of Granville, Franklin and Warren. The fifteenth section of that statute provides as follows: "That that portion of the citizens and taxable property taken from the counties of Franklin and Granville and attached to the county of Vance, shall not be released from their proportion of the outstanding public debts of the said counties of Granville and Franklin contracted before the passage of this act; said proportions to be ascertained and determined by the county commissioners of Granville, Franklin and Vance Counties, in such manner and by such method as may be agreed upon."

Soon after the election of commissioners for the county of Vance, the board of commissioners of the county of Granville appointed a commissioner, charged with authority to act conjointly with a like commissioner to be appointed by the board of commissioners of the county of Vance in settling the matters and things mentioned and referred to in the statutory provision above recited; but the latter board had not appointed such like commissioner, or suggested or proposed any manner or method of making such settlement at the time this action was brought, on 4 September, 1882. The statute above cited was ratified on 5 March, 1881.

The plaintiff board alleged, in its complaint, that the county of Granville owed an outstanding public debt specified at, and next before, the enactment of the statute above cited; that it had appointed a commissioner as above stated; that the defendant had refused to appoint a like commissioner, or to take any action looking to a settlement of the matters and things mentioned and referred to in the above (293) cited section of the statute, as therein contemplated; and it demanded judgment as follows:

1. That an account may be taken by and under the order and direction of the court, so as to ascertain and determine the true amount of the public debt of the said county of Granville contracted before, and outstanding at the time of the passage of said act, and of the interest thereof, and also the proper proportion thereof of that portion of the citizens and taxable property taken from the county of Granville and attached to the county of Vance as aforesaid, within the meaning and intent of the said act, or that the same may be ascertained and determined in such other manner as the court may think proper to direct.

2. That the plaintiff may have judgment for the proportion aforesaid of the said public debt of said county of Granville, when ascertained and determined as aforesaid, and interest on the same, and for costs of suit.

3. That the defendant may be compelled, by writ of *mandamus,* to levy and collect, according to law, on the taxable polls and property of that portion of the said county of Vance which was taken from the said county of Granville and attached to the said county of Vance as aforesaid, sufficient taxes for the payment of the said judgment, and to apply the said taxes, when collected, to the payment of the same.

4. That the plaintiff may have such further or other relief as the nature of the circumstances of this case may require and to the court shall seem meet.

The defendant, in its answer, admitted the right of the plaintiff to have an account taken; denied that the outstanding debt was such or so much as alleged in the complaint; that it had refused to take proper action as contemplated by the statute; averred its readiness to take such action at all proper times, and submitted to the court its readi-
(294) ness and willingness to take such action as might be proper, etc.; and it alleged that it was entitled to have certain real estate, not necessary for public purposes of the plaintiff, sold, and the proceeds of sale applied in part payment of such outstanding debt, etc. The plaintiff filed its reply, denying the defense alleged.

Afterwards, by consent of the parties, "all the matters of controversy in the action" were referred to referees. Their findings of fact were to be "final and conclusive," and reported; and they were to state separately their conclusions of law, and all questions and issues of law raised—these to be reviewed and affirmed or reversed by the court, etc.

Afterwards the referees made an elaborate and detailed report, and with a view to present certain questions of law raised, among other things, reported as follows:

"By request of the counsel of defendants, in order to enable the defendants to raise and present the questions of law hereinafter mentioned, and with the consent of the counsel of the plaintiff, the undersigned report the following:

"1. That during the month of May, 1881, the sheriff and treasurer of said county of Granville, under an order made by the board of commissioners of said county, on 7 December, 1880, paid the sum of $3,450.42 out of the tax levy of 1880 upon the judgments rendered and docketed prior to 5 March, 1881, against the board of commissioners of said county of Granville, which judgments are charged in this account, without credit for such amount, and the same was allowed him

on 17 May, 1881, upon an examination of his account at that date by the finance committee of the board of commissioners of said county of Granville.

"2. That the board of commissioners of said county of Granville expended out of the taxes collected on the tax levy of 1880 the sum of $2,700 for the current expenses of said county from 5 March, 1881, to 1 September, 1881. (295)

"3. That on the settlement of the sheriff and treasurer of said county of Granville for the tax levy of the year 1880, which settlement was made 1 September, 1881, there was a balance of cash in his hands of $9,260.60, after deducting schedules B and C, including $200 of the tax levy of 1879.

"5. That on 5 February, 1879, the justices of said county of Granville directed the commissioners of said county to make sale of a portion of the poorhouse lands of Granville County unnecessary for pauper purposes; that in pursuance of this direction the said commissioners ordered such sale 17 November, 1879, and the same was made and reported 15 December, 1879, and ratified by said commissioners on 6 January, 1880; that the sale was reported to the justices, who refused to confirm the same, that no further steps were taken towards making sale prior to 5 March, 1881, but that sale has since been made of a portion of said poorhouse lands under an order made since 5 March, 1881, by justices of the peace and the commissioners of Granville County; that the land thus ordered to be sold 17 November, 1879, was reasonably worth the sum of $5,000, and a copy of the order of the commissioners directing said sale is hereto annexed.

"7. That amongst the county orders hereinbefore mentioned as issued after 5 March, 1881, for debts contracted before 5 March, 1881, and existing and outstanding against Granville County at that date, and which are included in the amount of indebtedness hereinbefore mentioned as existing and outstanding against the county of Granville on said 5 March, 1881, was a county order, No. 196, for $158.89, issued to Robert Garner on 5 July, 1881, for stationery furnished the county of Granville for 1880, and that said order was allowed said Garner as a credit in the settlement on 1 September, 1881, of his (296) collections of taxes under the tax levy of 1880."

The counsel of the defendants insisted, as matter of law, that before estimating the said townships' porportion of the public indebtedness aforesaid of the county of Granville, existing and outstanding on 5 March, 1881, there ought to be deducted therefrom the said sum of $3,450.42, paid after 5 March, 1881, upon judgments rendered and docketed before said 5 March, 1881, as aforesaid; also the said sum of

$2,700 expended for current expenses of the county of Granville from 5 March, 1881, to 1 September, 1881, out of the taxes collected on the tax levy of the year 1880 as aforesaid; also the said sum of $5,000 (value of the lands ordered 14 November, 1879, to be sold as aforesaid); also the said sum of $9,260.60 (balance of cash in hands of said Robert Garner, as sheriff and treasurer, on settlement made 1 September, 1881, as aforesaid); also the said sum of $1,000 (value of the portion of lot leased by the commissioners of Granville County to the commissioners of the town of Oxford as aforesaid); also the said sum of $158.89 (amount of county order No. 196, issued to Robert Garner on 5 March, 1881, allowed him as a credit in settlement on 1 September, 1881, aforesaid); all of which sums amount to .....

The plaintiffs' counsel insisted to the contrary, and it being a mere question of law upon the facts stated herein, the undersigned, who are unable to agree on any of these questions of law, submit it for decision to the court.

Defendants also denied their liability for any costs upon judgments rendered since 5 March, 1881; and this, with other questions of law, is left to the judge.

(297) The defendants filed several exceptions to the above part of the report, assigning as error that the referees had failed and refused to decide each of the questions of law in its favor; and it further excepted, as follows:

"8. That said referees do not find as a fact, as, from the evidence, they should have done, that county orders, juror and witness tickets referred to them as having been issued subsequent to 1 March, 1881, together with other orders, juror and witness tickets included in their statement of the outstanding indebtedness, were for the current expenses of said county for the fiscal year ending 30 June, 1881, covered by and paid out of the tax levy for 1880, and ascertain the amount thereof, and state their conclusion of law therein."

(It is admitted that the statement of indebtedness included orders, juror and witness tickets, being part of the current expenses of Granville for the year ending 30 June, 1881.)

The court gave judgment for the plaintiff, and the defendant, having excepted thereto, appealed, assigning error as follows:

"The defendant excepted to the judgment, and, for ground of exception says that the court erred in overruling exceptions 1, 2, 3, 4, 5, 6, and 8 to the referee's report."

R. W. Winston for plaintiff.

C. M. Cooke, T. M. Pittman and T. C. Fuller for defendant.

MERRIMON, C. J., after stating the facts: The defendant contended in this Court that the complaint fails to state facts sufficient to constitute a cause of action, and, therefore, the action must be dismissed. This objection is unfounded in any aspect of it. The parties have corporate capacity to sue and be sued, and the plaintiff may maintain an action against the defendants as to any cause of action against it it may have, of which the court ordinarily has jurisdiction. It certainly has the right to have its cause of action and rights in and about the same, when denied and withheld, litigated, settled, enforced and administered by appropriate judicial procedure—certainly in all cases where (298) some particular effectual method of redress is not prescribed.

Clearly, the plaintiff alleges a cause of action. As to that part of the county of Vance taken from the county of Granville, the statute creating the former county provides, as it might do, that "the citizens and taxable property" therein "shall not be released from their proportion of the outstanding" public debt of the county of Granville; and it prescribes further, that such proportion of that debt shall be ascertained and determined by certain county commissioners "in such manner and by such method as may be agreed upon." Thus, an important pecuniary liability to, and in favor of, the county of Granville was continued, to be settled and determined in the way prescribed. But the commissioners directed and required to ascertain and determine that liability failed, neglected and refused, as is alleged, to ascertain and determine the same. Has the county of Granville no redress in such case? Has the court no jurisdictional authority to compel the defaulting commissioners to a discharge of the duties imposed upon them by proper action and the application of pertinent principles of law and equity? The very purpose of the court is to afford appropriate remedy and grant relief. Such actions in cases in many respects like this have been oftentimes entertained. Code, secs. 702-705; *Comrs. v. Comrs.*, 79 N. C., 565.

It was further objected, that the statute provides that "said proportions (of the outstanding debt of the county of Granville), to be ascertained and determined by the county commissioners of Granville, Franklin and Vance counties, in such manner and by such method as may be agreed upon," and that the commissioners of the county of Franklin were not called upon to join in the discharge of such duties, and are not parties to this action. We think that this clause, properly interpreted, implies that the commissioners of Vance and the (299) commissioners of Granville should have coöperated, for the purpose specified, as to the claim of Granville County, and the commissioners of Vance and Franklin counties, as to the like claim of Franklin County. The purpose was to ascertain and determine the claims of Granville and Franklin counties, respectively and distinctly. Each of

these counties had no interest in the claim of the other, but the county of Vance, as to parts of its citizens and taxable property, was interested adversely to Granville and Franklin counties, not jointly, but severally and distinctly. In the nature of the matter, there was no substantial reason why the commissioners of the three counties should coöperate conjointly for the purpose specified; there was substantial reason why the commissioners of the county of Vance should act conjointly with the commissioners of Granville County, as to the claims of that county, without regard to the similar claim of Franklin County. This interpretation is not unreasonable, and it seems that the parties acted upon it, certainly to some extent. Moreover, the defendant, in its answer, submits to have the matters in controversy settled by this action.

The fifteenth section of the statute recited above provides that "that portion of the citizens and taxable property taken from the counties of Franklin and Granville and attached to the county of Vance, shall not be released from their proportion of the outstanding public debts of the said counties *contracted before* the passage of this act." This provision created no new or additional liability; it simply continued an existing one, for the present purpose, as to the outstanding public debt of the county of Granville contracted before the enactment of this statute, 5 March, 1881. As to this debt, that part of the county of Granville which became a part of the county of Vance, the citizens and taxable property embraced by it, continued to be, in effect, a part of the county of Granville. The intention was that the liability should
(300) continue to exist just as if the citizens and taxable property were still, and notwithstanding the erection of the county of Vance, part of the county of Granville. *Comrs. v. Comrs.*, 79 N. C., 565. And in ascertaining and determining the proportion of the debt to be paid by the citizens and taxable property so in the county of Vance, they should be treated as if in Granville County; they are neither to be favored nor discriminated against in ascertaining the outstanding debt, or the part of it, to be paid by them.

We are of the opinion that the exception of the appellant as to the sum of $3,450.42, paid after 5 March, 1881, upon judgments rendered and docketed before that date, must be sustained, because the money so paid was part of the taxes due and collected in, and as for, the year 1880. This sum of money, above that necessary to pay the current expenses of the county, was properly applicable to the payment of such judgments. The taxpayers represented by the defendant paid the part thereof due from them, and for that purpose, just as did the other taxpayers of the county.

And so, also, and for the like reason, the exception as to the sum of $9,260.60, part of taxes collected in 1880, balance in hands of the county

treasurer on 1 September, 1881, must be sustained. The taxes, so far as appears, levied and collected, or collectable, in the year 1880, were intended to pay the current expenses of the county, and the whole surplus was properly applicable, first to the outstanding debt on 5 March, 1881, and, generally, to any debt the county owed afterwards. The law contemplates that taxes shall be collected promptly, and that the money, when collected, shall be applied promptly to the payment of current county expenses, and to the payment of outstanding county debts due and payable. If the money to pay part of the debt was paid by the taxpayers as taxes, surely those of them represented by the defendant should not be prejudiced by the delay to apply it to the payment of part of the debt until after 5 March, 1881. That (301) would be rank injustice!

The exception founded upon the ground that the sum of $2,700 of the taxes of 1880 was applied to the payment of the current county expenses from 5 March, 1881, to 1 September, 1881, was not deducted in ascertaining the outstanding debt in question, cannot be sustained, because the taxes levied and collected, or collectable in 1880, were collected for, and properly applied to, that purpose. At the time the statute creating the county of Vance was enacted, this money was, in contemplation of law, designated for, and devoted to, that purpose.

The other exception, based upon the ground that the "county order" No. 196, dated and issued on 5 July, 1881, was not deducted from the debt in controversy, is groundless, because it appears that it was for a debt contracted before 5 March, 1881. It was contracted before, and properly constituted part of, the outstanding debt at that time. The order issued afterwards was merely evidence of it.

We are likewise of opinion that the exception, founded upon the ground that the sum of $5,000, the value of certain land of the county of Granville not necessary for public purposes, and which it owned in 1880, was not deducted from the outstanding debt mentioned, cannot be sustained. As we have seen, the citizens and taxable property represented by the defendant, for the purpose of ascertaining and determining their proportionate part of the outstanding debt in question, must be treated as if they and such taxable property were in, and part of, the county of Granville. So treating them, they had not the right, on 5 March, 1881, or at all, to have the real estate of the county, not necessary for public purposes, appropriated to the payment of its outstanding debts. This law does not so appropriate it, specifically and necessarily. (302) This could be done only at the instance of a creditor, in some appropriate way, or by the properly constituted authorities of the county. Its real estate referred to belonged to it for such lawful purposes as its constituted authorities might select, and they have the

authority to determine when, and how, and to what purpose they will devote it. There is nothing in the statute creating the county of Vance that, in terms or by any reasonable interpretation, implies a purpose to devote or direct the appropriation of the property mentioned of the county of Granville to the payment of its debts; nor does any purpose appear to give the taxpayers represented by the defendant any benefit of it in decreasing the amount of the outstanding debt, part of which they are required to pay, nor to secure to them any part of it, in any way, for any purpose. They had no more right to have this property applied in payment of the outstanding debt on 5 March, 1881, than other citizens of the county of Granville had at that time, with whom they were on an equal footing as to the debt in question. If, subsequently, the county authorities saw fit to sell the land and pay the county debt, they might do so, but the defendant could not have benefit of such sale, because those taxpayers whom it represents were not then citizens of Granville County. In the absence of statutory provision to the contrary, when they became citizens of Vance County, they, as such, ceased to have any interest in the property of the county of Granville. *Comrs. v. Comrs.*, 95 N. C., 189.

It may be that, if the land had been sold prior to 5 March, 1881, and turned into a cash fund, devoted to no particular purpose, that the defendant could have benefit of it, on the ground that when a county owes debts and has money not needed for a particular purpose, it
(303) ought at once to pay its creditors, but the land was not sold until after the time mentioned.

The eighth exception is without merit, because, as we have seen, the taxes of 1880, so much thereof as was necessary for that purpose, were properly appropriated to the payment of the current county expenses of the fiscal year 1881.

What we have said disposes of all the exceptions. There is error. The account must be restated in accordance with this opinion, and the judgment modified accordingly, and, thus modified, affirmed. To that end, let this opinion be certified to the Superior Court.

Error.

Cited: Comrs. v. Comrs., 157 N. C., 519.

*D. F. JARRETT AND FANNIE E. MURPHY v. JOSHUA F. GIBBS.

Practice—Amendment—The Code, Section 273—Power to Strike Out Name of Party—Appeal.

Under The Code, sec. 273, the court, in its discretion, may allow the motion of one of several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting the motion, is not reviewable.

If the judge refuses the motion, on the grounds of a want of power, an appeal lies.

APPEAL from *Merrimon, J.*, at Fall Term, 1890, of MCDOWELL.

The action was originally begun by Fannie E. Murphy against the defendant for recovery of certain crossties. At the return term (Fall 1888), by leave of the court, and without objection of the defendant, D. F. Jarrett, brother of plaintiff, was made a party plaintiff, and the complaint was filed in their names, alleging that they were the owners of certain crossties, wrongfully cut and removed from (304) their land by the defendant, and the defendant filed his answer in denial thereof.

The cause was continued, by consent, till Fall Term, 1890. At that term, after the jury was impaneled, counsel for plaintiffs stated to the court that the plaintiff, D. F. Jarrett, was the sole owner of the crossties sued for, and of the land upon which the trespass was committed in cutting them, and asked to withdraw the name of Fannie E. Murphy and complain in the name of Jarrett alone. The defendant objected. The court stated that it would allow the amendment, if it had the power to do so, but being of the opinion that it had no jurisdiction to grant the motion, denied it. Plaintiffs thereupon submitted to a nonsuit and appealed.

J. F. Morphew and W. H. Bower for plaintiffs.
John Devereux, Jr., for defendant.

CLARK, J. The Code, sec. 273, empowers the court, before or after judgment, to "amend any pleading, process or proceeding by adding or *striking out* the name of any party." The refusal or granting of such motion is a matter of discretion and not reviewable, unless the refusal is placed, as in this case, on the want of power, and then an appeal lies. *Henderson v. Graham,* 84 N. C., 496.

*Headnotes by CLARK, J.

Even if the effect of the amendment had been to allow a substitution of one plaintiff for another, it would have been within the competency of the court. *Reynolds v. Smathers,* 87 N. C., 24, and cases there cited. Jarrett, however, had been made a party two years before, without exception. The case stood, therefore, as if both plaintiffs had been named in the original process. The motion of the plaintiff Murphy to be allowed to withdraw and to amend the process and pleadings by striking out her name, was within the power and rested in the discretion of the court.

Per Curiam. Error.

Cited: Plemmons v. Improvement Co., 108 N. C., 615; *Sheldon v. Kivett,* 110 N. C., 411; *Simmons v. Jones,* 118 N. C., 474; *Aiken v. Mfg. Co.,* 141 N. C., 339; *Campbell v. Power Co.,* 166 N. C., 490; *McLaughlin v. R. R.,* 174 N. C., 185; *Joyner v. Fiber Co.,* 178 N. C., 636.

(305)

R. R. ROBERTS ET AL. V. K. LEWALD ET AL.

Assignment, Fraudulent and Void—Promissory Notes—Debts Not Due —Creditors—Trustee—Injunction.

1. In an action for debt, and to have declared fraudulent and void a deed of assignment, brought by creditors against the assignor and assignee, the plaintiffs allege that the defendant assignor executed to them several promissory notes for goods sold, intending to make the debts fall due after his assignment, and thus, at all times, intending to defraud his creditors; that the property is insufficient to pay his debts specified in the trust; that the trustee is unfit to administer his trust; that there is connivance between the assignor and trustee, and other facts tending to show a fraudulent assignment: *Held,* that the complaint stated a sufficient cause of action, and this although it appeared that the notes were not yet due.

2. Where, in a motion for injunction, the court below finds the facts, this Court will review such findings when the evidence is sent up.

3. The trustee should be restrained from paying any part of the proceeds of sale coming into his hands until the controversy is determined.

4. The court has authority to secure this fund.

MOTION for injunction, heard 4 February, 1890, at ROCKINGHAM, by *Bynum, J.*

This action is brought by the plaintiffs in behalf of themselves and all other creditors of the defendant Lewald, to obtain judgment against

him for certain debts specified in the complaint, and to have a deed of trust specified, executed by him to the defendant Nimocks, conveying to the latter all his property in trust, to be sold, and the proceeds of sale applied to the payment of certain debts in the deed mentioned, declared and adjudged fraudulent and void; to have the property so fraudulently conveyed, sold, and the proceeds of such sale applied to the payment of the judgment of the plaintiff and the judgments of other like creditors who may join in this action, etc.

Among other things, it is alleged in the complaint: (306)

"3. That, on 8 July, 1889, plaintiffs Roberts & Hodge sold and delivered to the defendant, K. Lewald, a bill of boots and shoes, amounting in the aggregate to the sum of $1247, for which said K. Lewald executed to plaintiffs, on 16 November, 1889, his three several promissory notes, dated 15 October, 1889, or thereabout, the first note for $415.67, and payable 15 to 18 January, 1890; the second note for $415.67, to be due 15 to 18 February, 1890, and the third note for $415.66, to be due 15 to 18 March, 1890, and all bearing interest from maturity at the rate of 6 *per centum* per annum.

"7. That plaintiffs believe, and so aver, that at the time of the purchase of the goods from affiant's firm, mentioned in paragraph 3 of this complaint, and at the time of the execution of said promissory notes, and at all times since, said K. Lewald intended to defraud plaintiffs, and, in execution of his said fraudulent intent, said K. Lewald induced plaintiffs to accept said notes, so as to make the debt fall due after the time he intended to make his said fraudulent deed of trust; the plaintiffs believe, and so charge, that the said deed of trust to R. M. Nimocks was made with the fraudulent intent and purpose of hindering, delaying and defrauding plaintiffs and other creditors of the said K. Lewald.

"4. That on 14 December, 1889, the defendant K. Lewald executed to the defendant, R. M. Nimocks, a deed of trust, conveying to him all of the boots, shoes, clothing, dry goods, and all other articles of merchandise of every description, contained in the storehouse on Hay street, in the town of Fayetteville, N. C., where he was doing business as a merchant, together with all other property of every description owned by the said K. Lewald, except the exemptions allowed by law," etc.

The complaint further alleges, at great length and much in detail, facts and circumstances which, if proven to be true, render the deed of trust in question fraudulent and void as to the plaintiffs and many other creditors. It is alleged that the property is insuffi- (307) cient to pay the debts specified in the deed; that the defendant trustee is unfit to administer the trust; that he connives at and helps the defendant Lewald in his fraudulent schemes and purposes, etc. The defendants, in their answer, admit some of the material facts, deny

others, and especially deny the alleged fraud and the fraudulent character of the deed of trust, and allege that the defendant trustee is, in all respects, a fit and proper person to be such trustee; that he is entirely solvent and responsible; that the sale of the goods should not be delayed, etc. At chambers, on 30 December, 1889, a judge granted the restraining order, of which the following is the material part: "On reading the foregoing affidavit, it is ordered that the defendant, R. M. Nimocks, show cause before the judge holding the January Term of the Superior Court at the courthouse in Fayetteville, on Monday, 20 January, 1890, at 12 m., why the injunction prayed for should not be granted, and in the meantime the said defendant, his agents and servants, are restrained from disposing of any of the assets which have or which may hereafter come into the hands of said Nimocks, as trustee, under the deed of assignment made by said Lewald to said Nimocks, and referred to in the affidavit." Afterwards, on 4 January, 1890, this order was modified as follows: "It is further considered that the order heretofore made by me be modified so as to permit the assignee, R. M. Nimocks, to sell and dispose of the goods and effects assigned to him by the deed of trust referred to in the complaint, and he is restrained from disposing of the fund arising from said sale, except the personal property exemptions of Lewald to be paid in cash, until the return day of the order, to show cause heretofore granted." Afterwards the court heard the mo-
(308) tion for an injunction pending the action upon the complaint and answers used as affidavits, exhibits, and numerous affidavits produced by the plaintiffs and defendants, and vacated the restraining order and denied the motion. The plaintiffs excepted, and appealed to this Court.

N. C. Sinclair, H. L. Cook, A. W. Haywood and H. McD. Robinson for plaintiffs.

N. W. Ray and T. H. Sutton for defendants.

MERRIMON, C. J., after stating the facts: The defendants moved in this Court to dismiss the action, upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. The motion cannot be allowed. The action is brought in behalf of all the creditors of the defendant Lewald who become parties thereto, and it appears from the record that a creditor other than the plaintiffs who brought the action has become a party plaintiff and filed a proper pleading, alleging his cause of action as such creditor. Moreover, the plaintiffs who brought the action allege a cause of action that may be sustained when the action shall be tried upon the merits. It is true, the notes specified in the complaint were not due at the time the action began,

but the complaint alleges the indebtedness of the defendant Lewald to the plaintiffs, for which the notes were given and which they represent, and it further alleges that the notes were given by the maker of them for the fraudulent purpose of hindering the plaintiffs in bringing their action at once, and to enable him to execute the more successfully and effectually the deed of trust alleged to be fraudulent. It is not proper now to decide that the action can, or cannot, be sustained as to the notes mentioned, in some aspects of them, or that it can, or cannot, be sustained as to the cause of action—the indebtedness—of the defendant debtor that they represent, but certainly a cause of action is alleged sufficient and fit, in its character and substance, to be liti- (309) gated, and this is sufficient for the present purpose, whatever may be the final result. It is settled that a creditor's action, such as this purports to be, can, and will, in proper cases, be entertained and sustained. This is so, because the court has jurisdiction of both the legal and equitable rights of parties in the same action, when these are properly alleged in the pleadings. *Bank v. Harris,* 84 N. C., 206; *Mebane v. Layton,* 86 N. C., 571; *Dobson v. Simonton,* 93 N. C., 268; *Frank v. Robinson,* 96 N. C., 28.

The defendants also moved here to affirm the judgment, upon the ground that "no sufficient statement of exceptions has been filed by the appellant, and there is no finding of fact." Nor can this motion be allowed. The motion for an injunction is equitable in its nature, and hence, upon appeal from the order of the court below allowing or denying the same, it becomes the duty of this Court to examine the evidence before the court below, find the facts, and determine, upon such finding, that the motion was properly allowed or denied. But this Court can so review and find the facts only when the same evidence is sent up to this Court that was before the court below. When the evidence is not all sent up, and cannot, for any cause, be brought up, this Court can only examine questions legal or equitable in their nature, raised by the facts as found by the court below. *Jones v. Boyd,* 80 N. C., 258; *Young v. Rollins,* 90 N. C., 125; *Worthy v. Shields, ib.,* 192; *Coates v. Wilkes,* 92 N. C., 376; *Gatewood v. Burns,* 99 N. C., 357. All the evidence before the court below in this case has been sent up and is now before us. The exceptions are very general in their character, but they sufficiently raise the question, whether or not, from the facts, the court should have allowed an injunction pending the action, and, if it should have been granted, what should have been its particular character, compass and purpose. We have examined and considered carefully the evidence before us, and, without adverting to it in detail (we ought not to do so), we cannot hesitate to declare and find that it tends to prove the substance of the allegations of fraud in the deed (310)

of trust, and the fraudulent conduct of the maker thereof, as alleged. While the evidence tends, not so strongly, to prove that the defendant trustee is not so careful as he ought to be in the discharge of his duty as to the property with which he is charged, it shows that he is capable and abundantly solvent, and that it will promote the interests of all parties to sell the property in controversy as rapidly as this may be prudently done. We are, however, of opinion that part of the fund arising from the sale of the property should be paid in discharge, or on account of, any debt specified in the deed of trust, or which it purports to secure, pending the action. The order of injunction should, therefore, be granted, restraining the defendant trustee from paying any part of such debt pending the action, until it shall be disposed of upon its merits, or otherwise. The court has authority to thus secure the fund arising from the sale of the property. Otherwise, the trustee might dispose of the fund as directed by the deed, and greatly embarrass, if not altogether defeat, the rights of the plaintiffs to have the same, or part thereof, applied to the payment of their debt when if they shall recover judgment for the same. *Frank v. Robinson,* 96 N. C., 28.

The defendants' counsel, on the argument, cited and relied upon *Levenson v. Elson,* 88 N. C., 182, and *Rheinstein v. Bixby,* 92 N. C., 307. In these cases the application was for an injunction and receiver, but here, the trustee is simply restrained from disposing of the fund within the jurisdiction and control of the court pending the action. This case comes within the rule applied in *Harrison v. Bray,* 92 N. C., 488; *Ellett v. Newman, ib.,* 519; *Whitaker v. Hill,* 96 N. C., 2; (311) *Lumber Co. v. Wallace,* 93 N. C., 22.

There is error. That an injunction may be granted, as in the opinion directed, let this be certified to the Superior Court.

Error.

Cited: S. c., 108 N. C., 405; *Burns v. McFarland,* 146 N. C., 383.

H. H. SNEEDEN v. GEORGE HARRIS ET AL.

Appeal—Case on Appeal—Record—What Essential in Appeals—Interlocutory Order—Final Judgment.

1. Where the facts, upon appeal to this Court, appear only from the statement of the case, and there is no transcript of the record, and it does not appear that a court was held at the time and place appointed by law, the appeal will be dismissed in this Court.

2. Generally, an appeal at once does not lie from an interlocutory order. The appellant should have assigned error of record and appealed from the final judgment.

MOTION heard by *Bynum, J.*, at the September Term, 1890, of NEW HANOVER.

On 5 April, 1888, the plaintiff brought this action against two of the defendants. On 6 April, 1889, without leave of the court, he caused a summons to be issued making the appellant a party defendant with the defendants at first made such. At the Spring Term, 1889, on a day in the term, the court made an order discontinuing the action as to the appellant. At the same term, on the next day, that order was stricken out, and the appellant was notified to show cause why he should not be made a defendant. At the September Term of the same year, the court allowed the motion to make appellant a party defendant, and allowed the plaintiff thirty days within which to file his complaint, and the defendant appellant sixty days within which to file his (312) answer. The appellant contended that this was but an allowance to the plaintiff to make him a defendant; that the summons issued theretofore as to him was void; and the plaintiff would have to issue another summons as to him, returnable at the next term.

Plaintiff insisted that the appellant was in court under the summons issued, and the notice to show cause, and that this was the appearance term. The court held, as matter of law, and not as matter of discretion, that this was the appearance term, and ordered the pleadings to be filed as to this term.

The appellant excepted, and appealed to this Court.

Iredell Meares for plaintiff.
S. C. Weill for defendants.

MERRIMON, C. J., after stating the facts: The facts stated above appear only from what purports to be the case settled on appeal in a case therein mentioned. There is no transcript of a record proper. It does not appear that a court was held at the time and place prescribed by law, no summons or pleadings appear; there is no transcript of the record of an action in the Superior Court. Moreover, if a proper transcript appeared, the supposed appeal was taken from an interlocutory order, from which an appeal at once did not lie. The appellant should have assigned error on the record, and appealed from a final judgment.

The appeal must be
Dismissed.

Cited: Sinclair v. R. R., 111 N. C., 509; *Monroe v. Trenholm*, 114 N. C., 590.

(313)

ISAAC BROWN v. IVEY KING ET AL.

Ejectment—Action to Recover Land—Nonsuit—Color of Title—Adverse Possession.

1. Refusal of the Superior Court to allow a nonsuit after verdict and judgment will not be reviewed in this Court.

2. Where the plaintiff failed to connect himself with the former owners of a tract of land, and failed to show color of title or adverse and continuous possession for twenty-one years: *Held*, that the court properly instructed the jury to return a verdict for the defendants.

3. In an action of ejectment, and the modern substitute for it—an action for the possession of land—the plaintiff must allege and show that defendant held adverse possession at the time of action brought, and that he is entitled to the immediate possession.

ACTION for the recovery of land, tried before *Boykin, J.*, at Fall Term, 1889, of JONES.

The plaintiff introduced a deed describing three several tracts of land from John Martin Franks to Isaac Brown, Sr., dated in 1832. There was evidence tending to show that the plaintiff chipped boxes on one of the said tracts set out in the said deed for seven or eight years immediately preceding the late Civil War; that said tract was exclusively woods land, and was in no way used or occupied during the said war, nor afterwards, until about six or seven years before the commencement of this action, since which time it has been in the possession of the plaintiff.

The boundaries of neither of the said three tracts were the same as those set out in the complaint, and there was no evidence tending to identify any of the tracts described in the said deed with that described in the complaint, except one of the witnesses testified he had heard one of the tracts mentioned in the deed was the land in dispute be-
(314) tween the plaintiff and the defendants, but said he did not know but one of the lines of said tracts.

The plaintiff, who was the last witness examined, testified that at the time of the commencement of this action he was in possession of the land described in the complaint.

When the plaintiff rested his case the counsel for the defendants arose and inquired of his Honor if he understood the plaintiff to testify that he was in possession of the *locus in quo* at the time this action was commenced, and receiving an affirmative answer from the court, the defendants announced they would not introduce any evidence.

His Honor directed the jury, if they believed the evidence, to return a verdict for the defendants. The jury found all issues in favor of the defendants.

Some time after the verdict of the jury had been returned and the judgment signed by his Honor, counsel for the plaintiff moved to be allowed to take a nonsuit. Motion denied. Appeal by plaintiff.

George Rountree for plaintiff.
No counsel for defendants.

AVERY, J. The plaintiff offered a deed from John Martin Franks to Isaac Brown, Sr., bearing date 1832, and purporting to convey three tracts of land. The boundaries of the tract described in the complaint were not the same as those of any one of the three set out in the deed. A witness testified that he had heard that one of the tracts mentioned in the deed was the land in dispute between the plaintiff and the defendants, but that he, witness, did not know but one of the lines of said tracts. There was no testimony tending to show that the land in controversy was that described in the complaint, if the evidence of the witness could be considered as more than a scintilla of testimony to show the identity of the land in dispute with any tract mentioned in the deed introduced. But if it be admitted that the disputed terri- (315) tory described in the complaint is covered by the boundaries set out in the deed, the plaintiff offered no grant, and in order to show title under color in himself *prima facie,* ought to have offered evidence tending to prove continuous adverse possession in himself, or those under whom he claims, or both, for twenty-one years of the time intervening between the execution of the deed to Isaac Brown, Sr., in 1832, and the date of the bringing the action, exclusive of the time elapsing between 20 May, 1861, and 1 January, 1870, when the operation of the statute was suspended, and ought, moreover, to have connected himself with Isaac Brown, Sr., by deeds, or proof of devise, or descent. There was no attempt to prove such possession for twenty-one years, and, therefore the judge was justified in telling the jury that they must find the issue of title for the defendants. *Ruffin v. Overby,* 105 N. C., 78; *McLean v. Smith,* 106 N. C., 173; *Mobley v. Griffin,* 104 N. C., 112; *Davis v. Stroud,* 104 N. C., 484.

It is familiar learning that a plaintiff could not, in ejectment, and cannot in the modern action for possession, substituted for the former, recover without proving that the defendant held adverse possession of the land in controversy when the action was brought, as well as that the plaintiff was then entitled to the possession, or was owner and had a right to immediate possession, according to the allegations of the com-

plaint. *Davis v. Stroud, supra; Gillman v. Bird,* 30 N. C., 285. When, therefore, the plaintiff testified that he was in possession of the land in dispute when the action was brought, his Honor was bound to tell the jury that there was no testimony tending to prove a wrongful possession on the part of the defendant, and the second issue must be answered in the negative.

(316) Under the former practice, in all actions at law, the plaintiff could, at his option, submit to judgment of nonsuit at any time before verdict, and, under the provisions of our present Code, he is deprived of the right to take that course only in cases where the defendant claims affirmative relief. *Graham v. Tate,* 77 N. C., 120; *Tate v. Phillips,* 77 N. C., 126.

It is not error in a judge to refuse to order a judgment of nonsuit, on motion of the defendant, where the plaintiff has not moved for such judgment, except in cases where the duty is imposed by statute; but, on the contrary, the plaintiff, so long as he appears and prosecutes his action, has the right to have the facts alleged in his complaint, if they are sufficient to constitute a cause of action, "admitted by demurrer or found by a jury." *Smith v. Smith,* 30 N. C., 29; *Carleton v. Byers,* 71 N. C., 331. It has been held, that even where the law expressly allowed a defendant to move the court for judgment of nonsuit or dismissal, the motion would not lie, as a matter of right, after judgment for the plaintiff had been entered without objection. *Allison v. Hancock,* 13 N. C., 206; *Kingsbury v. Hughes,* 61 N. C., 328.

When the defendant's counsel asked the court whether the plaintiff had not testified that he was in possession of the land in controversy, and, upon receiving an answer in the affirmative, declined to offer testimony, the plaintiff was put on notice of what the inevitable result must be if he should remain passive. He might have asked to correct his testimony if he was misunderstood, and if he could not make the fact so appear, or the judge, in his discretion, refused to hear additional evidence, he had the right to submit to judgment of nonsuit, and thereby avoid the conclusive effect of a verdict and judgment upon the issues. The plaintiff chose the battlefield when he voluntarily put the title, as well as the possession, in issue, and it was also his own folly to stand his ground till it was too late for him to withdraw from the the contest. He persisted, despite all reasoning, in going to the jury upon the issue of title, as well as that involving the right to

(317) present possession; and if the fears of the learned counsel who appeared for him here for the first time, that the plaintiff might be estopped from claiming title as against the defendant, should be realized, it will be due to the injudicious management of his case on the trial below, for which it is now too late to find a remedy.

No error.

STATE EX REL. TOWN COUNCIL OF WADESBORO v. J. A. ATKINSON ET AL.

Official Bond—Tax Collector—Charter of a Town—Authority to Collect Taxes—The Code—Estoppel—Levy.

1. The findings of fact by referee, where there is evidence to support it, is conclusive.

2. A town council levied a tax upon property and polls exceeding the amount allowed in the original charter. An act amendatory thereof gave the town all the privileges and rights allowed to the most favored towns in the State: *Held*, that this amendment would seem to allow the increased taxation, and if not, The Code, sec. 3800, conferring on towns and cities power to lay a tax on real and personal property within the corporation, certainly allows it.

3. Where it appears that taxes were levied, and no insufficiency is shown, they will be presumed regular and sufficient, although no written order of collection is endorsed upon the levy.

4. The tax collector, having accepted and acted under such levy, cannot be now heard to impeach its sufficiency.

APPEAL at November Term, 1889, of ANSON, from *Shipp, J.*

This action is brought against the defendant Atkinson as late constable of the town of Wadesboro, and the sureties to his official bond, for an alleged breach of the condition thereof, in that he failed to collect and account for certain taxes due to the plaintiff's relators, as (318) he was charged and bound to do, etc. The pleadings raised certain issues of fact, which were tried by a jury, who rendered their verdict adversely to the defendants. Thereupon, the court directed a referee to ascertain and state an account of the taxes the defendant constable collected, or ought to have collected, and failed to account for, etc., and to make report of his account, etc., etc. The referee took and stated an account as directed, and made report thereof. The following is so much thereof as it is necessary to report here:

"*Facts.*—I find the facts to be that, on 1 September, 1882, the town commissioners of Wadesboro levied a tax of fifty cents on the one hundred dollars valuation of property, and one dollar and fifty cents on each poll. That the same was made out by the defendant, and was taken charge of by him under verbal directions from the mayor. That there was no written order on said list to collect the taxes therein specified. That the defendant proceeded to collect the taxes on said list, and continued to do so until his term of office expired. That the defendant, as marshal, had special taxes to collect, a statement of which is herewith sent. The

taxes amounted to $1,482.24, and that the defendant paid out, or is entitled to credit, for $1,301.21, as per statement of account hereto attached, and that there is a balance due the plaintiff of $181.73, with interest from 4 September, 1883, till paid.

"*Conclusions of law.*—I conclude that it was the duty of the defendant to collect the taxes levied, and that, on the foregoing facts, he had authority to collect the same, and that if he failed to do so, he was liable."

The defendant filed numerous exceptions to the findings of fact, and also to the referee's conclusions of law, as follows:

"Defendant excepts to the conclusions of law—

(319) "1. Because he finds it was the duty of the defendant Atkinson to collect the taxes levied, which is erroneous.

"2. Because there is error in the finding that he had authority to collect the same.

"3. Because there is error in the finding that if he failed to do so he is liable.

"4. Defendants except to any judgment against them, and insist that there should be judgment against the plaintiff for costs."

The court gave judgment in favor of the relators, and the defendants, having excepted, appealed to this Court.

J. A. Lockhart for plaintiff.

J. G. Shaw for defendants.

MERRIMON, C. J., after stating the facts: The exceptions to findings of fact by the referee approved by the court, cannot be considered here. The findings of fact were conclusive, as there was no exception upon the ground that there was no evidence to support them. *Cooper v. Middleton,* 94 N. C., 86; *Usry v. Suit,* 91 N. C., 406; *Wiley v. Logan,* 95 N. C., 358.

The defendants contended that the relators had no authority to levy the taxes in question, and therefore the defendant constable was not bound to collect the same. It was insisted particularly that the levy exceeded that allowed by the charter of the town of Wadesboro. That town was incorporated by the statute (Laws 1825, ch. 75), and sec. 7 thereof allowed the proper town authorities to "lay and collect such taxes on town property not exceeding ten cents on each hundred dollars," etc., but this limitation was expressly repealed by the subsequent statute (Laws 1879, ch. 155). Moreover, the statute (Laws 1873-74, ch. 88) amends the charter of this town so as to confer upon it power to tax all property taxed by the State, and section 5 thereof provides, "That the powers herein granted shall be in addition to those

(320) already allowed by law, and the said town of Wadesboro shall

have all the privileges and rights allowed to the most favored town in the State," and section 7 provides that this act and that of which it is amendatory "shall be liberally construed in favor of the corporate authorities of said town." This provision is not very definite as to the increase of the powers of taxation, but it would seem that part of the purpose of it was to allow the authorities to levy taxes as any other town might do. But any doubt in this respect is removed by the statute (Code, sec. 3800), applicable to "towns and cities" generally, except when their charters otherwise provide, which, in terms, confers upon such "towns and cities" power to "lay a tax on real and personal estate within the corporation," and also "on *such polls* as are taxable by the General Assembly for public purposes," not oftener than annually. In the absence of power especially conferred upon the town of Wadesboro to levy taxes for its purposes on polls, the statutory provision just cited extended to and embraced it (Code, sec. 3827). So that the town authorities had ample power to levy the tax in question. They did not exceed the limit upon their power prescribed by the statute (Laws 1881, ch. 166, schedule B), which prohibited towns and cities from levying a greater tax on real and personal property than one and one-half *per centum* of the value thereof.

The relators had power and authority to appoint the defendant to be town constable, and as such it became, and was, his duty to collect the taxes levied for the town; and it was the duty of the relators, also, to take from him a proper bond, conditioned for the faithful discharge of his duties as constable, and particularly for the faithful collection and accounting for the taxes he might be charged to collect. Code, secs. 3800, 3808, 3809. Moreover, one condition of his bond sued upon is, that he "shall faithfully collect, account for and pay over to the proper officer, all fines, penalties and taxes which [it] shall be (321) his duty to collect as such officer."

But the appellants insist that the tax-list was not duly placed in the constable's hands for collection, not having written on the same an order of collection. Neither the charter of the town, nor the general statute in respect to towns and cities, required that such order should be so endorsed. It is sufficient that the taxes were levied, and that a proper list of the same was made out to charge the taxpayer. It appears the relators made the levy. It must be taken that this levy was regular and sufficient. The contrary is not suggested. The list was made out—the just inference is, made out from the proper *data* for the purpose, by the constable, and he took charge of the same "under verbal directions from the mayor." It is not suggested that such list is not a true one. The levy gave it life and force, and created the liability of the

taxpayer. It had official sanction. The mayor recognized it, and the constable accepted it as sufficient. It was sufficient, certainly in the absence of objection, and he cannot be heard now to say the contrary. The law charged him to collect the taxes as levied, and the taxpayers to pay the same. The list directed him as to who owed the taxes and the amount due. If the taxpayers had refused to pay the taxes charged, and questioned his authority in any respect, he might properly, if there had been need, obtained other and further evidence of his authority from the town authorities and their records. His authority sprang out of the levy and his official character in connection therewith. He undertook, and purported to, and did exercise his authority, and, as it appears, collected most of the taxes due. Why he did not collect the balance does not appear. The presumption is that he could, and ought to have done so. He shows no legal excuse why he did not. He cannot be (322) heard to say, nor can his sureties, that the list was not sufficient.

So far as appears, it served all the purposes of a regular list—it does not appear, he does not suggest, that a taxpayer refused to pay on account of the tax-list he had, or on any other account. Under the tax levy, and as town constable, he assumed the duty of collecting the taxes levied, and the law charges him with a faithful discharge of that duty, and makes him and his sureties responsible for his default. It would be unreasonable, unjust and monstrous to allow a public officer to escape responsibility because of mere irregularity, of which he had knowledge, without objection, and which was, in part at least, attributable to himself. The law does not tolerate, much less sanction, such subterfuge and evasion.

Affirmed.

Cited: Rogers v. Bank, 108 N. C., 577; *Montcastle v. Wheeler,* 167 N. C., 259; *Sturtevant v. Cotton Mills,* 171 N. C., 120.

A. D. PUFFER & SON v. A. F. LUCAS.

Verdict, Conflicting, Inconsistent, Unintelligible—Judgment—The Code.

1. Where a verdict is unintelligible, conflicting and inconsistent, it should be set aside and no judgment pronounced.

2. Section 412 of The Code does not embrace all the grounds upon which a verdict should be set aside and new trial granted.

ACTION to recover the possession of a certain soda and mineral apparatus known as the "Eifer machine," tried before *Bynum, J.*, at September Term, 1889, of NEW HANOVER.

The plaintiffs allege title to the machine under a contract set (323) out at length with the complaint, and asked a judgment for the possession thereof, or for $330, its value, in case its delivery cannot be had, and for $250 damages. The defendants, answering, admitted the possession of the property and agreement under which the plaintiffs claim it, but they say, in bar of the plaintiffs' right to recover, and set up as a counterclaim, that the plaintiffs entered into a new contract with them, set out at length with the answer, by which they agreed to ship a new apparatus to them, and take back the old machine, which they now seek to recover, in part payment for the new, and, in the meantime, permit the defendants to retain possession of the old apparatus. They allege a breach of this contract, and ask judgment that the plaintiffs' demand for the possession of the property be denied, and for $500 damages for breach of the contract. The following issues were submitted to the jury, each of which was answered as indicated:

"1. Is the plaintiff entitled to the recovery of the possession of the property specified in the complaint? Answer: 'Yes.'

"2. Does the defendant unlawfully detain this property? Answer: 'Yes.'

"3. What is the plaintiffs' damage for detention? Answer: '$100.'

"4. What is the balance due, if any, on the Eifer machine? Answer: '$70.'

"5. Did plaintiffs, since the institution of this action, agree to take the Eifer machine in controversy in part payment of a new machine, and to allow the defendant Lucas to keep the old machine until the new machine arrived? Answer: 'Yes.'

"6. Did plaintiffs fail to perform their contract? Answer: 'Yes.'

"7. What damages, if any, have defendants sustained by reason of the breach of said contract? Answer: '$20.' "

Upon the rendition of the verdict, the plaintiffs asked for the following judgment:

"This action having been tried before his Honor and a jury (324) empaneled to try the issues raised by the pleadings, and the jury having found that the plaintiffs are the owners and entitled to the possession of the personal property described in the complaint; that the defendant unlawfully detained the same from the plaintiffs, and assessed the damages to plaintiffs at $100, and the said jury having also found

that the plaintiffs made the contract with defendant set up in the answer by way of counterclaim, and committed a breach of the same, and assessed the damages of defendant at $20:

"It is now, on motion of T. W. Strange and E. S. Martin, counsel for the plaintiffs, adjudged that the plaintiffs recover of the defendant the possession of said personal property, or $330, in case delivery of said property cannot be had, and also $100 damages, together with the costs of this action, to be taxed by the clerk.

"And it is further adjudged that the defendant recover of the plaintiffs the sum of $20, which they shall have the right to set off against the said judgment for damages in favor of the plaintiffs and against said defendant in this action."

The court refused the plaintiff's prayer, and rendered the following judgment:

"Upon the verdict the plaintiffs demanded judgment, which the court declined to grant, and plaintiffs excepted. Defendant moved for a new trial on the ground of error by instructions of court. Motion overruled. The defendant demanded judgment, which the court declined to grant, and defendant excepted. Thereupon, the court ordered that the verdict rendered by the jury be set aside, from which said order and the refusal to grant either of the judgments aforesaid, both parties prayed (325) an appeal to the Supreme Court."

Iredell Meares for plaintiffs.
No counsel for defendant.

DAVIS, J., in plaintiffs' appeal: The jury did not find the value of the personal property to be $320, and there is no aspect in which the verdict can be viewed that would entitle the plaintiffs to the judgment asked, or to any judgment, for it is unintelligible, inconsistent and conflicting, and was properly, and *ex necessitate,* set aside by his Honor because no proper judgment could be rendered upon it. *Morrison v. Watson,* 95 N. C., 479, and cases cited. Section 412 of The Code does not embrace all the grounds upon which a verdict may be set aside and a new trial ordered. *Thomas v. Myers,* 87 N. C., 31, and cases cited. We suggest that upon a new trial issues may be eliminated from the complaint and answer less calculated to confuse the jury.

Appeal dismissed.

DAVIS, J., in defendant's appeal: As we have seen, no judgment could be rendered upon the verdict in this case, and, though the defendant's case on appeal presents a number of exceptions and assignments of error,

there was no judgment against him, and when the verdict was properly set aside and a new trial ordered, there was nothing from which he could appeal, and it was inadvertently taken.

Appeal dismissed.

Cited: McCaskill v. Currie, 113 N. C., 316; *Turner v. Davis,* 132 N. C., 188; *Stern v. Benbow,* 151 N. C., 463.

(326)

JOHN R. BERRY, JAMES P. BERRY ET AL., EX PARTE.

Appeal, Docketing—Printing the Record—Rules 5 and 28.

When an appeal, taken at the November Term, 1889, of the Superior Court, was not docketed in this Court until 17 October, 1890, and no part of the record has been printed (no leave to appeal in *forma pauperis* having been obtained), the appeal must be dismissed for either cause stated.

MOTION to dismiss the appeal. The facts are sufficiently stated in the opinion of the court.

John W. Graham for appellees.
No counsel for appellant.

CLARK, J. The appellees move to dismiss this appeal, and assign as grounds therefor—

1. Because the order appealed from was made at November Term, 1889, of the court below, and the appeal was not docketed at the Spring Term, 1900, of this Court, as required by Rule 5.

2. Because the record is not printed, as required by Rule 28.

3. Because no statement of case on appeal was served on appellee, or his counsel, within the time allowed by law.

4. Because no bond for costs on appeal is filed, nor leave obtained to appeal in *forma pauperis.*

5. Because it is apparent that the attorney who took the appeal has no client.

It appears from the record—

1. That the appeal was taken at November Term, 1889, of Orange Superior Court, and the transcript was not docketed in this Court till 17 October, 1890.

(327) 2. That no part of the record has been printed, as required, though it is not an appeal in *forma pauperis.*

By repeated decisions of the Court, either is sufficient ground to entitle appellees to have the appeal dismissed. This renders it unnecessary to consider the other grounds assigned in the motion.

Per Curiam. Appeal dismissed.

Cited: Pipkin v. Green, 110 N. C., 462.

J. W. TOMLINSON v. THE WILMINGTON AND SEACOAST RAILROAD COMPANY.

Exemplary Damages—Passengers—Railroad—Train—Expulsion—Rudeness—Malice.

To entitle a passenger to exemplary damages for his wrongful expulsion from a train, there must be evidence of undue force, unnecessary rudeness, or insult, malice, or some willful wrong accompanying his ejection.

APPEAL at May Term, 1890, of CUMBERLAND, from *Brown, J.*

The plaintiff was ejected from defendant's car by the conductor for refusing to pay an extra charge for neglect to buy a ticket at the station.

The plaintiff testified, in reference to the manner and conduct of the conductor at the time when he was compelled to leave the train, as follows: "I first offered twenty-five cents for a round-trip ticket. He refused. I then offered twenty-five cents for a single-trip ticket from Wrightsville to Wilmington. He refused, and demanded the extra charge for not having a ticket, which I refused to pay. I cannot state any word the conductor used. He did not touch me or McLaugh-

(328) lin. He used no insulting language. He stopped the train and told us we must get off, and we did so.. I thought he was harsh and ungentlemanly."

Question by the court: "State any violent act, or any rudeness or insult offered by the conductor."

Plaintiff replied: "Conductor did not touch me or use any improper language; only told us we would be compelled to leave the train or pay full fare demanded by him. We were made to leave the train near the place called the Commissary, and walk to Wilmington."

W. G. McLaughlin testified in behalf of the plaintiff, in reference to the same matter, as follows: "Conductor said if we did not pay regular

fare he would stop the train and put us off; conductor did not use any insulting language, or touch either of us; he only said if we did not get off the train he would put us off; he told us not to get up behind the train; conductor did not touch either of us; we got off after what he said. I thought he was harsh towards us. He did not use any profane or insulting language; spoke in the usual voice, but said repeatedly that we must get off or pay regular fare demanded by him."

The plaintiff offered no other testimony as to the manner, language or acts of the conductor at the time of putting him and his companion off the train.

The conductor testified in behalf of defendant, in relation to the same transaction, among other things, as follows: "Plaintiff refused to pay twenty-five cents, and told me to put him off. I offered to pay fare for him. He said he did not want me to do so, and told me to stop the train and he would get off. I stopped the train about one hundred yards from a small regular station; many other persons got off at the same place. It was five miles from Wilmington. The company were selling special tickets to soldiers in uniform at twenty-five cents, but the plaintiff had on no uniform, nor any soldier's ticket. The regular fare was twenty-five cents one way, and fifty cents for round-trip." (329)

The plaintiff had testified that he had on militia, or State Guard, uniform. That after tendering twenty-five cents for a round-trip ticket, he offered to pay the same amount for a single ticket, but the conductor demanded an extra charge for failure to get ticket.

It is not necessary to give the testimony of other witnesses introduced for the defendant.

The plaintiff requested the court to charge, that if the jury believe the defendant put the plaintiff off its train unlawfully, they are entitled, if they see fit, to award such damages as, in their opinion, will compensate the plaintiff for his unlawful ejectment, and may, also, add to that such other damages, by way of punishment for the unlawful act towards plaintiff. The prayer was refused, so far as it relates to punitive damages. Upon the subject of exemplary damages, the court instructed the jury, that in this case the evidence was not sufficient, in any view of it, to entitle the plaintiff to recover punitive damages. The plaintiff excepted to the refusal to give the instruction asked, and to that given, and assigned as error the refusal to charge that the jury might allow exemplary damages.

T. H. Sutton for plaintiff.

E. C. Smith and John Devereux, Jr., for defendant.

AVERY, J., after stating the facts: The rule laid down by this Court in *Rose v. R. R.*, 106 N. C., 170, was, that "where a passenger is unlawfully expelled from a railway train, he is entitled to recover the actual damages that he sustained therefrom, and if the expulsion is attended with undue force, or other aggravating circumstances calculated to humiliate the passenger, or wound his pride, or if the passenger (330) be unlawfully ejected, but undue force used, accompanied by fraud, or an exhibition of malice, rudeness, recklessness, or other willful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts." *Knowles v. R. R.*, 102 N. C., 66; *Holmes v. R. R.*, 94 N. C., 318.

We concur in the conclusion reached by his Honor, that the plaintiff was not entitled to recover in any view of the evidence, and it is needless, in support of our opinion, to do more than reproduce what has already been said by this Court in one case, and cite others sustaining the same principle. "The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude, as a claimant of punitive damages, than if he had been rightfully ejected, but in an unlawful and unwarranted manner, or with undue force. It is an essential prerequisite to the acquisition of the right to recover exemplary damages for the wrongful expulsion of a passenger from a train, that there should be evidence of undue force, unnecessary rudeness in the application of the force, or insult, malice, or some willful wrong accompanying the act of ejecting him, or causing him to leave the train." *Rose v. R. R., supra,* and authorities there cited.

No error.

Cited: Hansley v. R. R., 115 N. C., 605, 612; *Brooks v. R. R., ib.*, 629; *Ammons v. R. R.*, 138 N. C., 559; *Webb v. Tel. Co.*, 167 N. C., 490; *Meeder v. R. R.*, 173 N. C., 60.

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(331)

A. G. THORNTON v. C. P. VANSTORY.

Homestead Allotment—Objections—Second Allotment—Value of Homestead—Issues—Exceptions.

1. Where a homestead has been allotted, the return of appraisers registered, and time for filing objections passed, a second allotment, though under a judgment docketed since the first allotment, will be treated as void.
2. No valid issue as to the value of the homestead at the time of the second allotment can be raised by exceptions of creditors thereto.

THORNTON *v.* VANSTORY

APPEAL by the defendant in proceedings under the Homestead Act, tried before *Brown, J.*, at September Term, 1890, of CUMBERLAND.

It appeared in testimony, and by the admission of all parties, that one of the defendants (Vanstory) herein had recovered a judgment herein against the plaintiff, which had been duly docketed in the Superior Court for said county, and execution issued thereon; that on 4 March, 1890, under said execution, the homestead exemption of the plaintiff was set apart by the sheriff and appraisers, and returned to the office of the clerk. In due time and place the plaintiff filed objections and exceptions to said appraisement, and appealed to this Court, and the same was duly docketed for trial. On the trial the plaintiff offered in evidence the record of an assignment of a homestead, dated 20 April, 1885. It was admitted that the plaintiff's homestead had been duly and legally set apart under another execution, and the record thereof registered 20 April, 1885. It was admitted that the last-named assignment of homestead, by its metes and bounds, covered the entire dwelling-house and residence lot of the plaintiff as described therein.

It was admitted that the assignment of homestead, dated 4 (332) March, 1890, included in its metes and bounds a little more than half of the said lot, and that the line ran through the dwelling-house, dividing it into two parts, giving the plaintiff the eastern part of the lot, and a side entrance to the dwelling, and one-half of the stairway, and the entire kitchen.

There was evidence on the part of the plaintiff tending to prove that the part assigned to him 20 March, 1890, was not worth $1,000; there was evidence on part of the defendant that said part was fully worth $1,000, and that the entire lot, both parts together, is worth from $1,750 to $2,500 at this date.

It is admitted that the debt upon which defendant Vanstory recovered judgment against the plaintiff, referred to above, is founded on a debt contracted since the allotment of homestead in April, 1885, increased in value over and above $1,000 and offered to prove these facts in support thereof, viz.: That there was a dwelling-house on said lot on 20 April, 1885, included in said assignment, and allotted to plaintiff; that since then it had been burned and entirely destroyed; that the plaintiff had erected a new dwelling-house thereon since the old one was burned, containing eight rooms, which could not have been allotted on 20 April, 1885, and worth at least $600 to $800 more than the old one, and that the lot and property had then increased in value $600 to $800, and that the whole lot assigned in April, 1885, the old dwelling being burned and the new dwelling erected thereon, is worth from $1,750 to $2,500 at date of January, 1890, allotment. There was no answer or pleading of any kind filed herein on the part of the defendant setting up such

facts, and no equitable or other proceedings appear to have been commenced by him, seeking to set aside the allotment of 20 April, 1885, on such ground, or asking a reallotment. *Gully v. Cole,* 96 N. C., 447.

The court refused to submit the said issue, and excluded such testi-
(333) mony, to which defendant excepted.

The due and regular allotment of homestead of 20 April, 1885, being admitted by the defendant, the court gave judgment setting aside the allotment of 4 March, 1890, and gave judgment against defendant Vanstory for costs. The defendant appealed to the Supreme Court.

N. W. Ray for plaintiff.
T. H. Sutton for defendant.

AVERY, J., after stating the facts: Where a homestead has been allotted in the manner prescribed in chapter 10 of The Code, the time for filing objections has passed, and the return of the appraisers has been registered, as in this case, a second allotment made by appraisal, in the manner prescribed in said chapter, at the instance of a judgment creditor, will be treated as void, though his judgment may have been rendered and docketed after the homestead was first laid off. In such a case, where the creditor files objections to the return of the appraisers so appointed at his instance, and offers proof tending to show that by the return the appraisers assigned to the "homesteader" land worth more than one thousand dollars, the courts will not treat such objections filed as raising an issue as to the value, for the jury. *Gulley v. Cole,* 102 N. C., 333; *ib.,* 96 N. C., 447; *Ray v. Thornton,* 95 N. C., 571.

There was no error in the refusal of the court below to submit the issue tendered to the jury, nor in the order setting aside the second allotment as void.

Affirmed.

Cited: Aiken v. Gardner, post, 239; *Vanstory v. Thornton,* 110 N. C., 12.

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(334)

W. N. WILLIAMS, TRUSTEE, ET AL. v. S. A. B. WALKER ET AL.

Interlocutory Orders—Appeal—Final Judgment.

In an action to foreclose a mortgage, it appeared that the plaintiffs had a lien upon the land specified, and the court made an order directing that an

account be taken to ascertain the balance of the debt yet unpaid, and retaining the cause for further action: *Held*, that the order was interlocutory, and appeal would not lie from it.

ACTION for foreclosure of a mortgage, tried at December Term, 1889, of CUMBERLAND, before *MacRae, J.* The facts appear in the opinion.

H. McD. Robinson and Thos. H. Sutton for plaintiffs.
J. B. Batchelor, John Devereux, Jr., and N. W. Ray for defendants.

MERRIMON, C. J. This case is intended to present several very interesting questions which were argued elaborately by counsel at the last term, but we are not at liberty to decide them now, because the case is not properly in this Court. The counsel failed to direct our attention to the character of the order appealed from, and we did not observe it until we came to scrutinize the manuscript record. We may add, in this connection, that the plaintiff cannot have benefit of his exception presenting an important question argued unless he shall appeal at the proper time.

It appears that, upon the pleadings and facts found by the jury, the court below adjudged that the plaintiff had a lien upon the land specified in the complaint to secure his debt, and made an order directing that an account be taken to ascertain the balance of his debt yet unpaid, and retaining the case for further action. The *feme* (335) defendant excepted, and at once appealed to this Court.

Obviously, an appeal did not lie from such interlocutory order. It would lie only from the final judgment. *Blackwell v. McCaine,* 105 N. C., 460, and cases there cited.

Appeal dismissed.

Cited: S. c., 111 N. C., 605; *Shankle v. Whitley,* 131 N. C., 168.

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*COMMISSIONERS OF MAXTON ET AL. V. COMMISSIONERS OF ROBESON COUNTY.

Liquor Selling—County Commissioners—Mandamus.

When county commissioners refuse to grant license to retail liquor, on the ground that the applicant is not a fit person, a *mandamus* will not lie to compel the commissioners to grant it.

*Headnotes by CLARK, J.

MANDAMUS to compel the commissioners of Robeson County to grant license to retail liquor to J. T. Pool and others, plaintiffs in this action, heard, on demurrer to the answer, by *Graves, J.*, at September Term, 1890, of ROBESON.

Demurrer was overruled, *mandamus* refused, and judgment against plaintiffs for costs. Appeal by plaintiffs.

T. H. Sutton for plaintiffs.
William Black and T. A. McNeill for defendants.

CLARK, J. In the answer, it is alleged, "the defendants deny that they willfully and absolutely refused to grant license to said J. T. Pool & Co. on that or any other occasion, but that, after hearing evidence both for and against the said applicants, and argument of
(336) counsel and due consideration of the application, the defendants were of the opinion that said applicants were not fit persons to retail spirituous liquors"; and also "they further aver that, on the hearing of their said applications for an order for license to retail at Maxton, in this county, on 22 August, 1890, the defendants examined witnesses and heard testimony as to good moral character and fitness of the said applicants, as required by law, and also as to the places at which, in said town of Maxton, they proposed to conduct their traffic; and, after hearing arguments of counsel and due consideration of the evidence, they were of the opinion that the evidence was not satisfactory and did not establish that the applicants were men of good moral character, or that the places at which it was proposed to retail were suitable for that business, and denied the same. Defendants further deny that they acted willfully or arbitrarily in said matter, but proceeded on their convictions of duty in the light of evidence and the facts."

The demurrer admits these allegations to be true. It is settled that upon such state of facts a *mandamus* could not issue. *Muller v. Comrs.*, 89 N. C., 171; *Jones v. Comrs.*, 106 N. C., 436.

The plaintiffs rely upon sections 75 and 76, chapter 25, Private Laws 1889, and contend that, inasmuch as the answer admits that at the election held in Maxton "license" to sell liquor carried the majority of votes, the county commissioners were deprived of any discretion in regard to the character of the applicant to sell liquor in that town, provided permission in writing had been granted to such applicant by the commissioners of the town. We do not think so. The sections referred to prohibit the county commissioners from granting license to retail liquor in said town without permission in writing from the commissioners of the town, and prohibit the town commissioners from

granting such permission, unless the town shall vote for "license," (337) and in that event all laws prohibiting the sale of liquors in said town are repealed.

The town of Maxton, having so voted, was like any other territory in which there was no prohibitory law, and the powers and duties of the county commissioners were the same in regard to it, except that before they could grant license to any person, however fit they might adjudge him to be, the permission of the town commissioners, in writing, must be first had. The effect of those sections is simply to require a concurrence of both boards to authorize a license to sell liquor in the corporate limits. *S. v. Propst,* 87 N. C., 560.

We do not see why the commissioners of Maxton were joined as parties plaintiff with the applicants for license. Their presence seems to have been unnecessary, but in no wise prejudicial.

Per Curiam. Affirmed.

Cited: Hillsboro v. Smith, 110 N. C., 419; *Barnes v. Comrs.,* 135 N. C., 43.

W. A. GUTHRIE v. E. W. BACON.

Cause of Action—Parol Trust—Court of Equity—Creditors—Complaint — Demurrer — The Code—Limitation—Legal and Equitable Causes of Action.

1. Where A purchased land and paid for it with his own money, but had the conveyance therefor executed to another, who was to hold upon a parol trust to reconvey, and this transaction was in fraud of A's creditors: *Held,* (1) that A had no such interest in the land as could be asserted in a Court of Equity; (2) A's creditors had a right to follow the fund so converted into land; (3) the complaint, setting forth the above facts, states a sufficient cause of action; (4) the statute of limitations, not being pleaded, is no bar to the action.

2. The Code, sec. 138, requires the statute of limitations to be specially pleaded, and no distinction is made between legal and equitable causes of action in this respect.

ACTION heard upon complaint and demurrer, before *MacRae,* (338) *J.,* at September Term, 1890, of CUMBERLAND.

The facts are sufficiently stated in the opinion of the Court.

Rose & Rose (by brief) for plaintiff.
N. W. Ray and T. H. Sutton for defendant.

SHEPHERD, J. As this action was dismissed upon demurrer, we must, of course, assume that all of the allegations of the plaintiff are true. It appears from the complaint that E. W. Bacon purchased the land in controversy at an administration sale, paid for the same with his own money, and, for the purpose of defrauding his creditors, procured it to be conveyed to W. S. Hair, who agreed, by parol, to hold it in trust for him. It also appears that the said Hair and the other defendants are claiming the land under and through the said fraudulent conveyance.

It is plain that E. W. Bacon, by reason of his fraudulent intent, had no interest whatever in the property which he could have asserted in a Court of Equity. In a similar case it was said that such a 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 will not act at the instance of either party." *Page v. Goodman,* 43 N. C., 16; *Everett v. Raby,* 104 N. C., 479. The creditors of Bacon, however, had a right to follow the fund which had thus been fraudulently withdrawn. *Page v. Goodman, supra; Rhem v. Tull,* 35 N. C., 57; *Gowing v. Rich,* 23 N. C., 553; *Dobson v. Erwin,* 18 N. C., 569; *Gentry v. Harper,* 55 N. C., 177; *McGill v. Harman,* 55 N. C., 179; *Wall v. Fairley,* 77 (339) N. C., 105; *Dixon v. Dixon,* 81 N. C., 323; *Everett v. Raby, supra.* This right vested in the assignee of Bacon when he became a bankrupt, and the assignee, representing the creditors, would not have been estopped from asserting it. *Boone v. Hall,* 7 Bush., 66; *In re Metzger,* 2 B. R., 114; *Bradshaw v. Kline,* 1 B. R., 146; *In re Wynne,* 4 B. R., 162. The plaintiff, under the peculiar provisions of the bankrupt law, and the very comprehensive language of the conveyance executed to him by the assignee, acquired the said right to pursue the fund, and the complaint, therefore, sets forth a cause of action.

The defendants, however, insist that the action is barred by the lapse of time, and our attention is called to the bankrupt act, section 2, which provides that such causes of action shall be prosecuted within two years from the time they accrue in favor of the assignee.

It is urged, upon the authority of *Robinson v. Lewis,* 45 N. C., 58, that where an equitable claim appears upon the face of the bill, to be barred by lapse of time, or the statute of limitations, that it may be taken advantage of by demurrer, and that it need not be specially pleaded. This was unquestionably true under the former system, but the statute now requires it to be pleaded (The Code, sec. 138), and no distinction is made in this respect between equitable and legal causes of action.

Smith, C. J., in *Freeman v. Sprague,* 82 N. C., 366, while conceding the practice under the old system, says that, "As the separate systems are now merged in a single mode of procedure, in order to secure uniformity of practice, the rule which prevailed at law is adopted and prescribed." Of course, if the *title* were involved, lapse of time could be relied upon without any plea in order to show title out of the plaintiff as well as in the defendants. But such is not the case here, and even if the title were in issue, the complaint does not show any adverse possession in the defendants, without which the defense (340) would be incomplete.

We are of the opinion that the complaint set forth a cause of action, and that, in the absence of the plea of the statute, it is not barred.

The judgment dismissing the action should, therefore, be

Reversed.

Cited: Cox v. Ward, post, 507; *Albertson v. Terry,* 109 N. C., 10; *Sherrod v. Dixon,* 120 N. C., 62; *Ins. Co. v. Edwards,* 124 N. C., 117; *King v. Powell,* 127 N. C., 11; *Hallyburton v. Slagle,* 130 N. C., 486; *Oldham v. Reiger,* 145 N. C., 258; *Michael v. Moore,* 157 N. C., 465; *Jordan v. Simmons,* 169 N. C., 142.

JOHN WALKER ET AL., EX PARTE.

Partition — Charge Against More Valuable Shares — Bankruptcy — Statute of Limitations—Statute of Presumption—Tenants in Common.

1. A discharge in bankruptcy does not cancel the charge of owelty of partition against the land of the bankrupt.
2. Where the decree creating the charge was entered in 1867, it was *Held,* that there is no statute of limitations applicable as a bar.
3. The statute (Rev. Code, ch. 65, sec. 18) which declares judgments, decrees, etc., shall be *presumed* to be satisfied within ten years, is not conclusive. The court found as a fact that the charge had not been satisfied.
4. The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge, until the same shall be satisfied.

MOTION in the cause, heard at Fall Term, 1890, of ROBESON, by *Graves, J.*

It appears that in 1867, at the May Term of the late Court of Pleas and Quarter Sessions in and for the county of Robeson, an *ex parte* petition was filed in that court by John Walker and others, to obtain partition of the land in the petition specified among the peti-
(341) tioners according to their respective rights.

Partition of the land was made, and such proceedings were had in the matter as that a final judgment was rendered confirming the report of the commissioners appointed to make partition of the land filed in the case. By the report and judgment thereupon, lot No. 5 of the division was allotted to A. M. Cobb and his wife, Flora C., in severalty; and lot No. 3 thereof was allotted in severalty to John Walker, and this lot of land, a more valuable dividend, was charged with the sum of $236 in favor of, and to be paid to, the less valuable dividend No. 5, above mentioned, and it also appears that such sum of money so charged has not been paid. At the Fall Term, 1890, of the Superior Court of the county above named, the said Cobb and wife moved for a writ of *venditioni exponas,* the purpose being to sell the said lot No. 3 to pay the sum of money so charged upon it.

It further appears that, after such partition was made, the said John Walker, to whom the said lot No. 3 was allotted, was duly adjudged a bankrupt in the District Court of the United States in and for the district of Cape Fear, in North Carolina, and that, regularly, he obtained a discharge in bankruptcy, dated 14 October, 1871, as allowed by the bankrupt laws of the United States then in force. Afterwards, in 1872, the said John Walker died intestate, leaving surviving him his widow and others, his children, his heirs at law, who oppose the motion mentioned of the said Cobb and wife, claiming and insisting that the said charge upon the lot No. 3 was embraced by the discharge in bankruptcy of the intestate; that more than ten years have elapsed since the said charge was created and began to be efficient, and the right of the appellees is, therefore, barred by the statute of limitation applicable; and, also, that more than ten years having elapsed since the said charge was created and had effect, the statute applicable
(342) raises the *presumption* that the same has been paid and discharged.

Upon the above state of facts, the court was of opinion and adjudged that the said Cobb and wife were entitled to the writ prayed for by them, and ordered that the same be issued. The heirs at law of the said John Walker, appearing and opposing the motion for the writ, excepted to the decision and order of the court, and appealed.

William Black for appellants.
T. A. McNeill contra.

MERRIMON, C. J., after stating the facts: It is not questioned that such title to the land designated as lot No. 3 as John Walker, the bankrupt, had, passed to the assignee in bankruptcy. But how such title in the latter passed from him to Walker does not appear. It may be that he purchased the same from the purchaser at the sale thereof by the assignee. It, however, appears from the allegations of the appellee that Walker owned the land, in some sense, at the time of his death; that it descended to the appellants, his heirs at law, and they are now in possession thereof and resist the appellee's motion.

The decree of partition which created the charge in question was entered in 1867, and might, so far as appears, have been enforced at any time thereafter. Hence, if the charge be treated as one that could be affected at all by the lapse of time, it was not subject to the present or any former statute of limitation. The present statute does not apply to cases where the right of action accrued before 24 August, 1868. The statutes prevailing before that time apply in such and appropriate cases. The Code, sec. 136. There was no statute of limitation that could bar the appellee's right. *Sutton v. Edwards,* 40 N. C., 425; *Ruffin v. Cox,* 71 N. C., 253; *Dobbin v. Rex,* 106 N. C., 444.

If it be granted that the statute (Revised Code, ch. 65, sec. (343) 18), which declares that judgments, decrees, contracts and agreements shall be presumed to be paid, or satisfied, "within ten years after the right of action on the same accrued," could apply in cases like the present one, it cannot help the appellants, because the court below found the fact to be that the charge upon the land had not been paid or satisfied, and thus the presumption raised by the statute was rebutted. The presumption was not conclusive; it might be rebutted by any pertinent proof, and it must be taken that there was such proof, as there is no complaint of the finding of fact by the court.

In our judgment, the proceedings and discharge in bankruptcy, relied upon by the appellants, did not embrace, discharge, or at all affect the charge upon the land in question, or the right of the appellees to enforce the same, as they now ask to be allowed to do. The charge was not a debt against the bankrupt and provable in bankruptcy against his assets in the hands of the assignee. It was a legal charge upon the land, not created by the contract of the parties, and charging one with a debt in favor of the other, but by the law. It was the debt, in contemplation of law, of the land charged, going to the dividend of land of less value, and for which the owner of the dividend of greater value was not personally responsible. The land alone was responsible, and the title to the dividend of greater value did not vest completely in him to whom the same was allotted until that dividend had paid the charge upon it to the dividend of less value, and, till then, the partition was not com-

plete. Such condition of incompleteness ran with and affected the title to the land, no matter who might come to be the owner of it. Perforce of the statute, the dividend of less value shared in the title of the dividend of greater value—had more than a mere lien upon the land—and this interest accrued and belonged to the appellees until the charge should be extinguished. This seems to be the purpose of (344) the statute (The Code, secs. 1894, 1896), and this Court has so, certainly in effect, uniformly interpreted it. *Wynne v. Tunstall,* 16 N. C., 23; *Jones v. Sherrard,* 22 N. C., 179; *Sutton v. Edwards, supra; Ruffin v. Cox, supra.* Nor did the appellees have a debt against the bankrupt secured by a mere lien or mortgage, or one that created an incumbrance on the bankrupt's land, in the sense of the statute of the United States in respect to bankruptcy. This is so because, as we have said, the charge on the land was a debt, so made by the statute, due from it to the dividend of land of less value allotted to the appellees, and the partition was not complete, nor did the title vest in severalty in him to whom the dividend of larger value was allotted, until the charge should be extinguished. Walker, the ancestor of the appellants, did not have the title in severalty to the land, because he failed to extinguish the charge upon it. Moreover, the charge was not a debt due to the appellees secured by a mere lien. In contemplation of the statute, they were tenants in common with John Walker, the bankrupt, to the extent of the charge, until the same should be, in some way, discharged; and the appellees had the right, under the statute, to have it discharged, when they might see fit to do so, by a sale of the land, and they could not do so otherwise. The court of bankruptcy could not take notice, or take jurisdiction, of such charge because, in contemplation of the statute, it was not a debt of the bankrupt, nor was it a lien upon his land in favor of his creditors, enforcible in the bankrupt court.

Affirmed.

Cited: Herman v. Watts, post, 651; *In re Ausborn,* 122 N. C., 44; *Wilson v. Lumber Co.,* 131 N. C., 167; *Smith, ex parte,* 134 N. C., 499.

(345)

C. F. REID ET AL. v. J. D. BOUSHALL.

Will—Ambulatory—Power of Appointment—Life-tenant—Contract to Convey Land—Specific Performance—Vendor—Vendee.

1. A power of appointment in one who is a joint tenant for life with her husband does not confer upon her an absolute estate.

2. The conditions annexed to a power of appointment must be strictly complied with; and where, by the terms of a deed of settlement, power of appointment was given a wife "by her last will and testament," such power can only be exercised by such instrument.

3. A will is, by its nature, and whether or not in the execution of a power of appointment, ambulatory during the lifetime of the maker.

4. Where the donee of a power of appointment, by will, being also at the same time life tenant with her husband of the land which was the subject thereof, had made a contract, he joining, to convey said land in fee: *Held*, that an instrument in the nature of a will, with covenants against revocation, executed by her jointly with her husband, was not sufficient execution of the power, and that the vendee, under the contract of purchase, could not be compelled to accept a title depending for its validity upon such instrument.

ACTION heard upon the facts agreed, at the Spring Term, 1890, of WAKE, before *MacRae, J.*

It was brought to compel the defendant vendee, under a contract of purchase, to pay the purchase-money for a parcel of land, the plaintiff alleging, and defendant denying, that he could and was ready to make a good title, according to his contract.

It appeared that on 2 March, 1881, and prior to the execution of the said bond for title, the plaintiff C. F. Reid, who was at that time owner in fee of the land, executed to one Dickson a deed in trust for the benefit of himself and his wife, the plaintiff H. F. Reid, embracing (346) this land, the material parts of which are as follows:

"That the said C. F. Reid and wife, Harriet F. Reid, shall retain the possession of said lands during their joint lives, and shall not be liable to account to the said trustee for the rents and profits. The said lands shall not be subject to any debts that may be contracted and owing by the said C. F. Reid. It is further stipulated and agreed that the said Harriet F. Reid shall have and is hereby invested with the power of appointment, and to dispose of the aforesaid property herein conveyed by last will and testament, and the said W. W. Dickson, trustee, as aforesaid, upon the happening of the event of death of the said Harriet F. Reid, when it shall appear that she hath made a last will and testament, shall turn over and give possession of said land to the parties

entitled under said will, or hold the same upon such trusts as may be declared therein. In case the said Harriet F. Reid should die without leaving a last will and testament, then the trustee, W. W. Dickson, shall hold the property herein conveyed for the sole and separate use of the grantor, C. F. Reid, during his natural life; and if the said C. F. Reid shall die in the lifetime of the said Harriet F. Reid, then her right and title to such property shall become absolute, to enable her to convey title as she may see proper, free and discharged from any trust or encumbrance credited by this deed; but if the said Harriet F. shall die without having conveyed said property in her lifetime, and without executing and leaving a last will and testament, then upon her death, if she survive her said husband, or upon his death, if he survive her, the said W. W. Dickson shall convey said property to the child or children of the said C. F. Reid and Harriet F., if any there be, and if there are not child or children surviving them, then to the heirs at law of the said C. F. Reid. In witness whereof the said parties have hereunto set their hands and seals, day and date first above written."

(347) The plaintiffs, in reply, offered to have the said Harriet F. Reid, by and with the consent of her said husband, by joining therein, execute, declare and publish her last will and testament, properly witnessed, willing to said J. D. Boushall in fee simple said land contracted to be purchased, with covenant therein not to make any other last will and testament in violation or contrary thereto, and not, in any other way, to dispose of said land, which said last will and testament, with covenants therein, the plaintiffs offered to have delivered to said defendant with the deed.

The court gave judgment dismissing the action and taxing plaintiffs with the costs, from which plaintiffs appealed.

J. N. Holding for plaintiffs.
J. D. Boushall for defendant.

SHEPHERD, J. It is too plain for argument that the power of appointment conferred upon Mrs. Reid does not vest an absolute estate in her. She and her husband are joint tenants for life with a power of appointment in the former. If she fails to execute this power and her husband survives, he takes the property for life, and then it goes in remainder to the children. By the terms of the deed the wife's power of appointment, during the life of her husband, can only be exercised by "her last will and testament," and it is well settled, says *Chancellor Kent* (4 Com., 330), "that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been if no such precise direction had been given. They are

incapable of admitting any equivalent or substitution; for the person creating the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. The courts have been uniformly exact on this point." (348)

Although a will made in execution of a power is not strictly a will, but simply a declaration of a use, yet it so far retains the properties of a will as to be ambulatory until the death of the testator, and consequently revocable in the same manner as an ordinary testamentary instrument. 2 Sugden Powers, 14.

It must follow, therefore, that the execution of a will by Mrs. Reid in favor of the defendant purchaser is not a performance of the plaintiffs' contract to convey to him an indefeasible estate in fee.

It is insisted, however, that the covenant of Mrs. Reid not to revoke the will operates, in some manner, to take away the power of revocation, and that the will and covenant together are sufficient to vest an acceptable title to the land in the purchaser.

In *Whaley v. Drummond,* Ch. Easter Term, 1745, M. S., *Lord Hardwicke* said that "a power to be executed by will cannot be executed by any act to take effect in the lifetime of the donee"; and to the same effect is 4 Kent Com., 331, and the general current of authority.

If, then, the will and covenant are sufficient to vest a present indefeasible fee in the purchaser (and he can be required to accept none other), the principle above stated will be contravened, and that which is clearly forbidden to be done directly will be permitted to be done indirectly.

Such, in our opinion, is not the law, and we are not surprised that the researches of the plaintiffs' counsel have resulted in a failure to discover any authority in support of his contention.

There is no error in the ruling of the court that the plaintiffs had not performed their contract to execute to the defendant a valid title to the property.

Affirmed.

(349)

JAMES JONES ET AL. V. S. S. HOGGARD ET AL.

Appeal—Imperfect Transcript.

1. When both parties appeal, a transcript of the record must be sent up for each.

2. The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held and that it had obtained jurisdiction of the parties by service or waiver of process. This rule has now been modified. See Rule 19, 174 N. C., 832.

APPEAL at Spring Term, 1890, of BERTIE, from *Armfield, J.* The facts sufficiently appear in the opinion.

No counsel for plaintiffs.
Winston & Williams (by brief) for defendants.

CLARK, J. The transcript of the record is defective in several particulars:

1. Though it appears that both plaintiff and defendant appealed, only one transcript is sent up—it does not appear which. Hence, the appeal cannot be determined. *Perry v. Adams,* 96 N. C., 347.

2. It does not "appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the time and place prescribed by law." *S. v. Butts,* 91 N. C., 524. There is in the transcript a copy of a commission to a judge to hold a term of Bertie Court in lieu of the judge regularly designated by statute, and a judgment certified to have been signed by him, but nothing to show that, in fact, a term of the court was held. Clerks, in making up transcripts for this Court, should follow the requirements of law as stated by the present *Chief Justice* in the case just cited, omit-
(350) ting, in civil cases, of course, the recital as to the grand jury.

3. The transcript of the record does not show any process, nor pleading, nor that the defendants have been brought into court by any means known to the law. There appears only a statement of facts agreed, signed by counsel, a judgment and leave to both parties to appeal in *forma pauperis* upon certificate and affidavit filed, and a copy of the judge's commission, as just stated. This is not a controversy "submitted without action," under The Code, sec. 567. It lacks the essential requirements of that section. *Wilmington v. Atkinson,* 88 N. C., 54; *Jones v. Comrs.,* 88 N. C., 56. There is no waiver of process apparent, nor anything to show that the cause was properly constituted. The case is the same as that of *Rowland v. Mitchell,* 90 N. C., 649, and *Daniel v. Rogers,* 95 N. C., 134.

Since these defects have been called to the attention of the parties, a second transcript has been sent up, which contains a copy of the complaint and the same statement of facts agreed and judgment. There is still neither process, waiver thereof, nor answer, nor, in lieu thereof, an affidavit, under The Code, sec. 567, nor aught to show that the term of the court was regularly held, nor that the cause was regularly constituted in court.

We cannot assume jurisdiction upon such a record, and, to the end that a full and perfect transcript may be sent up, the cause is

Per Curiam. Remanded.

Cited: S. v. Bost, 125 N. C., 711; *Mills v. Guaranty Co.,* 136 N. C., 256; *Caudle v. Morris,* 158 N. C., 595; *Pope v. Lumber Co.,* 162 N. C., 209.

(351)

W. W. BRUMMITT v. R. H. MCGUIRE.

Voluntary Payment of Money by Mistake—Recovery of Money Paid by Mistake—Full Knowledge.

1. A plaintiff who pays money voluntarily, although there is no debt, with full knowledge of all the facts, cannot recover it back upon the ground that it was paid by mistake.
2. Nor if the payment be made in ignorance or mistake of fact, can it be recovered back when the means of knowledge or information is in reach of the party paying and he is negligent in obtaining it.
3. When the plaintiff gave a note in settlement of money due, and found afterwards it was for too much, and then, in order to save harmless another person, he paid the full amount more than twelve months after its execution, and with full knowledge or with ample means of obtaining such knowledge: *Held,* he was not entitled to recover it back.

APPEAL from a justice of the peace, tried before *MacRae, J.,* at July Term, 1890, of GRANVILLE.

The following is the case settled on appeal by appellee, and accepted by appellant:

The plaintiff alleged that the defendant was indebted to him for money paid in excess of rent account for a certain house in Oxford for the year 1886.

The defendant denied the debt, and alleged besides that the matter in controversy had been compromised and settled by the execution of a chattel mortgage and bond; by the execution of a bond and security to stay proceedings; by the judgment of S. V. Ellis, J. P., and by the payment of said mortgage.

W. W. Brummitt, the plaintiff, testified: "I rented a house for the year 1886, in Oxford, of R. H. McGuire. I was to give him $125 for the year, and executed a note. I paid him a quarterly payment in advance, and afterwards paid him $21.25 and $10. I stayed in
(352) the house about seven months, until about the first of August. I moved away about that time. The day I moved, Mr. Allen, defendant's attorney, told me he would indict me if I did not give him the keys, and I gave them to him. In February, 1888, eight months after I had left the house, one N. H. Whitfield, a clerk in defendant's store, proposed to me to buy my pony. I asked $80 for the pony. He said he would give it, and told me when to bring him down. I brought the pony, and Whitfield came out and told me to give him to the boy standing there and he would pay me for the pony as soon as McGuire came back from the courthouse. I waited until McGuire came back, and went into the office with him. McGuire said, 'You owe me a note I have got against you,' taking the note from his safe. I said I did not think I owed him anything. He said, 'Yes, you do; we have got your pony, and you will have it to pay before you get him.' Whitfield said nothing to me about the note. He was not present. I then left McGuire's office and went up to Whitfield's house to get my pony. Whitfield had the pony locked up, and told me if I could get him, to get him. I then went home. It was Saturday. Monday I came back and fixed up the papers to get the pony. I did not know how much I owed McGuire, and before giving up the pony he required me to execuate to N. H. Whitfield a note for $38, secured by a chattel mortgage on the pony and other property, which was assigned to McGuire. I have paid the $38 note to McGuire. Since looking up the receipts I had taken, I find that on the day the note for $38 was executed I owed him only $10.41. McGuire claimed I owed him the balance on the $125 note. It was $41 or $42 I paid McGuire on the $38 note made payable to N. H. Whitfield and assigned to him. McGuire got a new tenant in about two weeks, I think."

(353) Defendant's counsel then asked witness if he did not trade the pony before the Whitfield mortgage was due; if McGuire did not institute claim and delivery proceedings and take the horse from Young Dixon; if he was not present at the trial and did not consent to the judgment of S. V. Ellis, J. P., and if he did not pay the $38 note to McGuire. To all these interrogatories the plaintiff objected, upon the ground that the plaintiff was not a party to the claim and delivery proceedings and was not bound by the proceedings or the judgment therein rendered. Objection overruled. Witness then said he had heard of the

claim and delivery, but that he was not a party to the suit, nor was he present at the trial, nor did he consent to the judgment; that he paid the $38 note to protect Dixon; he traded the pony to Dixon.

Judgment in case of N. H. Whitfield to use of R. H. McGuire against Young Dixon. Settled between the parties, 24 April, 1889.

S. V. ELLIS, J. P.

The note set out is for $38, executed under seal by the plaintiff, Brummitt, to N. H. Whitfield, on 6 February, 1888, payable on or before 1 October, 1888, "secured by mortgage" and endorsed by Whitfield to defendant, McGuire, "without recourse."

Jordan McIver was sworn. He said the house Brummitt lived in was occupied in about two weeks after Brummitt left.

B. T. Fuller was sworn. He said he moved Brummitt from the house. It was 1 August.

R. H. McGuire testified: "Brummitt occupied the house until about the middle of August, and I did not get a renter in two or three weeks after the time. I sold the Brummitt note for $125 (subject to a credit of $62.60) to Whitfield for $20. He did not pay cash for the note, but I charged him up with the $20 the day I sold him the (354) note. When Whitfield bought the pony of Brummitt, he offered the $125 note, on which $62.50 was due, and the balance in money for the pony. Brummitt refused to do this. Whitfield took the new note for $38. After he got the note for $38 he assigned the same to me, without recourse. (Witness then produced his books, and, after examining them, said the entries were made in the book on 9 February, which was five days after the note was sold to Whitfield, and that the entry showed it was $18 instead of $20, as stated, but that the trade between him and Whitfield was fair and square.) When I found that Brummitt had traded the pony on which I, as assignee of Whitfield, held the $38 note and mortgage, I instituted claim and delivery proceedings, and Crews, the constable, brought the pony to town under the papers. The day of the trial, 24 April, 1889, John Elliott came in and gave me his note, at thirty days time, to stay the proceedings. I took the note, and the suit was stopped and settled."

N. H. Whitfield testified: "I bought the $125 note from McGuire for $20. I didn't pay him cash. I bought the pony from Brummitt and sent him up home to the stable and locked him up. Brummitt executed the note and mortgage to me, and I assigned it to McGuire. The trade between me and McGuire was fair and square."

There was a verdict and judgment for the plaintiff for $27.59.

The defendant excepted to the charge as given, and for failure to charge as requested; also, because the judge submitted the question of mistake in paying the debt by plaintiff, whereas there was no evidence of such mistake to go to the jury. Motion for a new trial, because the verdict was contrary to the weight of the evidence, and because there was no evidence that the plaintiff or Elliott paid the defendant
(355) more than he owed him for rent of the house by mistake. Motion overruled. Appeal by defendant.

T. T. Hicks for plaintiff.
R. W. Winston for defendant.

DAVIS, J. The defendant asked for eight specific instructions, all of which, except the seventh, which was given in part (what part was given and what refused does not appear), were refused.

If the defendant was entitled to any one of these instructions and it was not cured by the charge as given, it was error.

It is well settled that money paid under a mistake of fact may be recovered back, and it is equally well settled that money demanded and paid with a full knowledge of all the facts cannot be recovered back.

The plaintiff's counsel relies upon *Pool v. Allen,* 29 N. C., 120, and *Adams v. Reeves,* 68 N. C., 134. In *Pool v. Allen,* Pool, the plaintiff, owed Allen, and, having removed to another State, left two agents in this State, with directions, among other things, to pay the debt due the defendant, the then creditor, Allen. Allen had placed the debt in the hands of a constable for collection. One of the agents paid the money to the constable who had the claim in hand for collection, and the other agent, meeting with the defendant (creditor), paid the money to him, and after discovering that the money had been paid to the constable for the creditor (Allen, the defendant), it was held that the plaintiff (Pool, the debtor) could recover back the money paid under mistake, the debt having been already paid. "The money was paid and received in discharge of a debt then believed to subsist. In that," says *Ruffin, C. J.,* "there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also, and it is plain that
(356) money thus gotten under a mistake, and for no consideration, cannot be kept *ex equo et bono.*"

In *Adams v. Reeves* it is said: "A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt. But a payment under a mistake of fact may be," and for this many authorities are cited. We see nothing in *Pool v. Allen* or in *Adams v. Reeves* in conflict with the well-settled law that money voluntarily paid, with a full knowledge of all the facts, cannot be recovered back.

But the plaintiff says: "In this case there was compulsion, for the horse, at the time the money was paid or arranged to be paid, was locked up in the clerk's stable." This was no such compulsion or legal *duress* as to make void a payment made long thereafter, though made, as the plaintiff says, to "protect Dixon," to whom he had sold the mortgaged horse, and if there was any mistake as to the amount when the note and mortgage were executed, on 6 February, 1888, as a settlement of the controversy then existing between the parties, the plaintiff had ample time, before the note was due, the first of October following, and certainly before the payment was made, 24 April, 1889, by the exercise of ordinary diligence, "to look up the receipts he had taken" and discover the mistake *before* the money was paid. It appears from the testimony of the plaintiff himself that there was no material fact of which he was ignorant at the time of the payment, and no mistake as to the amount of the debt which, by ordinary diligence, he might not have discovered before the debt was paid. The plaintiff ought not to have given the note if the settlement was not satisfactory, and he ought not to have paid it more than a year after if he denied its correctness or validity.

In *Matthews v. Smith,* 67 N. C., 374, the plaintiff testified that "he was forced to pay the note to relieve his sureties from a suit," and it was held that he could not recover the money back if he paid it with a full knowledge of the facts, and that the court ought to have instructed the jury "that, according to plaintiff's own testimony, (357) he had full knowledge of the facts."

In *Devereux v. Ins. Co.,* 98 N. C., 6, it was held that a payment voluntarily made with a full knowledge of all the facts, though reluctantly done and under protest, cannot be recovered back.

Money voluntarily paid with a knowledge of all the facts cannot be recovered back, although there was no debt. *Comrs. v. Comrs.,* 75 N. C., 240; *Comrs. v. Setzer,* 70 N. C., 426. Nor, if thus paid, can it be recovered back, though paid in satisfaction of an unjust demand or one that had no validity. 4 Wait Actions and Defenses, 479, and cases there cited. Nor, if the payment be made in ignorance or mistake of fact, can it be recovered back, where the means of knowledge or information is in reach of the party paying and he is negligent in obtaining it. *Marriot v. Hampton,* 3 Smith Leading Cases, 1711; *Adams v. Reeves, supra.*

Without expressing any opinion as to the method resorted to by the defendant to obtain payment of his claims for rent, we are of the opinion that the plaintiff, when he gave the note, in February, 1888, and, certainly, when he paid it, more than twelve months thereafter, was, according to his own evidence, in possession, or by ordinary diligence might have been in possession, of all the facts upon which he bases his claim now set up to recover back the money, and might have availed himself

of them in contesting the defendant's demand, but, having given the note in February, 1888, and paid it in April, 1889, under no legal compulsion or duress, and without setting up any defense or contesting its validity for any cause, as he might have done, he waived any
(358) defense that he might have had, and by his own act "settled," and cannot now, under the circumstances as testified by him, recover it back.

The defendant was entitled to the first instruction asked, and this relieves us of the necessity of considering the others.

Error.

Cited: Bank v. Taylor, 122 N. C., 570; *Bernhardt v. R. R.,* 135 N. C., 263.

J. M. MITCHELL v. PATSY TEDDER.

Case on Appeal—Practice.

When the judge sustains exceptions filed by appellee to appellant's statement of case on appeal, and directs the case thus modified to be redrafted and sent up, it is the duty of the appellant to have the case redrafted and presented to the judge for signature. When he does not do this, but merely sends up his statement of case, together with appellee's exceptions and the order of the judge, there is no "case settled on appeal," and the court (if there are no errors on the face of the record proper) may, on motion of appellee, or *ex mero motu,* either affirm the judgment or remand the case.

APPEAL by defendant from *Gilmer, J.,* at Fall Term, 1889, of WILKES.

The facts appear in the opinion.

No counsel for plaintiff.
D. M. Furches (by brief) for defendant.

CLARK, J. The appellant served his statement of case on appeal, to which the appellee filed numerous exceptions. The judge sustained all of the appellee's exceptions, and directed that the "case" be redrafted by incorporating the exceptions sustained and striking out the
(359) parts of the appellant's case which this made necessary. This has not been done. The transcript sent up contains merely the appellant's case, together with the appellee's exceptions and the order of the judge sustaining the exceptions. The appeal is not in a condition to be intelligently presented and argued. There is, indeed, in contem-

plation of law, no "case settled on appeal." The Court might, therefore, well affirm the judgment below, as there appear to be no errors upon the face of the record proper. The appellee, however, has not moved the Court to affirm the judgment, and in the present case the Court will not do so *ex mero motu*. Such loose practice, however, will not be tolerated.

The case will be remanded, that the appellant may have an opportunity to comply with the order of the judge by redrafting and reforming the "case on appeal" in conformity with the amendments and alterations required by the order.

The transcript should not be cumbered with appellant's statement of case, defendant's exceptions thereto, and the judge's order. These are *minutiæ* of the "settlement," with which this Court has nothing to do. It has often held that it will not go behind the "case settled." Had the judge died after passing upon the exceptions and before the "case" had been reformed as ordered by him, and counsel could not agree upon the redraft, then, *ex necessitate*, it may be that these matters should be sent up, that this Court might pass upon the scope and effect of the order; but here, though the judge has gone out of office, it is still made his duty to settle the case by the last paragraph of The Code, sec. 550. The redrafted case should be sent to him by the appellant for signature, and, when signed and settled by him, it will be sent up as the transcript of the "case on appeal."

Per Curiam. Remanded.

Cited: S. c., 108 N. C., 266; *Hinton v. Greenleaf*, 115 N. C., 6; *S. v. King*, 119 N. C., 911; *Stevens v. Smathers*, 123 N. C., 499; *Gaither v. Carpenter*, 143 N. C., 241.

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(360)

S. H. LOFTIN v. W. C. HINES.

Mortgage on Crops—To What Crops Confined—Public Policy.

1. A mortgage upon crops to be raised, other than those of the year current, is invalid.

2. This limitation is based upon grounds of public policy and upon analogy to the agricultural-lien law.

APPEAL from *Armfield, J.*, at August Term, 1890, of LENOIR.

The facts appear in the opinion.

George Rountree (by brief) for plaintiff.
W. R. Allen for defendant.

CLARK, J. In June, 1888, the defendant, to secure an existing indebtedness of $825, executed to the plaintiff a mortgage "in and to all crops now being cultivated, or hereafter to be cultivated, for the years 1888, 1889, 1890, 1891, and as long thereafter as may be necessary to pay off and discharge said debt" on a tract of land (describing it).

This is an action in which it is sought, by claim and delivery, to recover the crops grown on said tract during 1889. Unless said mortgage conveyed to the plaintiff either a legal or equitable title to the crop of 1889, the plaintiff cannot recover. It is held by *Davis, J.*, in *Wooten v. Hill,* 98 N. C., 52, that "the authorities do not warrant the conveyance of an indefinitely prospective unplanted crop, and we think it should be limited to crops planted, or about to be planted, as the crops next following the conveyance"—that is, the crops of the years current when the mortgage is executed. This case is to the same purport as the opinion by *Pearson, C. J.*, in *Mastin v. Marlow,* 65 N. C., 695, and it has been cited and approved by *Smith, C. J.*, in *S. v. Garris,* 98 (361) N. C., 733; by *Shepherd, J.*, in *Smith v. Coor,* 104 N. C., 139, and by *Avery, J.*, in *Taylor v. Hodges,* 105 N. C., 344. We think the mortgage was invalid as a conveyance of title, either legal or equitable, to the crop of 1889, and the proceeding by claim and delivery must fail.

Whether the mortgage was good as a contract which the plaintiff might enforce in equity by subjecting each successive crop, or whether his remedy is, at law, by damages for breach of contract, we need not decide, for if the plaintiff can have specific performance as to each crop as it matures, this is only a right in equity and not an equitable title, and he could not recover the possession of the crop by claim and delivery. We may note, however, that public policy, as indicated by legislation, does not favor the plaintiff's contention. The Code, sec. 1799, limits the agricultural lien for advances to the crop of the year current when such advances are made. The act prohibiting dealing in futures, and similar legislation, indicate the same policy. Political economists assure us that even the civilized world is never more than one crop ahead of starvation, and countless thousands of the human race are in a day's march of it. If, therefore, it were law that the crops of future years could be conveyed or mortgaged, it would be possible for powerful syndicates to forestall the market and control the very means of existence of a whole people. To an oppressive extent this is done when only the crop of the current year is subject to lien or mortgage. Besides, if the

sales of, or mortgages on, future successive crops were valid, those who make them would be tempted not to plant, and this would diminish production and the general prosperity which is dependent on it.

We are indebted to the counsel of the appellant for an able and instructive argument, showing great research and thought, but he fails to convince us that we should reverse the precedents above cited, which are directly in point, and in which the principle now contended for by him was carefully considered and rejected by the court.

Per Curiam. No error.

Cited: Perry v. White, 111 N. C., 199; *Crinkley v. Egerton,* 113 N. C., 448; *Brown v. Dail,* 117 N. C., 44; *Warren v. Short,* 119 N. C., 42; *Hahn v. Heath,* 127 N. C., 28; *Odom v. Clark,* 146 N. C., 551; *Jones v. McCormick,* 174 N. C., 88.

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THEO. GORDON ET AL. v. AUSTIN COLLETT ET AL.

Res Judicata—Probate by Deputy Clerk—Curative Act.

1. When a question has been decided on a former appeal to this Court in the same action, the matter is *res judicata* and not open for reconsideration by the court below.

2. The statute of 1889 (chapter 252) validates probates of deeds and privy examinations taken before a deputy clerk prior to 1 January, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto.

3. The curative statute (Acts 1889, ch. 252) is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute.

APPEAL from *Merrimon, J.,* at Fall Term, 1890, of BURKE.

The same cause has been twice before in this Court—102 N. C., 532, and 104 N. C., 381—in the first of which cases the facts are fully stated.

The plaintiff offered in evidence, *inter alia,* the note of memorandum of a contract between Mrs. M. C. Avery and Austin Collett, which is set out in the former report of this case in 102 N. C., 532.

The defendant Rufus Avery objected to the introduction in evidence of this instrument, on the ground that it was not a sufficient note or memorandum of a contract to convey land under the statute of frauds.

(363) His Honor stated that he would reserve the question for the present, and admitted the paper.

The plaintiffs having rested, Rufus Avery, the defendant, introduced T. G. Anderson as a witness, who testified that, on 22 August, 1887, he (the witness) was acting as deputy clerk of the Superior Court of Burke County, and, as such deputy clerk, he filled out the certificate of adjudication of the correctness of the probate on the mortgage deed from Collett and wife to the plaintiffs, and the order of registration, and signed the name of S. T. Pearson, who was clerk of said court, to said certificate, ordering the same to be registered; that the clerk was not present at the time, and did not adjudicate that the justice's probate, or his certificate thereof, was correct.

To this evidence the plaintiffs objected, and, upon its admission, excepted. Defendant Avery introduced a deed to himself from Mrs. M. C. Avery for the land in question—the same described in the mortgage. His Honor thereupon stated that he would charge the jury that if the evidence of Anderson was believed, the mortgage deed was invalid as against the defendant, Rufus Avery, on the ground that the adjudication by Anderson of the correctness of the probate thereof was not in accordance with law, and further, that the paper offered as a memorandum of contract to convey the land to Collett by Mrs. Avery was not a contract to convey the land, and could not affect the rights of the defendant, Rufus Avery.

The plaintiffs insisted that the probate was sufficient under the statutes, and that the note, or memorandum of the contract, was also sufficient under the statute of frauds.

His Honor stated that he would charge the jury to the contrary on both points, whereupon the plaintiffs excepted, and, in deference to the opinion of his Honor, submitted to a judgment of nonsuit, and appealed.

S. J. Ervin for plaintiffs.

J. T. Perkins, John Devereux, Jr., and J. B. Batchelor for defendants.

(364) CLARK, J. There are two exceptions stated—1. The court below held that the note, or memorandum, between M. C. Avery and Austin Collett was not sufficient under the statute of frauds. When this case was first here, 102 N. C., 532, the same point was presented, and this Court held that the memorandum was "a sufficient compliance with the statute." The question is *res judicata*. We must presume that the attention of his Honor was not called to the decision heretofore made by the Court.

2. The probate of the mortgage executed by Collett to plaintiff was in due form, of date of 22 August, 1887, and purported to be signed by the clerk of the Superior Court. It appeared in evidence that the probate, though so signed, had, in fact, been made by the deputy clerk. The court thereupon held that the probate was invalid. Chapter 252, Laws 1889, amending the Code, sec. 1260, validates all probates of deeds and privy examinations of married women taken prior to 1 January, 1889, by deputy clerks, and others named in the act who have mistaken their powers, and enacts that such probates, and the registrations in pursuance thereof, shall be as valid and binding as if the same had been taken before, or ordered by, the clerk of the Superior Court. The power of the Legislature to make such enactment was sustained in *Tatom v. White,* 95 N. C., 453. It can make no difference whether the deputy clerk, who supposed he had the power to take the probate in the way he did, attested it by his own signature, or signed the name of the clerk. In either case the probate was his, and his alone, and he mistook his powers in assuming to make it. But for the act of 1889, in either case the probate would have been invalid, and now, by virtue of that act, it is made "valid and binding for all intents and purposes."

It was earnestly contended by defendant's counsel that in *Tatom v. White, supra,* the validating act of 1871-72 was adopted before third parties had obtained a conveyance of the land, and that decision went no further; that where a conveyance is not proved in the (365) manner required by law, the public register has no authority to record it. *Todd v. Outlaw,* 79 N. C., 235, and *Duke v. Markham,* 105 N. C., 131; that a subsequent purchaser from the grantor in such instrument gets a good title, and that a curative act passed, validating the defective probate after the registration of the conveyance to the subsequent purchaser, could not divest his vested rights. We concur in this view. But it has no application to the case before us. The defendant, Rufus Avery, claims under a deed from M. C. Avery, recorded 8 July, 1888; the plaintiff claims under a contract to convey made by M. C. Avery to Collett, which was registered 22 June, 1888, and by mortgage executed by Collett to plaintiff. This mortgage is only of use as putting Collett's equitable title into the plaintiff. It need not have been recorded, as against Rufus Avery, till just before it was offered in evidence. If defectively probated, it might have been reprobated during the trial and offered in evidence. The act of the Legislature simply avoided a necessity for doing this. Had Collett, after having conveyed to plaintiff by this defectively probated mortgage, executed to defendant, Rufus Avery, a conveyance which was properly probated and registered, the curative act, if passed subsequent to registration of the last named deed, could not divest the rights acquired thereunder. But such, as we

have seen, is not the state of facts in this appeal, so far as it appears in the record. It is true that Rufus Avery alleges, in his answer, that Collett abandoned his rights under the contract with M. C. Avery before the mortgage to plaintiff; also, that he has assigned his rights to him (Rufus Avery).

The plaintiff, in his pleadings, contends that Collett executed a prior mortgage to him, which was duly recorded, and for which the present mortgage was given in renewal; that Rufus Avery was the agent of M. C. Avery in making the contract with Collett, and having (366) knowledge of plaintiff's mortgages, by combination and conspiracy with Collett, and with intent to defraud the plaintiff, procured M. C. Avery (who had no notice thereof) to execute the deed to Rufus Avery, and that Collett has remained all the while, and still is, in possession. These and other issues of fact and of law may arise upon the trial, but this appeal comes up on the nonsuit, and the only points now presented for our consideration are the rulings of the court in the two particulars stated.

Per Curiam. Error.

Cited: Williams v. Kerr, 113 N. C., 310; *Blackburn v. Ins. Co.,* 117 N. C., 533; *Barrett v. Barrett,* 120 N. C., 130; *Vanderbilt v. Johnson,* 141 N. C., 372; *Weston v. Lumber Co.,* 160 N. C., 268; *Vaught v. Williams,* 177 N. C., 81.

COUNTY BOARD OF EDUCATION OF GRANVILLE COUNTY v. STATE BOARD OF EDUCATION.

Statute of Limitation—Trust—The Code, Section 155 (4).

When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so that the cause of action is barred in three years. The Code, sec. 155 (4).

APPEAL from *Womack, J.,* at April Term, 1890, of GRANVILLE.

The defendant, the State Board of Education, in its apportionment of the school funds in August, 1881, found it impossible to apportion to the county of Vance, which had been created by an act ratified 5 March, 1881, for want of a school census of the new county. It thereupon proceeded to apportion to Granville, Franklin and Warren counties, out of which the new county had been formed, as if it had not

been created, and directed that the board of education of each of the three counties should pay to the board of education of Vance the sum to which the territory cut off from the respective counties was entitled. The plaintiff was notified of such arrangement, and drew (367) for the full amount, including the sum it was instructed to pay Vance County. This was afterwards ascertained to be $824.25. The plaintiff did not pay over that sum to Vance, and after repeatedly calling upon it to do so in vain, the defendant deducted that sum from Granville in the apportionment of 1883, and paid it to the board of education of Vance. Appeal by plaintiff.

Robert W. Winston for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

CLARK, J. On 6 November, 1883, the defendant apportioned to the plaintiff $1,047 as its proportion of the school funds in its hands for distribution. On 31 May, 1884, the defendant paid over $824.25 thereof to the county board of education of Vance County, and immediately notified the plaintiff thereof, and the plaintiff subsequently drew for and received the balance. This action was begun in September, 1888, to recover the $824.25.

After the apportionment made in November, 1883, the defendant held the amount apportioned to the plaintiff for and in its behalf and subject to its requisition. The payment of $824.25 to Vance County was a conversion thereof, and the statute of limitation began to run from said payment, and notice thereof given to plaintiff. "The trust was put an end to by the disavowal of the trustee." *Robertson v. Dunn,* 87 N. C., 195. It was certainly as distinct a disavowal as a demand and refusal could have been.

As more than three years thereafter elapsed before the beginning of this action, the demand is barred. Code, sec. 155 (4); *Currie v. McNeill,* 83 N. C., 176.

This renders it unnecessary to consider the other exceptions in the record.

Per Curiam. Affirmed.

Cited: Kennedy v. Cromwell, 108 N. C., 3; *Dunn v. Dunn,* 137 N. C., 535.

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McFARLAND v. THE SOUTHERN IMPROVEMENT COMPANY.

Prayers for Instruction—Judge's Charge.

When a party asks a prayer for instruction, to which he is entitled, it must appear that it was given, either as asked or was substantially given in the charge, if the appellant excepted to the refusal.

APPEAL from *Gilmer, J.*, at March Term, 1889, of BUNCOMBE.

The defendant asked several instructions, of which the 9th was as follows:

"9. Every person who professes to be a skilled workman impliedly undertakes to do his work well and in a workmanlike manner, and according to the rules and principles of his trade or art. The performance must be an actual *bona fide* performance, in accordance with the true meaning of the parties, and not a mere compliance with the letter of the agreement, in violation of the spirit of the contract, if such existed. If a contractor knows the purpose for which a work he engages to perform is done, the work must be reasonably fit for the purpose for which it is required."

The court refused all the instructions, except a part of the last, embodied in the charge given, and the defendant excepted.

There was no exception taken to the charge of the court.

Verdict and judgment for plaintiff. Appeal by defendant.

M. E. Carter and C. M. Busbee for plaintiff.

F. A. Sondley (by brief) and T. F. Davidson for defendant.

(369) CLARK, J. Upon the evidence and pleadings, the defendant was entitled to have his ninth prayer for instructions granted, if not in the very words asked, at least in substance. It appears that neither was done. The case, as settled by the judge, says, "All the prayers for instructions were refused, except a part of the ninth, embodied in the charge given, and the defendant excepted." It appears, therefore, that only a part of this prayer was given, and what part is not stated. As the charge is not sent up, we cannot say that the part given was the substance of the whole prayer; and it would seem that it was not, for the judge states, in effect, that part of that prayer (and the whole of the other prayers) was refused. The exception to the refusal to give the whole prayer as asked, was notice to the appellee and to the judge to send up the part of the charge delivered, which embodied the instruction given in that aspect of the case. This has not been done. There is in the record no exception to the charge given, and we must

assume that it was satisfactory as far as it went. This exception, however, is for an omission to charge, which would not be error unless an instruction was asked and refused as was done here. *S. v. Bailey,* 100 N. C., 528; *McKinnon v. Morrison,* 104 N. C., 354.

Error.

Cited: Emry v. R. R., 109 N. C., 602.

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(370)

J. T. YOUNG v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Company—Parties—Damages—Injury to Feelings.

Where a telegraph company received for transmission the following message—"Come in haste; your wife is at the point of death"—and failed to deliver the same for eight days, though the receiver's place of business was well known and within a short distance of the office of the company in the town in which the receiver resided, whereby he was prevented from being present at his wife's death or attending her funeral: *Held,* (1) there was gross negligence, and the receiver was entitled to maintain an action for the tort; (2) the plaintiff is entitled, in addition to the nominal damages, to recover compensation for the mental anguish inflicted on him by the negligence of the defendant.

ACTION tried before *Boykin, J.,* at the Fall Term, 1889, of CRAVEN, upon demurrer to the complaint.

The complaint alleges, in substance, that on 26 February, 1889, the stepfather of plaintiff's wife, at Greenville, S. C., at whose house the wife was on a visit, delivered to the defendant telegraph company the following telegram, paying the sum charged for its transmission:

GREENVILLE, S. C., 26 Feb., 1889.

To J. T. YOUNG, New Bern, N. C.

Come in haste. Your wife is at the point of death.

J. W. RICE.

That the telegram was received by the agent of defendant at New Bern on 27 February, and, with ordinary care and attention, could have been delivered to plaintiff within a few minutes after its receipt, as the plaintiff's residence and place of business were well known, the latter being on a principal street, within 400 yards of the telegraph office, and plaintiff had been a resident many years continu- (371)

ously in New Bern, engaged in business there; that by the gross negligence of defendant, the plaintiff had no notice of such telegram until the receipt of a letter from the sender on 5 March, whereupon he went to defendant's office, on 6 March, and demanded the telegram, which was then delivered to him; that the plaintiff was continuously in New Bern, at his usual place of business from 26 February till 6 March, 1889; that had the telegram been delivered with reasonable promptness, he could have had the consolation of being with his wife in her last moments and of attending her funeral, but by reason of aforesaid gross negligence on the part of the defendant, the death and burial of his wife took place without any knowledge thereof on the part of the plaintiff; that the plaintiff had suffered great pain, mental anguish and distress by reason of the gross negligence and delay in transmitting and delivering the telegram, and demands damages. The defendant demurred to the complaint, on the ground that "It does not state facts sufficient to constitute a cause of action, in that the only damage which it is alleged that plaintiff has sustained is mental anguish and grief by reason of the plaintiff's not being able, on account of defendant's failure to deliver the message, to be present with his wife during her illness and attend her funeral."

The demurrer was overruled and defendant appealed.

C. Manly and F. M. Simmons (O. H. Guion by brief) for plaintiff.
W. W. Clark for defendant.

(372) CLARK, J., after stating the facts: In addition to the ground of demurrer set out in the record, the defendant demurred *ore tenus* in this Court, that the complaint did not state a sufficient cause of action, in that the plaintiff was not a party to the contract, and, therefore, could not maintain an action for its breach.

Upon the question whether the receiver can maintain the action, Shearman & Redfield Negligence, sec. 560, says: "We think, therefore, upon the principle of these decisions, a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damage without any means of redress." There is ample authority to the same effect. *Wadsworth v. Telegraph Co.*, 86 Tenn., 695; *Elwood v. Telegraph Co.*, 45 N. Y., 549; *Ellis v. Telegraph Co.*, 13 Allen, 227; *N. Y. P. Co. v. Dryburg*, 85 Pa. St., 298; *Aiken v. Telegraph Co.*, 19 Mo. App., 80, and many others. This, while not the English rule, is stated by Gray on Telegraphs, sec. 65; 2 Thomp. Neg., 847; 5 Lawson's Rights and Rem., sec. 1972, and Wharton Neg., sec. 758, to be the invariable rule in this country. The

following may be summed up as the reasons assigned therefor: (1) That a telegraph company is a public agency, and responsible, as such to any one injured by its negligence, or at least it is the common agent of sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence; (2) that in a case like this the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence must be to him; (3) the message is the property of the party addressed, in analogy to a consignee of goods; (4) that upon the face of the message, such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a *tort,* if injury is done him by negligence in performance of the duty contracted for. "The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver." 3 Sutherland Dam., (373) 314. This author goes on to state that where there is gross or willful negligence the action can be brought either for *tort* or on contract, and in case of misfeasance the company is liable also to third parties as wrongdoers.

Upon authority and reason, we think it clear that the plaintiff could maintain the action, and whether it is an action *ex contractu* for breach of the contract of speedy and safe transmission, or *ex delicto* for negligence and violation of the duty which the defendant owed as a public corporation or as a common agent of sender and receiver, at least nominal damages could be recovered.

"The principle that, for the violation of every legal right, nominal damages at least will be allowed, applies to all actions, whether for *tort* or breach of contract, and whether the right is personal or relates to property." 1 Sutherland Dam., 11. Where "there is a neglect of duty by a telegraph company, and an infraction of the plaintiff's right to have care and diligence used in the sending and delivery of his message, he is entitled to nominal damages at least." *Ib.*

The other question, and the one most earnestly pressed upon our consideration, is whether the plaintiff can recover for mental pain and anguish when there has been no physical injury.

In Shear. & Red. Neg., sec. 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet, in such cases the damages ought

(374) not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message."

This paragraph was cited and approved by the Court of Appeals of Kentucky in an opinion filed in June of this year (*Chapman v. Telegraph Co.*, 90 Ky., 265), in which the Court says: "This seems to be the true rule—one which is in accord with reason, and necessary to a proper protection of individual right and the interests of the public."

In this case the court held that the plaintiff could recover damages for delay in the delivery of a message announcing the illness and death of the plaintiff's father, and says:

"Many of the text writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract, and whenever a party does so he is liable, at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If in mat-

(375) ters of mere trade it negligently fails to do its duty, it is responsible for all the natural and proximate damage, is it to be said or held that as to matters of far greater interest to a person it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for $100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval. It would sanction the company in wrongdoing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should

answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act.

"The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where the mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrongdoer for reparation. If injury to the feelings be an element to the actual damages in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity—legal insult added to outrage by the party by offering one cent, or the cost of a telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should (376) answer for all the proximate damages."

In Indiana and Texas, opinions to the same effect have also been filed during the present year. In the Indiana case (*Reese v. Tel. Co.*, 123 Ind., 294) *Berkshire, J.*, says: "Although the telegram had no relation to any business transaction which would have involved dollars and cents merely, this did not justify the appellee in neglecting its duty. It had undertaken, for a valuable consideration, to deliver the message promptly, and its failure so to do, or to make reasonable effort in that direction, was negligence and a violation of its undertaking. The diligence which a telegraph company is required to use in the delivery of a message will be determined to some extent from the character and importance of the message. Upon humane grounds, messages like the one here involved should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and in promptness of delivery should have preference over messages of the latter class. . . . From the information it had before it when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and, therefore, such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. . . . The appellant having suffered great mental anguish because, as he alleges, of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress except the mere pittance which he paid to have the telegram transmitted and delivered. Some of the authorities seek

(377) to draw a distinction as to the right to recover damages for mental suffering between cases where there may be a recovery for pecuniary loss and cases where there is, or can be, no pecuniary loss, to which class the present action belongs. With this distinction we have no sympathy, and confess we can see no good reason for it to rest upon. If a telegraph company undertakes to transmit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its agreement, or, as is sometimes said, failed to perform a duty which it owed to the sender of the message or the person to whom it is addressed, as the case may be. For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the parent, and it negligently fails to deliver the telegram, and as a result the sick relation dies without having the comforting presence of a husband, wife, father, mother, son, or daughter, with all the benefit, physical and mental, which would follow. Is it to be said that, under such circumstances, the most that the telegraph company is liable for is nominal damages, because of greater mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife, or child? In our judgment, no such rule can or should prevail. In failing to promptly deliver the telegram the telegraph company negligently fails to perform a duty which it owes to the sender of a telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public. In our opinion, the appellant is entitled to recover damages for the mental suffering which he has endured, and his measure of damages is the amount paid for the
(378) transmission of the message, and, in addition, what would seem to be just, as a compensation for his mental anguish."

In the other case (*Tel. Co. v. Moore,* 76 Tex., 66) the Court held that "A message delivered for transmission to a telegraph company, containing the words, 'Billy is very low; come at once,' is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that mental suffering is likely to result from a failure to transmit the message with diligence and dispatch"; and says, "In the case of *Telegraph Co. v. Adams,* 75 Tex., 531, it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company

upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral, in case of death. The same principle was affirmed in the case of *Telegraph Co. v. Feegles,* 75 Tex., 537, decided at the same term, and *Telegraph Co. v. Broesche,* 72 Tex., 654 (1889)."

In *Telegraph Co. v. Cooper,* 71 Tex., 507 (1888), *Collard, J.,* says: "Appellant claims that its demurrers to plaintiff's petition should have been sustained, because injury to feelings, disconnected from actual personal injury, are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages. The very question raised here was before the Supreme Court in the case of *Stuart v. Telegraph Co.,* 66 Tex., 580, and the Court, after discussing the *SoRelle case,* 55 Tex., 310, and the two *Levy cases,* 59 Tex., 543, 563, the case of *Hays v. R. R.,* 46 Tex., 272, and other authorities, uses the following language: 'But it is claimed that the mental is an incident to the bodily pain, and that without the latter the former injury cannot be (379) considered as actual damages. In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case—not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by, and contemplated in, doing the wrongful act is the principle of liability. The wrongdoer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness, as well as by a wound to the person.' The conclusion derived from the opinion in the case from which the foregoing extract is taken is, that injury to the feelings, caused by the failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damages. The same principle was decided by the Commission of Appeals in *R. R. v. Miller* (erroneously styled in the reports *R. R. v. Wilson*), 69 Tex., 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury."

In *Telegraph Co. v. Simpson,* 73 Tex., 422 (decided 1889), the Court reaffirmed the same doctrine as does *Loper v. Telegraph Co.,* 70 Tex., 689, which is exactly like our case, except that the relationship was that of a mother who was prevented from being at her son's death-bed and burial by negligent delay in the delivery of the telegram.

In a recent case (1888) (*Wadsworth v. Tel. Co.,* 86 Tenn., 695), the Tennessee Supreme Court affirms the same doctrine; and *Caldwell, J.,*

after quoting the authorities to the effect that damages for mental anguish cannot usually be given in an action for breach of contract, says: "These are but illustrations and applications of the general (380) rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that, in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties, and that, therefore, the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that, where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for the breach of contract) is subject to the same general rule, and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its nonperformance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything, no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as owned, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits were mainly or (381) altogether to the feelings or affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain or anguish such information, promptly conveyed, would prevent. By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages 'correctly and without unreasonable delay,' and in failing to do so it became responsible for all loss or injury occasioned thereby. Code, Mill. & V., secs. 1541-1542; *Marr v. Telegraph Co.*, 1 Pickle, 529; Gray Tel., secs. 81-82, *et seq.*; Cooley Torts, 646-647; Whart. Neg., sec. 767; 3 Suth. Dam., 298-300; Shear. & Red. Neg., sec. 605. This rule of damages is enforced by the Supreme Courts of Georgia, Virginia, and other States, even

where the message is in cipher. *Telegraph Co. v. Fatman,* 73 Ga., 285; 54 Amer. Rep., 877; *Telegraph Co. v. Reynolds,* 77 Va., 173; 46 Amer. Rep., 715, and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss, but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duty and liabilities of telegraph companies has hardly passed its infancy and cannot be expected at so early a day in its history to be settled, even in its important parts, by a long line of concurring decisions.

"In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind as is here averred, has but seldom occurred, and, therefore, has but seldom been brought to the attention of the courts of this country. To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default, would be to disregard the purpose of the telegrams altogether, and to violate the rule of law which authorizes a recovery of damages appropriate to (382) the objects of the contracts broken; and, furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such message at all, and that it has the right in the future to do so, as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result, we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons.

. . . . . .

"That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether, for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage. It is very appropriately said, however, in the conclusion of the opinion in *SoRelle's case,* that 'great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which the recovery may be had; and the attention of juries might well be called to that fact.' Nor do we think that the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment as a matter for the con-

sideration of the court in its endeavor to reach a just and sound conclusion. It is rather to be hoped that instances of such dereliction of plain, easy, and important duty have not been very numerous in the past, and that they will seldom transpire in the future."

(383) In the United States Circuit Court, in *Beasley v. Western Union Telegraph Co.*, 39 Fed., 181 (decided 1889), the Court held that if, by cause of the unreasonable delay of a telegram, the husband was prevented from reaching his wife's bed before her death, he could recover a proper compensation for his disappointment and mental anguish. The judge (*Maxey*) very properly adds that caution should be observed by the jury to distinguish between the pain caused the plaintiff by the wife's death, for which the defendant was not responsible, and that caused by being deprived, by defendant's negligence, of the consolation of seeing his wife before her death.

This subject is one of the first impression in this State.

It is a matter of importance to the public that it should be settled what legal obligation, if any, rests upon the telegraph companies to deliver promptly messages of a social nature, not concerning pecuniary transactions. To many, and in many instances, they are far more important. If no pecuniary damages can be recovered for a breach of the duty to deliver such messages, beyond the recovery of the petty sum paid for transmission, the usefulness and value to the public of such corporations will be materially diminished. We have, therefore, cited quite fully from the most recent cases on the subject. There are older cases sustaining the same doctrine.

In *SoRelle v. Telegraph Co.*, 55 Tex., 308, it was held that a telegraph company is liable for injury to the feelings of a son from delay in delivering to him a message announcing the death of his mother, whereby he was prevented from attending her funeral.

In *Stuart v. Telegraph Co.*, 66 Tex., 580, it is held that where, by gross negligence in delivering a telegram, plaintiff was prevented from seeing his brother in his last illness and attending his funeral, compensation for injury to feelings may be recovered. The same princi-

(384) ple is intimated in *Logan v. Telegraph Co.*, 84 Ill., 468, and there are other authorities. There are some authorities to be found of a contrary tenor (*West v. Telegraph Co.*, 39 Kan., 93; *Russell v. Telegraph Co.*, 3 Dak., 315, and some others), but they fail to satisfy us that they are consonant to justice and the "reason of the thing."

Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train (3 Suth. Dam., 259); in actions for breach of promise of marriage; in actions for slander and libel (*Terwiliger v. Wende*, 17 N. Y., 54); in actions

for malicious arrest and prosecution (*Fisher v. Hamilton,* 49 Ind., 341); in actions for false imprisonment (*Stewart v. Maddox,* 63 Ind., 51); for illegally suing out an attachment (*Bryne v. Gardner,* 33 La. Ann., 6); for *crim. con.* and for seduction, and in other cases. Damages for injured feelings were also allowed where a conductor kissed a female passenger against her will. *Craker v. R. R.,* 36 Wis., 657. In actions by a father for seduction of a daughter, by a fiction of law, the damage is laid *per quod servitum amisit,* but the recovery is generally out of all proportion to any possible valuation of the services, and it is well understood that, in fact, compensation is not given for them, but for the wounded and outraged feelings of the parent. We see, therefore, no reason why the doctrine of compensation for injury to feelings should not embrace a case like the one before us.

When a passenger, while traveling on the cars, is injured by a collision or other negligence, though there is a breach of the contract of safe carriage, yet the plaintiff can elect to hold the carrier liable in tort for the negligence which caused the injury. *Wood v. R. R.,* 32 Wis., 398; *Craker v. R. R.,* 36 Wis., 657-675, and cases cited.

By analogy, when there is an injury caused by negligence and delay in the delivery of a telegram, the party injured is entitled to sue *in tort* for the wrong done him. In *Stuart v. Telegraph Co.,* 66 Texas, 580, it is said: "We have no forms of action or technical rules (385) which can prevent a plaintiff, upon a statement of the facts of his case, from recovering all the damages shown to be sustained. If the facts show a breach of contract, and also that the breach is of such a character as to authorize an action of tort, all the damages for the thing done or omitted, either *ex contractu* or *ex delicto,* may be recovered in the one action." To the same effect, *R. R. v. Lacy,* 59 Tex., 547, and *Wadsworth v. Telegraph Co.,* 86 Tenn., 695.

It seems to us that this action is in reality in the nature of tort for the negligence, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage.

It is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other." 3 Suth. Dam., 260. And Cicero (who certainly may be quoted as an authority among lawyers) says, in his Eleventh Philippic against Anthony, "*Nam quo major vis est animi quam corporis, hoc sunt graviora ea quae concipiuntur animo quam illa*

quae corpore." "For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, as above stated, and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties
(386) injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.

Scott and Jarnigan on Telegraphs, sec. 418, says that damages for gross negligence in the delay of a telegram, whereby the feelings of the parties are outraged, are vindictive or exemplary, and largely in the discretion of the jury; that they are given rather to punish the offender than to recompense the party injured, and some of the authorities above referred to support that view. Our own opinion, however (certainly when no malice is alleged), is that they are awarded as compensation to the plaintiff for the wrong he has sustained in the mental anguish needlessly inflicted on him by the negligence of the defendant. Sedgw. Dam., 35.

The demurrer was properly overruled.

Per Curiam. Affirmed.

Cited: Thompson v. Tel. Co., post, 455; *Sherrill v. Tel. Co.,* 109 N. C., 533; *Hood v. Sudderth,* 111 N. C., 221; *Walser v. Tel. Co.,* 114 N. C., 446; *Sherrill v. Tel. Co.,* 116 N. C., 658; *S. c.,* 117 N. C., 358; *Havener v. Tel. Co., ib.,* 543; *Hansley v. R. R., ib.,* 573; *Lyne v. Tel. Co.,* 123 N. C., 133; *Chappell v. Ellis, ib.,* 262; *Cashion v. Tel. Co., ib.,* 270; *Kennon v. Tel. Co.,* 126 N. C., 234; *Rosser v. Tel. Co.,* 130 N. C., 254; *Morton v. Tel. Co., ib.,* 302; *Sparkman v. Tel. Co., ib.,* 449; *Meadows v. Tel. Co.,* 132 N. C., 43; *Snider v. Newell, ib.,* 619; *Bryan v. Tel. Co.,* 133 N. C., 608; *Hunter v. Tel. Co.,* 135 N. C., 472; *Green v. Tel. Co.,* 136 N. C., 496; *Hancock v. Tel. Co.,* 137 N. C., 501; *Dayvis v. Tel. Co.,* 139 N. C., 83; *Harrison v. Tel. Co.,* 143 N. C., 151; *Helms v. Tel. Co., ib.,* 394; *Woods v. Tel. Co.,* 148 N. C., 10; *Cates v. Tel. Co.,* 151 N. C., 506; *Shaw v. Tel. Co., ib.,* 642; *Carmichael v. Telephone Co.,* 157 N. C., 26; *Alexander v. Tel. Co.,* 158 N. C., 478; *Thomason v. Hackney,* 159 N. C., 305; *Penn v. Tel. Co.,* 159 N. C., 309, 315; *Smith v. Tel. Co.,* 167 N. C., 257; *Smith v. Tel. Co.,* 168 N. C., 520; *Jones v. Brinkley,* 174 N. C., 26.

JOHN W. WILSON, RECEIVER, v. W. T. CHICHESTER ET AL.

Supplementary Proceedings—New Action Pending Former Proceedings—Judgment Debtor—Creditor—Receiver—Interpleading.

1. Where all the matters in controversy can be determined in proceedings already pending, a second action commenced for this purpose should be dismissed.

2. In supplementary proceedings it was adjudged that the fund in question belonged to the judgment debtor, and order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund: *Held*, (1) that the action was improperly brought; (2) that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings; (3) that the action by the receiver was improperly brought, and should be dismissed, but without prejudice to any of the parties.

APPEAL at February Term, 1890, of GUILFORD, from *Armfield, J.* (387)

It appears that Edward A. Prior & Co., before 18 April, 1889, obtained a judgment in the Superior Court of the county of Guilford for $466.46 and costs against W. T. Chichester, which judgment was duly docketed on the judgment docket of that court, and execution issued thereupon, and the same was duly returned by the sheriff unsatisfied, because he found no property to satisfy the same, or any part thereof. Thereafter, on the day above specified, the said judgment creditors began their proceedings supplementary to the execution, and the said judgment debtor, on 19 April of the same month, appeared before the clerk of said court and was examined in respect to his property, etc., and sundry other witnesses were likewise so examined. The examination of such witnesses was duly taken in writing and filed. In the course of such proceedings the court (the clerk) was of opinion that $592.50, in the hands of a witness, S. Einstein, belonged to said judgment debtor, and it made an order that the said sum of money be paid into court, and accordingly the same was so paid.

Afterwards, on 26 April, 1889, J. M. Chichester made claim to the money above mentioned. The court thereupon appointed the present plaintiff receiver of the estate, property rights and choses in action of the said judgment debtor.

Afterwards, the present plaintiff, receiver, brought this action against the said judgment debtor and J. M. Chichester, to recover the said sum of money, the purpose being to try the right to the same.

Afterwards, C. R. Chichester and G. P. Chichester, trading as Chichester Bros., were made parties defendant in the action. They made defense, and alleged that the said money belonged to them,
(388) and not to either of their codefendants.

The answers of the defendants raised issues of fact and law. The court submitted to the jury the following issues:

"Is W. T. Chichester the owner of the money paid into court, $592.50?"

"Who is the owner of the $592.50, if W. T. Chichester is not?"

The jury responded to the first of these issues "Yes," and made no response to the second one.

On the trial, the plaintiff offered in evidence the written examination of the said judgment creditor, the like examinations of the said S. Einstein and J. M. Chichester, taken and filed in the proceedings supplementary to execution first above mentioned. The defendants each objected to such admission, but the court overruled their objections and allowed the said examinations to be read to the jury, and the defendants excepted.

There was other evidence received, and objections and exceptions thereto by the defendants, but the same need not be here reported.

Upon the verdict, the court gave judgment for the plaintiff, and the defendants appealed.

W. S. Ball for plaintiff.

L. M. Scott and J. A. Barringer for defendants.

MERRIMON, C. J., after stating the facts: This action is brought by the receiver, appointed in the course of the proceedings supplementary to the execution above mentioned, and the judgment debtor in such proceedings is made a party defendant to this action. Why he is made such party does not appear. Indeed, he is not a necessary or proper party defendant, or at all a proper party thereto. The plaintiff does not, in contemplation of law, seek to recover from him the money in controversy specified in the pleadings, or any redress against
(389) him. He, as receiver, already, by operation of law, has whatever and all the right, claim, interest and title to that money of the defendant judgment debtor.

Then, wherefore shall he bring this action against him? What pertinent purpose is served by it as to him? All proper redress as to him may, and ought to be sought in the proceedings supplementary to the execution. The purpose of this action ought to be to recover from third parties claiming and having it, the money in controversy, which the plaintiff alleges he has the right to have as such receiver. The

statute (The Code, secs. 494, 497), in cases like this, vested the judgment debtor's interest in, and title to, the money in him, and authorized him to bring this or any proper action to recover the same from the defendants or any person having it. *Coates v. Wilkes,* 92 N. C., 376; *Rose v. Baker,* 99 N. C., 323.

In the course of the supplementary proceedings the court, as it seems, being of opinion that it sufficiently appeared that the money in question belonged to the judgment debtor, so declared and required it to be paid into court, and this was accordingly done. Regularly and properly, the defendants claiming the money might, ought, to have applied to the court in such proceedings to be allowed to interplead therein and allege their title to and right to have it. This is so, because the court had possession and control of the fund for the just purposes of the supplementary proceedings, which were, in a sense, of the nature of a creditor's bill, and such interplea might be allowed. It was so held in *Munds v. Cassidey,* 98 N. C., 558. In case of such interplea, the burden would be on the party making the same to show title to the money or property claimed. *Wallace v. Robeson,* 100 N. C., 206.

It seems, however, we cannot see why, that the parties to such proceedings deemed it necessary—certainly not improper—to apply for a receiver, and accordingly the court, upon application, appointed the plaintiff to be such receiver. Afterwards he brought this action, as receiver, against the defendants — improperly, as we have (390) seen, against the judgment debtor — treating the money in question as if claimed by the defendants and within their control. It seems that the court thought this the proper way to try the right of the defendants to the money. It is said, in the case settled on appeal, that "the defendant J. M. Chichester put in his claim before the clerk as owner of the said money, and asked the court to pay the same to him. This the court refused to do, and, to test the matter, on motion of the plaintiff in said judgment, the said clerk "appointed" the plaintiff receiver. It appears, however, from the complaint, and as well from the case settled on appeal, that the money is still in the possession and control of the court under its order directing it to be paid into court as the property of the judgment debtor. As to and against the latter, the court could and ought, in the supplementary proceedings, to have applied the money to the payment of the judgment of the plaintiff in such proceedings, unless some third party claiming the money had applied to be allowed to interplead and allege his right to the same. When the present defendant (J. M. Chichester) "put in his claim before the clerk as owner of the said money, and asked the court to pay the same to him," if his application and motion to be allowed to interplead were properly made, his motion should have been allowed by the

court; and so, upon like proper application, the court might have allowed the present defendants (the Chichester brothers) to interplead. In that way, they might regularly and properly have asserted and litigated their rights to have the money.

The purpose of the plaintiff in this action is not to recover the money from the defendants; all the pleadings show that it is not in their possession or control; that the court has possession and control of it for all proper purposes of the supplementary proceedings. The simple purpose of the action is, as stated in the complaint, to
(391) have the court adjudge that the money is the property of the judgment debtor, and its application. But the court has already, in the supplementary proceedings, adjudged, as against the judgment debtor, that the money was his, and in such proceedings it may yet make all necessary and further inquiries and orders in respect to it and its proper application. And so, also, as we have seen, third parties claiming the money may interplead and litigate their claims to it in such supplementary proceedings, because they are not yet terminated. This action, therefore, is unnecessary, and serves no practical purpose. Indeed, it ought not to have been brought, and cannot be maintained, because what it seeks to accomplish might and should properly have been sought in the proceedings mentioned. It is settled that when redress is sought in an action that might and ought to have been sought in an action pending at the time such former action was begun, and yet may be had there, the latter cannot be maintained, but the court will, *ex mero motu,* dismiss it, in the absence of a motion made for that purpose. *Long v. Jarratt,* 94 N. C., 443; *Morris v. White,* 96 N. C., 91; *Albertson v. Williams,* 97 N. C., 264; *Jones v. Coffey, ib.,* 347.

The judgment creditor should have insisted upon the due application of the money in the supplementary proceedings, and when the court (the clerk) refused to allow the present defendant, J. M. Chichester, to interplead, he should have excepted and appealed to the judge.

The judgment must, therefore, be reversed, and an order entered dismissing the action without prejudice to any of the parties to the same.

Error.

Cited: Herman v. Watts, post, 652; *Ross v. Ross,* 119 N. C., 111; *Campbell v. Farley,* 158 N. C., 43.

(392)

THOMAS E. HICKS ET AL. v. C. J. WARD ET AL.

Will—Power of Appointment—Uses and Trusts—Donee of a Power—Revocation—Mortgage.

1. A will, which, after providing for the testator's other children, devised property to his son in trust for such person or persons and use or uses as he, by deed or will, should appoint, and until and in default of such appointment in trust for the sole and separate and exclusive use and benefit of the testator's daughter-in-law, the appointee's wife, confers upon the son a general power of appointment, under which he had a right to convey by mortgage or otherwise.

2. The mortgage by the donee of the power, providing that surplus was to be paid over to him and his heirs, etc., was a complete revocation of the trusts declared in the will.

CONTROVERSY without action, from GRANVILLE, submitted to *MacRae, J.*

In 1864 Thomas J. Hicks died, having previously made his will, the material parts of which are set forth in the opinion, wherein he devised to Edward H. Hicks, with general power of appointment as to certain property, real and personal, described, and limitation over in case of failure to execute it.

In an action against Edward H. Hicks, as executor in his own right, brought in the interest of the other distributees and parties in interest under the will, for an account and settlement of the personal estate, and sale of the real estate and division, according to the terms of the will, the real estate was sold by commissioner, and Edward H. Hicks was the purchaser thereof, except one lot. Afterwards, in compromise of a suit, Edward H. Hicks executed three notes, and, to secure the payment thereof, he and his wife executed a mortgage upon the lands purchased at the commissioner's sale, still retained by him. It was set forth in the mortgage that the same was made by him in the exercise and execution of the powers conferred on him (said Edward H. Hicks) by the deed of the commissioner and the will of Thomas J. Hicks. The other facts are sufficiently set forth in the opinion of the Court. (393)

J. W. Hays (by brief) for plaintiff.
R. W. Winston for defendant.

SHEPHERD, J. As Edward H. Hicks purchased the land at the commissioner's sale and procured it to be conveyed to himself "upon the same trusts, and with the rights and powers declared and set forth in

will of his testator," and as the parties to the action have agreed to rest the decision upon the construction of the said will in reference to the authority of the said Hicks to execute the mortgage in question, it is only necessary that we should consider the nature and extent of power conferred upon him by the said instrument.

The testator, after providing for his other children, devised the property which is the subject of this controversy to his son, the said Edward, "in trust for such person, or persons, and use, or uses, as he (should) by deed or will appoint, and until, and in default of, such appointment in trust, for the sole and separate and exclusive use and benefit of his daughter-in-law Harriet (wife of said Edward), during her life, and at her death to be equally divided between the children," etc. This very clearly conferred upon Edward a general power of appointment (*Rogers v. Hinton,* 62 N. C., 101), and under it he had the right to execute a valid mortgage. It is unlike a simple power to sell, which, it is very generally held, does not authorize the donee to charge the estate with such encumbrances. The language of the will is as broad and comprehensive as it can well be, and we cannot hesitate in hold-
(394) ing that the execution of the mortgage was authorized by the terms of the said power of appointment. 1 Sugden Powers, 496.

The other question to be determined is, whether the execution of the mortgage was such an appointment or revocation as to wholly defeat the trusts declared in the will. It is argued that, conceding the power to execute the mortgage, its execution was but an appointment or revocation *pro tanto,* leaving the equity of redemption, or the surplus after a sale, subject to the trusts above mentioned. This, as a general proposition, is well established by the authorities, as in equity mortgages are considered as only securities for money, and no alteration in the estate is made thereby. 1 Sugden Powers, 361.

It is equally well settled that where there is not only a mortgage, but an ulterior disposition inconsistent with the former (uses), it will operate in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto.* Sugden, *supra,* 4 Cruise Dig., 202.

Fitzgerald v. Fauconbridge (Fitz., 207) is illustrative of the principle just stated. There, under a general power of appointment or revocation, William Fowler conveyed the fee to trustees "to raise and pay debts, and after the payment thereof that they should pay the overplus, and reconvey the estates unsold to him, or to such persons as he should appoint." By a deed of the same date he reserved the power to revoke the conveyance, and it was held that the former settlement was wholly revoked, and that "Fowler's intention was to do an act inconsistent with the former settlement, and to *put the estate*

into a new channel." This decision was approved by the House of Lords, and is cited, with approval, in Cruise on Real Property, 4 Book, 202.

In our case there is an express provision that the "overplus is to be paid over to the said Edward H. Hicks, his heirs, executors, administrators or assigns," and we cannot but regard this as a plain manifestation of the intention of the donee of the power to (395) revoke the settlement and assume entire dominion over the estate. Under the will he could have appointed to his own use (Williams Real Prop., 300; Sugden, *supra,* 471), and thus have defeated the trusts, and he has completely exercised this power by mortgaging the property and limiting the "overplus" to the use of himself and his right heirs. In this view we are sustained by *Sir Edward Sugden, supra,* 361, who says that "where the equity of redemption or residuary interest is settled differently, or a different power of disposition is reserved over it, even equity will hold the mortgage or conveyance a total revocation."

Affirmed.

P. H. BOOTH v. J. R. CARSTARPHEN.

Assignment for the Benefit of Creditors—Fraudulent Deeds of Assignment—Provisions for the Benefit of the Maker—Fraudulent Intent—Actual Intent.

1. Where the maker of a deed of assignment to secure certain creditors was much embarassed, financially, and owed debts other than those secured thereby, and the deed contained a clause providing that he should remain on the assigned premises for two years and retain the rents and profits for his own benefit, reserving also his homestead and personal property exemptions: *Held,* that such conveyance raised a strong presumption that it was in fraud of creditors, and, nothing to the contrary appearing, should be declared void by the court.

2. The admission of the plaintiff that there was no *actual intent* to defraud some particular creditor does not prevent the deed from being fraudulent as to him. The facts and circumstances of the transaction determine its character and intent, without regard to the actual intent proved.

3. Discussion by *Merrimon, C. J.,* of fraudulent deeds of assignment.

IN THIS case, which was tried in the Superior Court of HALIFAX, before *Boykin, J.,* the parties agreed upon, and submitted to (396) the court for its judgment thereupon, a statement of facts, the material parts of which are as follows:

"1. That the sheriff of Northampton, by virtue of sundry executions to him directed, issued from Northampton Superior Court, on 5 May, 1887, and returnable to Fall Term, 1887, of said court, upon judgments duly docketed in said court against the defendants, John R. Carstarphen and others, partners trading as Carstarphen, Grant & Co., and in favor of P. H. Booth and others, did, on Monday, 1 August, 1887, having first caused the homestead and personal property exemptions to be allotted and set apart, and after due advertisement, sell, at public auction, for cash, at the courthouse in the town of Jackson, the following lands, then in possession of and belonging to the defendant, John R. Carstarphen, and situate in said county of Northampton, to wit: That tract on which the said, etc., (describing several tracts), . . . where and when the plaintiff became the purchaser of said lands, complied with the terms of sale, and received the sheriff's deeds therefor, and which deeds were duly recorded 11 August, 1887.

"2. That, on 15 January, 1884, the defendant, John R. Carstarphen, was much embarrassed financially and wholly insolvent, and has been ever since, his principal indebtedness being on account of the debts of Carstarphen, Grant & Co., a mercantile firm lately doing business in said county. The other members of said firm were the defendants, James W. Grant and one B. D. Woodruff both of whom were, on said day, and have been ever since, totally insolvent.

"3. That the assets of said firm were, on said 15 January, 1884, worth $4,000, and, on which day, they were conveyed to one, J. S. Grant, in trust to secure the indebtedness of said firm—a debt of $5,674.74 to the defendants Vaughan & Barnes being preferred. Said trustee has paid said Vaughan & Barnes about $3,200 on their
(397) said debt, and has in hand from $600 to $800 more to apply to said debt.

"4. That on said 15 January, 1884, the defendant Carstarphen conveyed all of his individual property, both real and personal, subject to his real and personal property exemptions to be thereafter allotted to him, to trustees, as follows:

"1. To one W. H. Collier he conveyed, by deed of trust, all of his stock of goods and store fixtures, then lying and being in his store, near his residence, in Northampton County, and all his choses in action, to secure certain of his individual debts, among which was a debt of $1,000 due the defendants Jones, Lee & Co. The property conveyed by this deed was not sufficient to pay, in full, the debts therein secured, and there has only been $100 paid on the Jones, Lee & Co. debt.

"2. To the defendant, James D. Boone, he conveyed, by deed of trust, all of his other individual property, both real and personal, not embraced in the aforesaid deed to W. H. Collier, to secure the payment of

the aforesaid debt of $5,674.74 to Vaughan & Barnes, and the aforesaid debt of $1,000 to Jones, Lee & Co., which deed was duly recorded 16 January, 1884, a copy of which is herewith filed, marked exhibit 'A,' as a part of this case. The real property conveyed by said deed of trust is the same as that described in the first paragraph of this agreed case, being all the real estate owned by said Carstarphen. At the same time defendant Grant conveyed, by deed of similar purport, all his individual property, real and personal, preferring said Vaughan & Barnes, a copy of which deed is also hereto attached, exhibit 'B.'

"5. That no sale has been had by the trustee Boone of any part of the property conveyed to him as aforesaid, nor have any of the creditors secured thereby notified or requested the trustee Boone to take possession and sell any part of said property; but the said creditors were advised by their attorneys that the defendant Carstar- (398) phen had a right to postpone the sale of his real estate until the assets of the concern of Carstarphen, Grant & Co., in the hands of the trustee, J. S. Grant, aforesaid, were exhausted; nor has said trustee ever taken into possession, or exercised any control over any of said property conveyed to him.

"6. That ever since the execution of said deed of trust to said Boone, said John R. Carstarphen has been in the possession and enjoyment of all the property conveyed thereby, using and consuming the same for his own use and benefit, without hindrance or interference on the part of the trustee Boone, or any of the beneficiaries.

"7. The real and personal property exemptions were never allotted and set apart to said Carstarphen until 22 June, 1887, when they were allotted under the executions mentioned in the first paragraph of this case.

"8. That the judgments on which the aforesaid executions issued were obtained and docketed subsequent to the execution and recordation of the aforesaid trust deed to said Boone; but the debts on which the aforesaid judgments were obtained were contracted several months prior thereto.

"9. That there is still due and unpaid, the debt of Vaughan & Barnes ($5,674.74), less the amounts received by them as aforesaid from J. S. Grant, trustee, and the debt of Jones, Lee & Co. ($1,000), less the $100 paid them as aforesaid.

"10. That the plaintiff admits, that in making the deed in trust to Boone there was no actual intent to defraud the creditors of Carstarphen, Grant & Co., but he insists that the intent with which it was made cannot change its legal effect, and that, upon its face, with the foregoing agreed facts, it is fraudulent in law, and, therefore, void as to other creditors."

(399) The copy of the deed, marked exhibit "A," mentioned above, contains, among others, the following provision:

"Upon this special trust and confidence, however, that the said James D. Boone will hold, use and apply the same to the interest and uses following, and to no other—that is to say, if the party of the first part should fail to pay off and discharge the claims due to R. B. Peebles, Vaughan & Barnes, Jones, Lee & Co., on or before the first day of January, 1886—then it shall be lawful, and shall be the duty of the said James D. Boone (being thereunto requested by the said parties), to sell said property, or so much thereof as may be necessary, after duly advertising the same according to law, and, after discharging said claims and all costs that may have grown out of the proceedings to sell land, to pay over the surplus to the party of the first part. And it is further covenanted and agreed by and between all the parties to these presents, that, in the meantime, that is to say, from the date hereof until the day of sale—the said party of the first part shall be entitled to live on the land, and to take, use and apply the rents, issues and profits, and every part thereof, to his own use and benefit."

The complaint demands judgment for an account to ascertain what amount was due the creditors secured by the deeds of trust mentioned; that the deed of trust be declared fraudulent, null and void as to the plaintiff; that plaintiff have possession of the land described in the complaint, and for general relief, etc.

Upon the facts so submitted to the court, it gave judgment for the defendant, and the plaintiff, having excepted, appealed.

J. M. Mullen for plaintiff.

T. W. Mason, W. H. Day, and R. B. Peebles for defendants.

(400) MERRIMON, C. J., after stating the facts: A deed like that in question here may be necessarily void because of fraud appearing upon its face from its vitiating provisions and purposes. This is so when the facts constituting the fraud so appearing are so manifest and of such vitiating character as that they of themselves imply fraud that admits of no explanation or conclusion to the contrary. In such case, it is the province and duty of the court to declare and adjudge the deed fraudulent and void whenever the same shall come before it for adjudication. The reason is, that the facts so appearing necessarily imply the fraudulent intent and character of the deed, and the court simply applies the law.

There are other cases where, in such a deed, one or more of its provisions and purposes, apparently and *prima facie,* imply fraud and the fraudulent intent and purpose of the maker thereof. In such case the

law raises the presumption that the deed is fraudulent, and therefore void, and this presumption will prevail and destroy the efficacy of the deed, unless a party claiming benefit of it shall rebut the presumption by proper evidence, proving that the supposed vitiating provisions were not such in fact, but lawful, and such as might properly be made and have effect. The rebutting facts proven must be such as that, if they appeared in appropriate connection in the deed, they would so explain and modify the provisions thereof, *prima facie* and of themselves fraudulent, as to render the deed, upon its face, free from fraudulent intent and purpose. The presumption of fraud may be rebutted, because the provisions of the deed, apparently fraudulent, and to be so treated in the absence of satisfactory explanation, do not necessarily and conclusively imply fraud—they admit of possible explanation that may render them valid. *Hardy v. Simpson,* 35 N. C., 132; *Starke v. Etheridge,* 71 N. C., 240; *Cheatham v. Hawkins,* 76 N. C., 335; *S. c.,* 80 N. C., 161; *Holmes v. Marshall,* 78 N. C., 262; *Boone v. Hardie,* 87 N. C., 72; *Moore v. Hinnant,* 89 N. C., 455; *Hodges v. Lassiter,* 96 N. C., 351; *Beasly v. Bray,* 98 N. C., 266; *Phifer v. Erwin,* 100 N. C., 59; *Brown v. Mitchell,* 102 N. C., 347; *Woodruff v. Bowles,* 104 (401) N. C., 197; *Bobbitt v. Rodwell,* 105 N. C., 236.

The fraudulent intent of a party charged with fraud in any transaction or matter appears from, and must be determined by, acts done or omitted to be done—their nature, connections, purpose and effect in contemplation of law. Such intent does not depend upon nor consist in, nor is it to be ascertained from simply the thought and purpose of the mind, but it depends upon, and is to be ascertained from such thoughts and purposes evidenced and manifested by and taken in connection with the acts done or not done, and pertinent facts and circumstances. It is the act or thing done or not done that gives cast, quality and character to the thought and purpose of the mind—the intent—and of this the law takes notice. The law cannot lay hold of and deal with the simple inactive intent of the mind; it knows and regards the intent as it appears to have distinctive character from what is done or not done in any transaction. It is, therefore, that a deed must be adjudged fraudulent and void when a provision or stipulation in it necessarily and conclusively implies its fraudulent character. Hence, too, when a provision in it raises the presumption that it is fraudulent, the law implies the intent, and the court must adjudge the deed void unless the presumption shall be rebutted. And such presumption cannot be rebutted by the mere fact that the thought, the simple intent, of the mind of the party charged with the fraud had no actual intent of his mind to perpetrate the same. He must produce evidence to prove pertinent facts—something done or not done—and facts and

circumstances that in their nature, connections and bearings, give cast, character and direction to the intent of the mind, as expressed in them, and show that the provisions of the deed supposed and presumed
(402) to be fraudulent were not so in contemplation of law, but really lawful. A party cannot be allowed to say that he did not really intend to perpetrate a fraud or do a fraudulent act, when the plain, necessary, natural and legal consequences of his acts are fraudulent in contemplation of law. *Cheatham v. Hawkins,* 80 N. C., 161; *Boone v. Hardie,* 83 N. C., 470; *S. c.,* 87 N. C., 72; *Phifer v. Erwin,* 100 N. C., 59.

The purpose of the deed before us in question purports to be to convey the land described therein to the trustee, to secure the payment of certain debts specified to the creditors therein named. At and before the time it was executed, the maker thereof was much embarrassed financially, wholly insolvent, and owed debts other than those provided for in it. It was executed on 15 January, 1884, and the power of sale provided therein could not be executed by the trustee until after 1 January, 1886. It contains, among other provisions, one in these words: "And it is further covenanted and agreed by and between all the parties to these presents, that, in the meantime—that is to say, from the date hereof to the day of sale—the said party of the first part shall be entitled to live on the lands, and to take, use and apply the rents, issues and profits, and every part thereof, to his own use and benefit." The deed further reserves to the maker thereof his right of homestead, and, as well, his personal property exemptions. If all these facts appeared on the face of the deed, it would be so manifestly and essentially fraudulent that the court would at once declare it void as to creditors other than those claiming benefit under it. But, although some of the material facts do not so appear, still the insolvency of the debtor—the maker of the deed —at the time he executed it; that he owed debts not mentioned in it; that the trust could not be closed for two years; that he reserved his right of homestead in the land, and his right of personal property exemptions; that pending the trust, he was to have the right to live
(403) upon and have the rents and profits thereof, clearly raised the strong presumption that the deed was fraudulent, and, if such presumption was not rebutted by proper evidence, then the court should have declared the deed void. This is so clear that we need not delay to point out the reasons that lead us to this conclusion. These are fully stated in the cases cited above, and many others in our own reports, and elsewhere. Indeed, this seems to be hardly denied.

But it is contended that "the plaintiff admits, that in making the deed in trust to Boone there was no actual intent to defraud the creditors of Carstarphen, Grant & Co., and, therefore, the deed is not fraudu-

lent. This contention is not well founded. The provisions mentioned of the deed, and the attendant pertinent facts admitted, manifest, give character and point to the intent, and imply, in legal contemplation, the fraudulent purpose of the maker. The mere fact that he had "no actual intent" to defraud the creditors named, the absence of which was unexpressed and was not made manifest by acts done, or not done, and pertinent facts and circumstances explanatory of, and modifying the meaning of the facts constituting the apparent fraud, and thus showing the lawful intent, could not rebut the presumption. This could be done, not by mere absence of special fraudulent purpose of the mind, but by intent made manifest by pertinent facts and circumstances, which, taken in connection with, and in their just bearing upon, the facts raising the presumption, show an honest and lawful purpose.

In *Hardy v. Skinner,* 31 N. C., 191, it was admitted that the plaintiff "did not impute any actual fraud to the parties other than what appeared from the deed itself; but he insisted that the deed was, upon its face, fraudulent in law, no matter what the defendant might show, and that the court was bound so to pronounce." The Court said, that "although this is a singular and extremely suspicious transaction, yet this Court thinks the plaintiff gave up his case by admitting (404) that there was no fraud in fact, and that everything might be taken in favor of the deed which could show that it was *bona fide.*" The present case, it seems to us, is very and materially different from that one. There, the plaintiff insisted that the evidence of fraud appearing on the face of the deed could not be explained or modified, and that it was essentially and conclusively fraudulent. So insisting, he admitted that there was not "any actual fraud of the parties." Hence, the court said justly, "that everything might be taken in favor of the deed which could show that it was *bona fide.*" The admission was so broad that the court treated the case as if the defendant had produced appropriate and sufficient evidence to rebut the presumption of fraud. But in this case, the admission is "there was no actual intent to defraud," etc., not that there was not "any actual fraud." If it had been proven, instead of admitted, that the defendant maker of the deed simply had no "actual intent to defraud," this could not be evidence to disprove the fraudulent intent manifested by acts, facts and circumstances which the law could take notice of and deal with. Nor can it be fairly insisted that the admission of "no actual intent to defraud," etc., should be treated as an admission that the defendant could prove such facts as would, in their nature, bearing and effect upon the evidence raising the presumption, show the absence of a fraudulent intent and a lawful purpose. It is very apparent the admission was not intended to have such broad and comprehensive meaning. It meant no more than that the maker of the deed

had "no actual intent to defraud," without reference or regard to his intent coupled with, and made manifest by, what he actually did. The mere intent of the mind could not rebut the intent accompanied and manifested by, and implied from, acts done.

(405) The facts agreed upon, so far from rebutting the presumption that the deed in question is fraudulent, and on that account void, seem to strengthen it. Clearly, in contemplation of law arising upon the facts admitted by the parties, the purpose and effect of it was to hinder and delay the creditors not mentioned in the deed, and to provide, to their prejudice, for the ease, convenience and valuable advantage of the debtor.

We are, therefore, of opinion that the court should have adjudged that the deed was inoperative and void, and given judgment in favor of the plaintiff for the possession of the land.

There is error. The judgment must be entered below for the plaintiff, in accordance with this opinion.

Reversed.

Cited: Booth v. Grant, post, 406; *Blalock v. Mfg. Co.,* 110 N. C., 105; *Cowan v. Phillips,* 119 N. C., 29; *Ferree v. Cook, ib.,* 171; *Commission Co. v. Porter,* 122 N. C., 698; *Grocery Co. v. Taylor,* 162 N. C., 311.

P. H. BOOTH v. JAMES W. GRANT.

Fraudulent Assignments.

Where, instead of two years, the deed of assignment provided that the maker thereof should remain on the premises for twelve months, and was, in other material respects, the same as in *Booth v. Carstarphen, supra: Held,* such deed raised a strong presumption that it was in fraud of creditors, and, nothing to the contrary appearing, the court should have declared it void.

ACTION heard before *Boykin, J.,* at chambers in HALIFAX, 1890, upon a case agreed. The plaintiff appealed.

The material facts are set out in *Booth v. Carstarphen, ante,* (406) 395, and in the opinion of the Court.

J. M. Mullen for plaintiff.

T. W. Mason, W. H. Day and R. B. Peebles for defendants.

MERRIMON, C. J. This case is, in all material respects, like that of *Booth v. Carstarphen, ante.*

The time within which the trust could not be closed was twelve months, but we do not think this fact makes any material difference. It is clear, from the provisions of the deed and the facts admitted, that the purpose and effect—certainly in contemplation of law—were to hinder and delay the creditors not provided for in the deed, and to provide for the convenience and substantial advantage of the debtor, to their prejudice. There was no evidence to rebut the presumption of fraud in the deed of trust.

There is, therefore, error. The judgment must be reversed, and judgment entered for the plaintiff, declaring the deed in question void, and that he have possession of the land.

Reversed.

(407)

DURANT WOODWARD ET AL. v. DAVID BLUE ET AL.

Legitimacy—Judge's Charge.

Where there was evidence that the wife, continuously for three years prior to the birth of the child, lived in open adultery with a white man; that the child, by its color, must have been the child of a white man, and not of the husband, who was a negro; that the mother declared it was not his child, and the husband, though living on the same farm, was not allowed at the house where the wife lived, much of which was contradicted by other evidence: *Held*, that, though there was not impossibility of access, the question of access or nonaccess became a question of fact for the jury, and the treatment of the child by the paramour was competent as a circumstance tending to corroborate the evidence of nonaccess.

ACTION for recovery of land, tried before *Merrimon, J.*, at Fall Term, 1890, of BURKE.

The plaintiffs Mourning Crisp claimed, as widow, and Emily Woodward, as daughter, of one Underzine Pelot. Mourning Crisp testified that her mother was a white woman and her father a slave; that, fifteen or sixteen years before the war, she married Underzine Pelot, a slave of one Greenlea. The rest of the evidence appears sufficiently in the opinion.

The defendants denied the marriage, and also the legitimacy of the plaintiff Emily, now married to Woodward Blue, and claimed the land as the heirs at law of Underzine.

Upon the issue submitted as to the legitimacy of Emily, the jury found in favor of the plaintiff, and from the judgment defendants appealed.

S. J. Ervin for plaintiff.
J. T. Perkins and John Devereux, Jr., for defendant.

(408) CLARK, J. The maxim, *"pater est quem nuptiæ demonstrant,"* was formerly so strictly construed that from the time of the Year-Books down to the last century a child born of a married woman was conclusively presumed legitimate, unless the husband was shown to be impotent or not *"infra quatior maria."* The ancient rule, with the homely illustration given by *Rickhill, J.*, in *Flettsham v. Julian* (Year-Book 7, Henry IV, 9, 13), is familiar to us by the great dramatist having placed it in the mouth of King John, *Van Aernam v. Van Aernam,* Barb. Ch., 375:

> K. John.—"Sirrah, your brother is legitimate;
> Your father's wife did after wedlock bear him;
> And, if she did play false, the fault was hers:
> Which fault lies on the hazard of all husbands
> That marry wives. Tell me, how if my brother,
> Who, as you say, took pains to get this son,
> Had of your father claimed this son for his?
> In sooth, good friend, your father might have kept
> This calf, bred from his cow, from all the world."
>
> (King John, act. 1, scene 1.)

But the rule was much modified in *Pendrell v. Pendrell,* Stra., 925, and the Banbury Peerage case in the House of Lords, 1 Sim. & Stuart, 153, and succeeding cases, until now it is best stated by *Chancellor Kent* (2 Com., 210), as follows: "The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the nonaccess of the husband, and the facts must generally be left to the jury for determination." Schouler Dom. Relations, sec. 225; *Hargrave v. Hargrave,* 9 Beav., 552, opinion by *Lord Langdale.* In *Cope v. Cope,* 5 Car. & P., 604, it is said: "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could not, therefore, be established."

The evidence of the mother in the present case was that, "while in Tennessee she and Underzine lived in one of the cabins on Greenlea's place; that they were in Tennessee six years, and the plaintiff Emily was born four years after they moved to Tennessee." It may be

noted that she does not testify that Emily was the child of Under- (409)
zine. As the defendants claim under Underzine, it may be a question under the Code, sec. 590, if the mother, who is a party plaintiff, was a competent witness to show the alleged marriage, or the living together, of herself and Underzine, but the point is not raised by any exception, and we pass it by. The testimony offered by defendants was that for two or three years, continuously, before Emily was born, the mother lived at the residence of Greenlea, the master, and Underzine and she did not live together for three years prior to Emily's birth, during which time there was no friendly intercourse between them, and Underzine was not allowed at the house where the mother and Greenlea stayed; that the child favored Greenlea, and, by its color, was the child of a white man; that the mother told Underzine the child was not his, and he would not have it to support; that Greenlea was an unmarried man, without family. There was evidence on the part of the plaintiffs that Underzine had declared Emily to be his child, and much evidence on the part of the defendants that he had repeatedly declared that she was not his child. The defendants then offered to show by a witness, a former slave of Greenlea, who lived on the farm in Tennessee at the time of Emily's birth, how Greenlea treated Emily, with a view of showing that he was her father. The court excluded the question, and the defendant excepted. Had Greenlea been a defendant in a bastardy proceeding, or in an indictment for fornication and adultery, this evidence would, in view of the other matters in evidence, have been competent. We can see no reason why it should not also have been valuable aid to the jury in arriving at a just conclusion in a proceeding to test the legitimacy of the child. There being evidence tending to show non-access by the husband, the jury should not have been cut off from a knowledge of how Greenlea treated the child. It may be that it could have been shown that he betrayed a fondness and affection for it, showed anxiety in its illness, lavished money on it, or educated (410)
it, and surely these things would be strongly corroborative of the evidence of the defendant, for it would be hardly expected that a white man should so act towards the child of Underzine, his negro slave. Was not the violent grief of David, the King, upon the death of the child, some corroboration that he, and not Uriah, was its father? In the nature of the case the paternity of a child can hardly be said to be subject to direct proof. Therefore, when it is born in wedlock, the law presumes its legitimacy from that circumstance. This presumption can only be rebutted by circumstances, and what more potent could there be than the conduct of the wife in living separate from the husband, with a paramour, and the latter's treatment of the offspring?

For, though there was opportunity of access by the husband, it is not conclusive of legitimacy. *Cope v. Cope, supra.*

In *Morris v. Davies,* 5 Clark & Finnelly, 163, the House of Lords, on an issue like this, gave weight to the conduct of the paramour towards the child. This, also, was done in *Cannon v. Cannon,* 7 Humph., Tenn., 410; 1 Bish. Mar. and Divorce, sec. 448. Such testimony is in the nature of natural evidence, and stronger than a mere declaration of paternity by the paramour.

It should appear what the party offering excluded testimony expected to prove by it (*S. v. Williford,* 91 N. C., 529), but here the question is sufficiently explicit, in that it was asked to show the treatment of Emily by Greenlea, and the bearing of the evidence is sufficiently indicated by the question and the statement that it was offered as testimony to show that Greenlea was the father.

When this case was here before (103 N. C., 109), the Court, *Smith, C. J.,* delivering the opinion, pointed out that the so-called marriage of Underzine and the mother, the former being a slave, and the latter a free person (the child of a white mother and a slave father) was (411) utterly invalid till the act of 1879 (Code, sec. 1281, Canon 13), and that "to repel the inference of paternity, drawn from the mere fact of cohabitation (by that act), the same stringent rules do not prevail as in cases of established legal marriage," for the application of that statute is made to depend upon "cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived. The cohabiting alone does not confer legitimacy, though it furnishes presumptive evidence," which is open to disproof.

A fortiori there was error in rejecting the testimony offered.

Per Curiam. Error.

Cited: Erwin v. Bailey, 123 N. C., 634; *Mebane v. Capehart,* 127 N. C., 50; *S. v. Liles,* 134 N. C., 742; *Ewell v. Ewell,* 163 N. C., 236; *West v. Redmond,* 171 N. C., 745; *Croom v. Whitehead,* 174 N. C., 310; *Ashe v. Pettiford,* 177 N. C., 133.

AMOS LASSITER v. SAMUEL UPCHURCH ET AL.

Administration—Heirs at Law—Claims Against an Estate—Effect of a Reference Between Claimant and Administrator—The Code—Constitution—Trial by Jury.

1. An agreement to arbitrate, and to award, under section 1426 of The Code, is competent evidence to prove the indebtedness of an estate.

2. An agreement to arbitrate, and the award, under section 1426 of The Code, between the claimant and the administrator, where there is fraud or collusion, is binding upon the heirs at law, even though they were not parties to the proceedings.

3. In a proceeding by an administrator to make assets to pay the debts of the estate, heard upon issue raised an appeal from the clerk of the Superior Court, the defendant's heirs at law offered to show that a claim adjudged to be a debt against the estate by the arbitrators to whom the matter had been referred under section 1426 of The Code, was not, in fact, a valid debt: *Held*, (1) that the finding of the arbitrators was binding upon the heirs, though they were not parties to the proceedings; (2) it is equivalent to a judgment; (3) such proceedings could only be impeached for fraud or collusion.

4. The admission of this agreement and award in evidence, and making them conclusive upon the heirs, does not deprive them of their right of trial by jury. They exercised that right in this action, and this decision relates merely to the force and effect of the evidence introduced to establish and disprove it.

SPECIAL PROCEEDING, commenced before the clerk of WAKE, (412) against the defendants, heirs at law of George Fuller, deceased, to sell land to make assets to pay debts, and brought up, on issues of fact joined, and tried before *Armfield, J.*, at October Term, 1889, of said court.

The plaintiff alleged the existence of a debt due from his intestate to Mary Barbee, the want of personal assets, and the necessity for the sale of land to make assets to pay, etc.

Some of the defendants answered, admitting the allegations of the complaint, and the defendants, Samuel Upchurch and Peter Olive, answered, denying the allegations, and the following issues were joined and submitted:

"1. Did the defendant owe the debt alleged to Mary Barbee?

"2. Were there personal assets which the administrator received, or ought to have received, applicable to said debt? And if so, what amount?"

To prove the alleged indebtedness of the intestate, the plaintiff put in evidence an agreement, in writing, with the claimant to refer the matter in controversy to three referees, in accordance with the provisions of section 1426 of the Code, and also the award of the referees. This evidence was objected to by defendants. The objection was overruled, and the defendants excepted.

The plaintiff then testified, in substance, that no personal estate of the intestate came into his hands, except what was laid off to the widow of the intestate as her year's support, and that there was not a sufficiency of personal property for her year's support, but a large deficiency, as appeared by the record.

(413) The defendants then offered evidence tending to show that the debt allowed by the referees against the plaintiff, as administrator, was in fact not a valid debt against the estate of his intestate. The plaintiff objected, and the court held that unless the defendant had some evidence tending to show fraud or collusion between the plaintiff and the referees, or some fraud on the part of the plaintiff in regard to the debt, this evidence would be incompetent, and, the defendants admitting that they had no such evidence, the court excluded the evidence, and defendants excepted.

Under the direction of the court, there was a verdict for the plaintiff. There was a judgment for the plaintiff, and defendants appealed.

R. W. York for plaintiff.
W. J. Peele for defendants.

DAVIS, J. Two questions are presented by the record for the consideration of this Court: (1) Was the agreement to refer, under section 1426 of The Code, with the award of the referees, competent evidence to prove the indebtedness of the intestate? And, (2) in the absence of fraud or collusion, could the defendants, admitting that there was no fraud or collusion, show that the debt allowed by the award of the referees against the plaintiff administrator was in fact not a valid debt against the estate of his intestate?

The Code, sec. 1426, authorizes the administrator to agree, in writing, with one who has a claim against the estate of his intestate "to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action."

Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful

voucher for the personal representative. The same may be im- (414)
peached in any proceeding against the personal representative for fraud therein.

If it was competent for the plaintiff to prove the indebtedness of his intestate, as it undoubtedly was, we are unable to see upon what principle the evidence was incompetent, and we think his Honor below was clearly right in admitting the evidence.

The force and effect of the reference, and award of the referees, presents a question not so easy of solution.

The proceedings of the referees "shall be the same in all respects as if such reference had been ordered in an action," and their award is to be filed in the clerk's office, "and shall be a lawful voucher." The trial by referees ordered in an action "shall be conducted in the same manner as a trial by the court."

Shall their award have the same force and effect? In a reference ordered by the court, "the report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon upon application to the judge." The Code, sec. 421.

It is insisted by counsel for the defendants that the submission to arbitration and the award constituted only an executory agreement (*Crawford v. Orr,* 84 N. C., 246), and had no more binding force, as against the heirs, than would a recognition of the debt and promise to pay by the administrator. However that may be in ordinary submission by parties to arbitration, we think that section 1426 of The Code was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators, or collectors and claimants against the estates of testators and intestates may be settled and determined, and, fairly interpreted, the award of the referees, unless impeached for fraud and collusion, should have the effect, at least, to determine and put an end to the controversy, if not of a judgment, in an action between the parties.

Its effect, if unimpeached for fraud and collusion, is to deter- (415)
mine and settle the validity or invalidity of the debt in a mode prescribed and authorized by law, and if not intended to put an end to the controversy involved, the statute is useless, but if it has this effect, then the award, when filed, whether for or against the administrator, is equivalent to a judgment, and can only be attacked for collusion and fraud. *Speer v. James,* 94 N. C., 417, and cases there cited.

It is insisted by the defendants that if the award is sufficient to charge the estate of the intestate with the debt, they will thereby be deprived of the right of trial by jury. The answer is, they have a jury trial in this action, and in this respect the only question is as to the conclusiveness or inconclusiveness, and the force and effect of evidence, in estab-

lishing or disproving the existence of a debt against the estate of the intestate, and any valid judgment against the administrator would have the same effect.

No error.

Cited: McLeod v. Graham, 132 N. C., 475, 476.

STATE EX REL. H. BRUNHILD v. H. D. POTTER ET AL.

Sheriff's Damages—Official Bonds—Execution—Claim—Justice of the Peace—Issue—Judgment—Nominal Damages.

1. In an action against a sheriff, or his official bond, for failure to levy an execution placed in his hands for collection, and to collect from a defendant in execution a debt, the jury found for the relator, but failed to assess damages in response to an issue respecting them. The court gave judgment for the amount of the execution: *Held*, there was *error*. The judgment should have been for nominal damages.

2. The court should have submitted to the jury the question, whether any substantial damages had been sustained, and required them, under proper instructions, to respond to the same.

3. The Code, sec. 1888, applies to executions from a court of a justice of the peace, and not those issuing out of the Superior Court.

4. To entitle the relator to substantial damages, the jury must have found that he had lost his debt, or some part of it, by the negligence of the sheriff.

5. The question of negligence being settled by the verdict of the jury, the question of substantial damages may now be submitted by the court.

(416) APPEAL at Spring Term, 1890, of GREENE, from *Boykin, J.*

The relator obtained judgment in the county of Greene, before a justice of the peace, for $148.41, with interest from 22 October, 1887, and for costs ($3.90), and duly docketed the same in the office of the clerk of the Superior Court of that county. Thereupon, an execution was duly issued and placed in the hands of the defendant sheriff of the same county on 19 October, 1888.

This action is brought by the relator against the defendant sheriff and the sureties to his official bond.

It is alleged, among other things, in the complaint that the said sheriff committed breaches of said bond, in that he wrongfully and neg-

ligently failed to levy said execution on the personal property of said J. J. Potter for several days, and in October, 1888, after said execution was placed in the hands of said defendant H. D. Potter, sheriff, as aforesaid, said J. J. Potter conveyed a large amount of his personal property by mortgage to G. W. Sugg and did not retain more than he was entitled to as his personal property exemption; that said H. D. Potter, sheriff, as aforesaid, could by due diligence have collected from said J. J. Potter, defendant in said execution, the amount of plaintiff's judgment, interest and costs; that the said defendant sheriff, as aforesaid, unlawfully, wrongfully and negligently failed to perform his duties by not levying and collecting from said J. J. Potter the amount of (417) plaintiff's debt, and interest and costs, to plaintiff's damage $200.

The defendants denied, in their answer, "that said sheriff wrongfully and negligently failed to levy said execution on the personal property of said J. J. Potter for several days," and also denied that, in any respect as to said execution, he had committed any breach of his said bond, etc.

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

1. Did the defendant H. D. Potter negligently fail to levy and collect the execution, described in the complaint, upon the personal property of J. J. Potter?

2. What damage, if any, has plaintiff sustained?

The jury responded "Yes" to the first issue, but made no response to the second issue.

There was conflicting evidence as to the instructions given to the sheriff on delivering him the execution, and as to whether he unreasonably delayed the levy, and as to whether there was any property subject to said execution above or beyond the property laid off as the debtor's personal property exemption.

There was evidence tending to show that said J. J. Potter was insolvent at the time said execution was placed in the hands of the sheriff, after his exemption.

The court explained the doctrine of negligence, and the rule of reasonable diligence, to the jury. There was no exception to this part of the charge.

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

"This cause coming on to be heard by the court and jury, and the first issue having been found by the jury in favor of the plaintiff, it is considered and adjudged that the plaintiff recover of the defendant H. D. Potter and the sureties on his official bond, the defendants J. B. Faircloth, R. D. S. Dixon, Jonas Williams, and D. W. (418)

Patrick, the sum of $5,000, to be discharged upon the payment of the sum of $148.41, with interest thereon from 22 October, 1887, together with the costs of this action."

From this judgment defendants appealed to this Court, assigning as grounds of error therein:

1. That the plaintiff is not entitled to recover on the verdict.
2. On the ground that in no event is the plaintiff entitled to recover the whole of his judgment debt.
3. On the ground that the court should have ordered a new trial.
4. On the ground that the court should have charged that if they should find negligence and the solvency of the debtor, that then the jury should answer the second issue as to the amount of damages.

G. M. Lindsay and W. C. Munroe for plaintiff.
W. T. Faircloth and T. C. Wooten for defendants.

MERRIMON, C., J., after stating the facts: In our judgment, the relator was entitled to only nominal damages upon the verdict. It seems that the court intended to apply the statutory provision (The Code, sec. 1888), which provides that "when a claim shall be placed in the hands of any sheriff, coroner, or constable for collection, and he shall not use due diligence in collecting the same, he shall be liable for the full amount of the claim, notwithstanding the debtor may have been at all times, and is then, able to pay the amount thereof." But it will be observed that this applies only to *claims* placed in the hands of the sheriff or other officer for collection—such claims as are within the jurisdiction of a justice of the peace and may be collected by judgment and process of execution granted by that magistrate. It does not
(419) apply to executions issuing from the Superior or other courts of record. The reason for the distinction is clearly and certainly pointed out in *McLaurin v. Buchanan,* 60 N. C., 91. The statute in effect now is just as it was when that decision was made, and we are not at liberty, nor in the least inclined, to disturb it.

The evidence was conflicting as to whether the defendant (in the execution placed in the hands of the sheriff, and which he failed to collect) had property leviable sufficient to satisfy that execution, and continued to have the same after the execution was, or ought to have been, returned. It may be that he had, and has, such property, and that the debt may yet be collectable by execution. The contrary does not appear by the verdict. That the sheriff negligently failed to collect the execution does not imply that the defendant did not have the property leviable sufficient to satisfy it while the sheriff had it, or that he then had the same and the sheriff negligently allowed him to rid him-

self of it, whereby the relator lost his debt, or part thereof. To entitle the relator to substantial damages, the jury should have found by their verdict, in effect, that he, by reason of the negligence of the sheriff, could not collect, or had lost his debt, or part of it. *S. v. Skinner,* 25 N. C., 564; *McLaurin v. Buchanan, supra; Buckley v. Hampton,* 23 N. C., 318.

The court should in this case have submitted to the jury, in place of the second issue submitted, the question whether any substantial damages had been sustained by the relator, and required them, under proper instruction, to respond to the same.

As we have said, the relator was only entitled to nominal damages upon the verdict rendered. There is, therefore, error. The judgment must be modified, allowing the relator nominal damages only; or, if he shall so elect, the court may submit to another jury the issue we have suggested above, giving them appropriate instructions as to the measure of damages. There was no exception to the instructions (420) the court gave the jury. The presumption is that they were correct and satisfactory to the parties. The question of negligence is settled by the verdict rendered, and the only remaining inquiry is as to the amount of substantial damages the relator has sustained. He may, or may not, require that to be made.

Error.

LYDIA FERRELL ET AL. V. ALFRED THOMPSON.

Pleadings—Verdict—Judgment—Record—Notice of Appeal—Case on Appeal—Weight of the Evidence—Husband and Wife—Jure Mariti—Waiver.

1. The consideration of this Court upon points arising out of the pleadings, verdict and judgment, will be confined to such exceptions as are shown by the record to have been taken.

2. Motions to set aside a verdict because against the weight of the testimony, or for newly discovered testimony, address themselves solely to the discretion of the court below.

3. In an action against a commissioner by a *feme* plaintiff and her husband, for the proceeds of the sale of certain slaves sold by him, it appeared that the sale was made in 1863; that the coplaintiffs were married in 1855, and that the action was brought in 1888: *Held,* that the proceeds of sale belonged to the husband, and judgment in favor of the wife instead of him was error.

4. The property vested in the husband *jure mariti*, and no act of the wife was necessary for this purpose or could have prevented it.

5. Notice of appeal, though in the record, is no more a part of it than the case upon appeal.

6. Where it appeared that the husband refused to receive the proceeds of sale, and said, at the time, he wanted his wife to have it, but this was not set up in the complaint, and the answer denied any interest in the wife, averring ownership in the husband, which averment was uncontradicted: *Held*, that the contention that the husband had thereby waived his right to the proceeds could not be allowed.

(421) ACTION to recover a share in the proceeds of sale of slaves belonging to the distributees of John Matthews, deceased, the father of the *feme* plaintiff, made by the defendant as commissioner, appointed by the court, to sell the same for partition, tried at September Term, 1890, of NASH, before *MacRae, J.*

It is alleged in the complaint, and admitted in the answer, that at the November Term, 1862, of the late Court of Pleas and Quarter Sessions of Nash County, an order was duly made, appointing the defendant commissioner to sell the slaves named in the complaint, for division among the children of John Matthews, deceased, the owner of said slaves; that in pursuance of said order, the said commissioner sold said slaves on 24 January, 1863, for the prices respectively named in the complaint, and made his report of the sale at the February Term, 1863, of said court, at which term said sale was duly confirmed, and that there were nine children of John Matthews, of whom the *feme* plaintiff, Lydia Ferrell, was one.

It is further alleged in the complaint, but denied in the answer, that, applying the scale of depreciation of Confederate money, the *feme* plaintiff, Lydia Ferrell, is entitled to $219.85 in good money, with interest from 24 January, 1863, and that the defendant has refused and failed to pay the same or any part of the money due as aforesaid, and the plaintiffs pray judgment therefor.

The defendant denies that the *feme* plaintiff is entitled to the money named, and says "that the share of the *feme* plaintiff in the
(422) slaves which came to her by her father's death, and mentioned in the complaint, vested, by virtue of her marriage, in her husband, P. L. Ferrell, and, upon settlement, defendant paid to him, the said Ferrell, the full amount due from sale of said slaves."

The defendant further relies upon the ten-year statute of limitations and of presumptions.

The male and *feme* plaintiffs intermarried in 1855. This action was commenced on 14 July, 1888.

Bunn & Battle (by brief) for plaintiffs. (426)
C. M. Cooke and F. A. Woodard for defendant.

DAVIS, J. It has often been held, and is well settled, that the appellate jurisdiction of this Court in an action properly constituted in a court of competent jurisdiction, so far as the *pleadings, verdict,* and *judgment* are concerned, will be confined to such exceptions as are shown in the record to have been taken in the court below. *Phipps v. Pierce,* 94 N. C., 514, and cases there cited.

The evidence and his Honor's charge are sent up, but the record presents no exceptions to either, and we need not consider whether objections, if properly taken below, might be successfully maintained here.

Whether his Honor was correct in charging the jury that the statute of limitations did not bar Mrs. Ferrell because she is, and has all the time been, a married woman, or should have instructed them that the statute of limitations had no application, but that it was governed by the statute of presumptions, in which there is no saving of the rights of persons under disabilities, as held in *Headen v. Womack,* 88 N. C., 468, and *Houck v. Adams,* 98 N. C., 519, and cases there cited, we need not consider; nor are we called upon to review his Honor's charge as to whether the statute of limitations began to run against the male plaintiff, though the uncontroverted evidence, both for the plaintiff and defendant, upon that question, is that the defendant refused (427) to pay prior to 1870; nor does it appear whether the instructions asked by the defendant were given or refused, nor is any exception presented in relation thereto.

The only exceptions that appear to have been taken are:

1. Because the verdict was against the weight of testimony.
2. For newly discovered evidence.
3. To the judgment in favor of the *feme* plaintiff instead of P. L. Ferrell, the husband.

It has been too often held to need repetition that the first and second address themselves solely to the discretion of the judge below and are not reviewable by us, and the only question presented by the record for our consideration is, Was the judgment rendered erroneous?

The counsel for the plaintiffs says this objection cannot avail the defendant, because, "after the judgment had been rendered, and, indeed, after the expiration of the term, a notice was served on the plaintiffs of an appeal by the defendant on account of the erroneous rulings by the judge on motion for a new trial." He insists that this notice, which appears in the record, "shows that, if any exception was taken during the trial because the judgment was rendered in favor of the *feme* plaintiff, such exception was abandoned, and that point is not involved in this

appeal," and the "record," and not the "case," controls. The answer to this objection is, that the "notice of appeal," though in the record, is no more a part of it than the "case" on appeal, which, having been settled by his Honor on disagreement of counsel, is conclusive unless in conflict with the record proper; in fact, "the concise statement of the case required," and not the notice, must show the exceptions and grounds of appeal.

(428) Upon the verdict, was the judgment properly rendered in favor of the *feme* plaintiff? We need not consider whether she was a necessary party to the action, or whether, as the property *jure mariti* vested in the husband, he should have sued alone. *Spiers v. Alexander,* 8 N. C., 67. But we are of opinion that the judgment in favor of the *feme* plaintiff was erroneous. Whatever may be the effect of his abandonment of her, or, as he says, of her abandonment of him, the interest of the *feme* plaintiff in the slaves had vested absolutely in the husband before the separation, and was subject to his debts and liabilities. *Pettijohn v. Beasley,* 15 N. C., 512, and cases cited. No act of the wife was necessary to vest the slaves, or her distributive share in them, in her husband, nor could she in any manner have prevented it. Whether, if the husband had died before the payment of the distributive share, it would have gone to his personal representatives or survived to the wife, we need not consider, for the husband is still living, and, though he has lived in another State for many years, and married another woman, joins in this action without objection. *Mardree v. Mardree,* 31 N. C., 295.

But it is contended by counsel for the plaintiffs that the male plaintiff waived his marital right in favor of the *feme* plaintiff when he refused to receive his wife's part of the proceeds of the sale of slaves, and said it belonged to her and he wanted her to have it.

The counsel for the plaintiff says: "Suppose that the title to an undivided one-ninth interest in the slaves did vest . . . in the said P. L. Ferrell (the male plaintiff), there is no reason why he may not have waived his right or have conveyed such interest in the slaves to his wife. . . . Whenever a contract would be good at law if made by a husband with trustees for his wife, that contract will be sustained in equity when made by the husband and wife without the intervention of the trustees. The husband, in our case, plainly considered the (429) wife meritorious, and there may have been not only a meritorious, but a valuable, consideration for his contract with her. At any rate, the judge could not take upon himself to say that there was no consideration for such a contract. The defendant, by his answer, raises no such issue nor asks for the jury to pass upon such an issue. *Taylor v. Eatman,* 92 N. C., 605; *Woodruff v. Bowles,* 104 N. C., 207."

Conceding that this would be so if there were no creditors of the husband whose rights would be affected, the complainant alleges no such claim for the *feme* plaintiff, and the answer distinctly denies any interest in the wife—avers the ownership of the husband, and that he has been paid in settlement, and the evidence shows, and this is not controverted, that the defendant refused to pay to the wife unless the husband would pay defendant's claim against him. And, besides, the male plaintiff testifies that he "never assigned or released to any one any part of said proceeds of sale," and joins the *feme* plaintiff in praying judgment therefor, and the cases cited by counsel have no application to this case.

By the law, as it then was, the title to the wife's interest in the slaves vested absolutely in the husband, became liable for the payment of his debts, and there is no allegation in the complaint, nor is there any evidence that the defendant agreed to hold in trust for the wife. On the contrary, the answer denies any interest in the wife, and the evidence is that he refused to pay to the husband or his wife unless the male plaintiff would pay defendant's claim, and the judgment is erroneous.

Error.

Cited: Benton v. R. R., 122 N. C., 1010; *Fowler v. McLaughlin*, 131 N. C., 210.

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(430)

H. H. COOR ET AL. v. AMOS SMITH.

Writ of Assistance—Motions—Orders—Notice—Possession.

1. A writ of assistance is never issued except upon notice to the person in possession, and upon proof of demand and refusal of possession.
2. Presentation of a deed is usually necessary, but is dispensed with when the person in possession is aware of it already.
3. When, in a motion to set aside a writ of assistance for want of notice, it appears that the writ was granted in open court, without objection from the counsel for the defendant in possession, who was present at the time: *Held*, that the motion should not be granted.
4. All parties are presumed to have notice of all motions and orders made while the action is pending.

MOTION of the defendant, founded on his affidavit, to set aside and annul an order for a writ of assistance, made and rendered in this action at January Term, 1890, of WAYNE, on motion of plaintiffs, the

object of defendant's motion being the restitution of the land of which he had been deprived under said writ. The motion was heard before *MacRae, J.,* at March Term, 1890, of same court.

Upon the hearing, the court found the facts and made an order refusing defendant's motion to annul and restore possession.

To the order of refusal the defendant excepted, and alleged for error that it appeared from the facts found that the defendant had no actual notice of a motion for the writ of assistance; that, although it appeared from the said facts that the defendant was represented by counsel in the action for foreclosure, in which said writ of assistance was moved for, who was present in court at the time of the said motion and made no objection to the granting of the same, this was not sufficient notice.

Defendant appealed from said order to the Supreme Court.

(431) *C. B. Aycock for plaintiff.*
No counsel for defendant.

CLARK, J. In *Knight v. Houghtalling,* 94 N. C., 408, it is held that a writ of assistance is never issued except "upon notice to the person in possession," and upon proof of a demand and refusal of possession, and that a presentation of the deed to the party is usually necessary, but is dispensed with when he is aware of it already.

It is found as a fact in the present case that there was a demand under the deed, and a refusal of possession also; that, though there was no notice of the motion served, the motion was made at the same term of the court at which final judgment was rendered in the foreclosure proceedings by confirming the sale and directing the deed to be executed to plaintiff, and the counsel who had represented the defendant throughout those proceedings were present in court when the motion and order for a writ of assistance were made, and raised no objection to the same. Though a final judgment does not terminate all connection of counsel with the case, notice of any motion made subsequent to that term of court must be served on them. *Allison v. Whittier,* 101 N. C., 490; *Branch v. Walker,* 92 N. C., 87; *Rogers v. McKenzie,* 81 N. C., 164. But while the action is pending no actual notice is required, as all parties are presumed to have notice of all motions, orders and decrees made in the cause. *Dawkins v. Dawkins,* 93 N. C., 283; *Williams v. Whiting,* 94 N. C., 481; *University v. Lassiter,* 83 N. C., 38; *Hemphill v. Moore,* 104 N. C., 379. The motion here was made at the same term at which final judgment was rendered. During that term such judgment was still *in fieri,* and motions affecting the rights of the parties, such as motions for new trial, or to set aside the verdict or the judgment, and many others, are constantly made without serving notice, and we

see no reason why the same rule should not apply in this case. (432) It is only when a motion is made subsequent to the term at which a final judgment is rendered that notice is exacted. The order having been made at the term when final judgment was rendered, the defendant had legal notice of what transpired.

Per Curiam. Affirmed.

Cited: Harper v. Sugg, 111 N. C., 327; *Zimmerman v. Zimmerman,* 113 N. C., 435; *Exum v. Baker,* 115 N. C., 244; *Ferrell v. Hales,* 119 N. C., 213; *Stith v. Jones, ib.,* 430; *Wagon Co. v. Byrd, ib.,* 464; *Hardy v. Hardy,* 128 N. C., 183; *Reynolds v. Machine Co.,* 153 N. C., 344; *Wooten v. Drug Co.,* 169 N. C., 66; *Jones v. Jones,* 173 N. C., 283.

E. J. OVERMAN, EXECUTOR, v. E. T. SASSER ET AL.

Fixtures—Executor—Remainderman—Life Tenant—Relations of Parties — Heirs—Landlord and Tenant—Agricultural Purposes—Freehold.

1. An engine, cotton gin and condenser were attached to a mill by the *tenant by the curtesy* after his term commenced, not solely for the better enjoyment of the land, but for the mixed purpose of trade and agriculture: *Held,* they belonged to the executor of the life tenant as against the remainderman.
2. The executor may remove such fixtures within a reasonable time after the death of the life tenant.
3. The doctrine of fixtures depends for its application upon the relations of the parties.
4. Between the executor and heirs, whatever is affixed to the freehold becomes a part of it and passes with it.
5. Between the executor of tenant for life and in tail and the remainderman, the right of removing fixtures is more in favor of the executor.
6. Between landlord and tenant, fixtures for the better enjoyment of trade are removable by the tenant, but fixtures for agricultural purposes pass with the land.

CONTROVERSY without action, submitted to *Brown, J.,* at April (433) Term, 1890, of WAYNE.

The plaintiff is executor of the estate of Eli Sasser, Sr., who died in March, 1890, and the defendants are the children of said Eli Sasser by his first wife, Eliza Sasser, who died in 1877, leaving the defendants heirs at law.

About 1873 said Eliza Sasser and one Amanda Cassely, wife of T. M. Cassely, became the owners as tenants in common in fee of a certain tract of land in said county, on which is a water-mill power, used for grinding corn, etc., and for ginning and packing cotton, etc., in a mill and gin-house situated on said water-power, on said land.

On the death of said Eliza Sasser, her interest in said landed property descended to the defendants, and her husband, Eli Sasser, Sr., and said T. M. Cassely purchased a small engine and located it by the side of said mill and gin-house for the purpose of grinding and ginning as aforesaid by steam power, when the water-power became insufficient, and it was so used. Subsequently, said Eli Sasser, Sr., and said T. M. Cassely disposed of said small engine and purchased a larger engine and boiler—the one in controversy—and placed it at the side of said gin and mill-house for the purpose of grinding grain and ginning cotton from said farm, and for others in the neighborhood. They also placed in said house for the same purpose a cotton-press, gin and condenser, an anvil and vise and blacksmith tools. The engine is about three feet from the house, with side timbers bolted to the engine, and these set on cross-timbers in the ground. The inspirator of the engine goes through the floor to the water, and thus the engine is supplied with water for steam, etc. The gin sits on the floor and is held in position by cleats nailed to the floor. The condenser is set on top of the gin and nailed to it and to the joists above. The anvil is (434) nailed to the block on which it sets, and the block extends into the ground. The vise is nailed to a bench at the top, which bench is nailed to the house and its posts in the ground. The bellows are supported by posts in the ground, and braced by pieces nailed to the house. The blacksmith tools are loose in the shop.

Said Eli Sasser, Sr., bequeathed all of his interest in said property to his second wife, Mary, and others, and the plaintiff, as executor, claims the same, except the cotton-press, and defendants claim said articles as attached to, and descending with, the land of their mother to them.

The value of said articles is more than two hundred dollars.

The court rendered judgment as follows:

"No point was made as to want of parties, the judgment of the court being asked only as to whether the property described became fixtures. Upon the argument, counsel abandoned all claim to the anvil, bellows, and blacksmith tools and vise.

"From the facts set forth, the court concludes that the engine, cotton gin and condenser were attached to the mill by the tenant by the curtesy, after his term commenced, not solely for the better enjoyment of the land and farm, but for the purpose of milling corn and ginning

cotton for the neighborhood, as well as for himself, and for the mixed purpose of trade and agriculture (*R. R. v. Deal,* 90 N. C., 110), and that the said engine, gin and condenser did not become fixtures, and did not descend to the defendants with the land.

"It is, therefore, adjudged that the plaintiff recover of the defendants the said engine, gin and condenser, together with the anvil, bellows and blacksmith tools and vise, and the costs."

The defendants excepted to the above judgment, and appealed.

(435)

C. B. Aycock for plaintiff.

W. R. Allen for defendants.

CLARK, J. In the great case of *Elwes v. Mawe,* 3 East., 38, 2 Smith Ldg. Cases, *Lord Ellenborough* holds the doctrine of fixtures to depend largely in its application upon the relations of the parties, which he divides into three classes.

1. *Executor and heir.* As between them, the common-law rule, that whatever is affixed to the freehold becomes a part of it and passes with it *(quic quid plantatur solo, solo cedit),* is observed in full vigor. In this class fall also mortgagor and mortgagee, vendor and vendee, as to whom the strict rule of the common law is still in force. *Foote v. Gooch,* 96 N. C., 265.

2. *Between executor of tenant for life, or in tail, and the remainderman,* in which case the right to fixtures is considered more favorable for the executor.

3. *Between landlord and tenant,* in which case, in favor of trade, and to encourage industry, the greatest latitude is allowed, so that all fixtures set up for better enjoyment of trade are retained by the tenant, though this does not include fixtures used for agricultural purposes. Where, however, they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. Williams on Personal Property, 16, *note,* and numerous cases cited.

The reason of the distinction is pointed out by *Pearson, C. J.,* very succinctly in *Moore v. Valentine,* 77 N. C., 188. When additions are made to the land by the owner, whether vendor, mortgagor or ancestor, the purpose is to enhance its value, and to be permanent. With the tenant the additions are made for a temporary purpose, and not with a view of making them part of the land, hence, for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the freehold, if affixed for purposes of trade, and not merely for better enjoyment of the premises. *Pemberton v. King,* 13 N. C., 376. (436)

In the present case, it is agreed that "the engine, cotton gin and condenser were attached to the mill by the tenant by the curtesy after his term commenced, and not solely for the better enjoyment of the land and farm, but for the purpose of milling corn and ginning cotton for the neighborhood, as well as himself, and for the mixed purpose of trade and agriculture."

His Honor properly held that they belonged to the executor of the life tenant as against the remaindermen. This case comes under the second class mentioned by *Lord Ellenborough,* and there are few adjudications on that class, but the ruling of the court below is sustained by that of *Lord Hardwicke* in *Lawton v. Lawton,* 3 Atk., 13, and in *Dudley v. Wood,* Amb., 113, and the observation of *Lord Mansfield* in *Lawton v. Salmon,* 1 H. Bl., 260. There are subsequent cases, which all seem to follow the above precedents. Tyler on Fixtures (Ed. 1877), 490, 491, 496, 503.

In our own reports, *Pemberton v. King,* 13 N. C., 376; *Feimster v. Johnson,* 64 N. C., 259, and *R. R. v. Deal,* 90 N. C., 110, which recognized the right of tenant to remove, were cases between tenant and lessor, while *Bryan v. Lawrence,* 50 N. C., 337; *Latham v. Blakely,* 70 N. C., 368; *Deal v. Palmer,* 72 N. C., 582; *Bond v. Coke,* 71 N. C., 97; *Foote v. Gooch,* 96 N. C., 265, and *Horne v. Smith,* 105 N. C., 322, which adjudged the fixtures to have become part of the freehold, all came under *Lord Ellenborough's* first class, *supra.*

This is the first instance in which the rule as to fixtures between executor of tenant for life and the remainderman has come before the courts of this State. It assimilates that between landlord and tenant, the principal difference, perhaps, being that the executor can
(437) remove such fixtures within a reasonable time after the death of the life tenant, whereas, between landlord and tenant, the tenant cannot go on the premises to remove the fixtures after the termination of his lease without being a trespasser, except in those cases where the duration of his term is not fixed, but uncertain, or where there is an agreement that he may remove after the expiration of the lease.

Per Curiam. Affirmed.

Cited: Clark v. Hill, 117 N. C., 13; *Causey v. Plaid Mills,* 119 N. C., 181; *Woodworking Co. v. Southwick, ib.,* 616; *Belvin v. Paper Co.,* 123 N. C., 144; *Best v. Hardy, ib.,* 227; *S. v. Martin,* 141 N. C., 838; *Watson v. R. R.,* 152 N. C., 216; *Basnight v. Small,* 163 N. C., 17; *Pritchard v. Steamboat Co.,* 169 N. C., 461.

W. M. DARDEN ET AL. v. THE NEUSE & TRENT RIVER STEAMBOAT COMPANY.

Lease—Probate—Registration—Acknowledgment—Privy Examination—Clerk of the Superior Court—His Power to Order Registration in Another County—His Certificates—The Code—Evidence—Hearsay—Mandatory and Directory Statutes.

1. In an action for some cotton, or the value thereof, by lessors, who were the executor and executrix of the deceased landowner, and residing in different counties, they offered in evidence a lease for lands located in another county, acknowledged by the executor before the clerk of the Superior Court of the county where he resided, and acknowledged again by him and also by the executrix and lessee, after the bringing of this action, the executrix having become a *feme covert* since her execution of the lease, and her husband not becoming a party to any of the acknowledgments. There was no certificate of the clerk of the county where the executor resided, as required by section 1246 of The Code, subsec. 2: *Held*, (1) there was a valid registration, and the lease was rightly admitted in evidence; (2) the proof of instruments ordinarily prescribed for those executed by *married women* is not required for the registration of a lease executed before, but acknowledged after, coverture; (3) it was not essential that the acknowledgments should have been taken respectively in the counties where the grantors respectively resided.

2. Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing, that it was in due form.

3. It is not essential to the validity of registration of an instrument proved in another county that the clerk of the county where the land lies should have adjudged that it had been duly acknowledged and proved in the same manner as if taken before him.

4. It is not necessary that a married woman should be privily examined as to the execution by her of a lease for land as executrix under the will of a former husband and when she was a *feme sole*.

5. The power to take probate carries with it the power to order registration.

6. When an acknowledgment or proof of the execution of a deed, or other instrument required or allowed to be registered, is taken by any other officer than the clerk of the Superior Court of the county where the land lies, it is not essential to the validity of registration that the latter should add an adjudication or order of registration to the certificate and *fiat* of the officer taking the probate.

7. The provisions contained in the last sentence of section 1246, subsection 2, that the clerk of the Superior Court of the county where the land lies shall pass upon the acknowledgments taken before other clerks and officers named therein, is not mandatory, but directory.

8. The original papers in a case lately pending in the Superior Court are admissible as primary evidence, if properly identified.

9. What the custodian of such papers said to another witness identifying them is hearsay.

(438) APPEAL at September Term, 1890, of CRAVEN, from *Womack, J.*

(442) *W. W. Clark and C. Manly for plaintiffs.*
M. D. Stevenson for defendant.

AVERY, J. We do not think that it is necessary to determine whether the acknowledgments by both of the lessors before the clerk of Lenoir, where the land was situate, was a sufficient compliance with the registration laws (The Code, sec. 1246, and the subsections) to make the registration valid. W. M. Darden, a resident of Greene, acknowledged the execution of the lease before the clerk of that county on 6 May, 1889, and C. P. Davis, the lessee, being a resident of Lenoir, made similar acknowledgment before the clerk of Lenoir on 14 May, 1889, and the fact that the other parties to the instrument appeared with Davis before the clerk of the latter county certainly does not vitiate the probate as to him, under subsection 2, section 1246, of The Code, if it would be otherwise sufficient. Hattie D. Kennedy, after she became the wife of W. H. Borden and removed to Wayne on 6 May, 1889, acknowledged the execution on her part before Grady, clerk
(443) of the Superior Court of the county in which she then resided. Subsection 6 is as follows:

"When the proof or acknowledgment of a conveyance, power of attorney, or other instrument *concerning the interest of a married woman in lands, is taken as in this chapter directed,* no clerk of the Superior Court shall adjudge such conveyance or other instrument to be duly proved or acknowledged, unless the private examination of such married woman is taken according to the laws of this State and a certificate thereof attached to the deed or other instrument."

As the agreement was signed by Mrs. Borden when she was a *feme sole,* had the authority to enter into it in her representative capacity, and did not affect any individual interest held by her in land, it was not necessary that she should be privily examined, or that her husband should, in any way, signify his assent to her act, if, indeed, the instrument were admitted to be such as, under any circumstances, to make a privy examination necessary to its efficacy. *Hodges v. Hill,* 105 N. C., 130. She acknowledged the genuineness of her signature and the delivery of a paper executed when she had unquestioned power to act as executrix, and, in doing so, she was not continuing to act as

executrix after coverture, but was merely furnishing the proof, in the mode prescribed by law, of an agreement previously made by her within the scope of her powers. Hence, her right to act as executrix after her marriage does not come in question.

But counsel contended that it was essential to the validity of the registration that the clerk of the county where the land lies (Lenoir) should have adjudged the lease to have been duly acknowledged or proved in the same manner as if taken or made before him, and, while the judge who tried the case below states that there was no certificate in the precise language of the statute, he also says, in another part of the statement, that said clerk appended a certificate when he took the acknowledgment of all the parties to the lease, on 14 May, 1889, after the lessors had appeared before the clerks of their respec- (444) tive counties. The lease, with all of the certificates attached, ought to have been sent up as an exhibit, so that the Court here could see the form of the certificate instead of acting upon a statement of a conclusion of law as to the nature and effect of the paper signed by him and appended to the lease.

The parties, lessors and lessee, appeared before Bizzell, clerk, and, in the language of the statement, "acknowledged the execution of said lease, and, *upon a certificate to that effect, said lease was registered on 14 May, 1889.*" In the absence of more specific information, we must presume that the officer, though he did not adjudge the lease to have been duly acknowledged or proved before the other clerks, in the same manner as if taken or made before him, did, in fact, adjudge that it had been duly acknowledged, and order it, with the certificates, to be registered, after the other two certificates had already been endorsed on or attached to it. We must presume, too, when the record does not show the contrary, that the officer did his duty and made his certificate in proper form. We do not deem it essential that he should have adopted the very language of the statute, and have adjudged that the lease had been duly acknowledged before each of the other clerks, if, acting upon the assumption that it had been, after the endorsement of two other certificates, he ordered the registration. The *fiat* presupposes the necessary approval of what had been previously done, and there is nothing in the record to rebut the presumption that a *fiat* constituted a part of Bizzell's certificate. The appellant might have insisted upon bringing up the lease, and, possibly, ought to have done so. He has no just ground of complaint, if the certificate is not in form what we assume the officer would make it.

But it is important that we should pass upon at least one of the questions that the counsel for both parties discussed before us and intended to present. Supposing that Bizzell did not, in (445)

terms, order that any certificate should be registered with the lease but his own, and admitting, for the sake of argument, that he had no authority to take the acknowledgments of residents of Wayne or Greene as to conveyances or leases of land lying in Lenoir, we would still be confronted with the question whether the registration as to Mrs. Hattie D. Borden and W. M. Darden, upon the certificates and *fiats* (which we presume were appended) of the two other clerks, was valid. We think that the concluding sentence of subsection 6, section 1246, should still be construed as directory merely, notwithstanding the changes made by The Code since this Court construed section 2, chapter 35 of Battle's Revisal, in *Holmes v. Marshall,* 72 N. C., 39, and approved that construction in *Young v. Jackson,* 92 N. C., 144.

The acknowledgment of the lessors having been taken in accordance with the terms of the second, and that of the lessee in compliance with the first subsection of section 1246, by the clerks of the Superior Courts in the counties where they respectively resided, it is not material whether the *fiat* of Bizzell, in terms or by implication, passed upon the probates taken by the other clerks and ordered them to be recorded with his own certificate and the lease.

The probate as to each of the parties having been taken by a competent officer, the right to order the registration follows as an incident to the probate jurisdiction. *Rodman, J.,* in *Holmes v. Marshall, supra,* says: "It would seem that a power to take probate naturally carries with it, as an incident, a power to order registration." We think that the most important and cogent reasons that led this Court in that case to sustain the authority of an officer who is empowered to take probate of deeds to add a *fiat* to his certificate still subsist. We therefore
(446) hold that where an acknowledgment or proof of the execution of a deed or other paper required or allowed to be registered is lawfully taken by any officer other than the clerk of the Superior Court of the county where the land lies, it is not essential to the validity of its registration that the latter should add an adjudication or order of registration to the certificate and *fiat* of the officer taking the probate. The provision contained in the last sentence of the subsection (section 1246) (2), that the clerk of the Superior Court of the county where the land lies shall pass upon the acknowledgments taken before the other clerks, judges or Justices of the Supreme Court, and determine whether they have taken due form or in the same manner as if he had taken them himself, was not intended to be mandatory, but directory merely.

A witness for the defendant produced, while upon the witness stand, a bundle purporting to be the original papers in a case lately pending in the Superior Court of Lenoir, wherein the plaintiffs in this action

and one Oettinger were defendants, and counsel for the defendant proposed to ask him the question, "Where did you get these papers?" The purpose of the counsel in propounding the question was to identify the papers as records, by showing that the clerk of the Superior Court of Lenoir gave them to the witness as the original papers, according to their purport. In other words, the proposition was to show that the officer intrusted by law with the custody of them told the witness that they were original records in his office.

The original papers offered, if they were material and were properly identified, were admissible in evidence. A copy of this record, with a proper certificate from the clerk, is declared competent as evidence by section 1342 of The Code, but it was the inconvenience of producing and identifying the originals that necessitated the admission of exemplified copies. *S. v. Voight,* 90 N. C., 745. It is not necessary to decide whether the record was relevant or pertinent, since the testimony offered to identify it was merely hearsay evidence and insuffi- (447) cient for that purpose. The custodian of the record might have identified it, if he had been introduced as a witness, but what he said to the witness in reference to the nature or character of the papers was no more competent than proof of the declarations of any other person in relation to them. *Springs v. Schenck,* 106 N. C., 165.

We conclude, therefore, that there was no error in the rulings of his Honor, to which exceptions were entered below, and the judgment must be

Affirmed.

Cited: Croom v. Sugg, 110 N. C., 260; *Williams v. Kerr,* 113 N. C., 310; *Long v. Crews, ib.,* 257; *Cochran v. Improvement Co.,* 127 N. C., 397; *S. v. Knight,* 169 N. C., 343; *Sluder v. Lumber Co.,* 181 N. C., 70.

H. C. HUNT v. RICHMOND & DANVILLE RAILROAD COMPANY.

Appeal Dismissed—Printing Record—Rules 28, 29 and 30.

The necessity of the rule requiring the "case on appeal" to be printed has been often pointed out. Unless appellants observe this requirement, it will save them needless expenditure to refrain from sending up appeals which can only be dismissed at their costs.

APPEAL from *Merrimon, J.,* at Fall Term, 1890, of HENDERSON.

At the close of plaintiff's evidence the court intimated an opinion that the plaintiff could not recover. Whereupon he took a nonsuit, and appealed.

S. V. Pickens (by brief) for plaintiff.
D. Schenck and F. H. Busbee for defendant.

CLARK, J. Rule 28 (104 N. C., 924) provides: "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
(448) as appear in the record in each civil action shall be printed." And Rule 29 provides that "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." Rule 30 provides that if these rules are not complied with by the time the case is reached in its order for argument the appeal shall, on motion of the appellee, be dismissed.

These rules were adopted six years ago. The absolute necessity of this regulation, its moderateness in not requiring the whole transcript, but only the "case on appeal," usually to be printed, and in exempting State cases and pauper appeals from its application, and the fixed intention of the Court to strictly enforce it, have been repeatedly affirmed. *Horton v. Green,* 104 N. C., 400, and in many other cases. In *Witt v. Long,* 93 N. C., 388, the Court stated that it would treat a mere colorable compliance with the rule as a failure to observe it.

In practice, the printing of the "case on appeal," and (when necessary) of such other parts of the record as require consideration on the argument, has been found almost as convenient to counsel as necessary to the Court. It is a matter of surprise, therefore, that, in any case, intelligent counsel should permit their clients to incur the expense of sending up the transcript of the record, and of paying the costs of this Court, when they must know that if the record is not printed the appeal must be dismissed.

In the present case there is not even colorable compliance. The "case on appeal" is not printed at all. Appellant's counsel favors us with a full printed brief of his argument, and in it inserts a very brief synopsis of what he deems the substance of a rather long "case on appeal," and adds, "see case stated by the judge for a full statement." Even the ticket, on the wording of which the controversy turned in the court below, and which is made a part of the "case," is not
(449) printed. The counsel for the appellee will not accept appellant's

synopsis as a substitute for the case as stated by the judge, nor will the Court. Printed briefs, while not required, are always desirable, and are appreciated by the Court, but they cannot be accepted in lieu of a printed "case on appeal." The motion of appellee to dismiss must be allowed.

There can be no excuse for any appellant being ignorant of the rule as to printing the "case on appeal," seeing the length of time it has been adopted, and the many decisions enforcing it. If not prepared or inclined to comply with it, counsel will save unnecessary expenditure by refraining from sending up appeals which must be dismissed at the costs of their clients.

Per Curiam. Appeal dismissed.

Cited: Edwards v. Henderson, 109 N. C., 84; *Carter v. Long,* 116 N. C., 47; *Wiley v. Mining Co.,* 117 N. C., 489; *Fleming v. McPhail,* 121 N. C., 184.

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*THOMAS J. THOMPSON AND WIFE v. THE WESTERN UNION TELEGRAPH COMPANY.

Telegraphs—Negligence—Judge's Charge.

1. If a prayer for instruction is given substantially in the charge, though not in the very words asked, it is sufficient.
2. A general exception "to the charge as given," without specifying any particulars, will be disregarded. *McKinnon v. Morrison,* 104 N. C., 354.
3. When an erroneous prayer asked by appellant is given, he cannot be heard to complain.
4. Mental suffering, caused by negligence and delay in delivery of a telegram not of a pecuniary nature, may be ground of damages, though no physical pain or pecuniary loss is suffered. *Young v. Telegraph Co., ante,* 370.
5. An omission to charge on a peculiar aspect of the case is not error, unless an instruction was asked and refused. *S. v. Bailey,* 100 N. C., 528.
6. Where a telegram is sent by a wife about to be confined to summon her husband, and, by reason of negligent delay in the delivery of twenty-four hours, he did not arrive, whereby, the complaint alleges, she suffered more physical pain, mental anxiety and alarm on account of her condition, and sustained permanent and incurable physical injury for want of his presence and services: *Held,* such damages are not too remote.
7. Where the jury gave substantial damages, which are affirmed on appeal, it is unnecessary to consider the charge given as to nominal damages.

*Headnotes by CLARK, J.

8. Where a telegraph office had the sign of the defendant company over the door, and the operator at that point testified that he paid over all receipts to the treasurer of said company, the office was *prima facie* an office of the defendant.

9. The stipulation on a telegraphic blank against liability for an unrepeated message does not protect the company when such message is negligently delayed in transmission. If such stipulation has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight.

10. Nonresidents can sue in the courts of this State.

(450) ACTION tried before *Bynum, J.*, and a jury, at April Term, 1889, of CASWELL.

The plaintiff's wife being about to be confined, and at that time, in Danville, Va., her son, by her direction, delivered a telegram to agent of defendant company in Danville, Va., addressed to her husband at Milton, N. C., "Father, come at once; mother is sick," and paid for the same. The telegram was not delivered till next day, in the afternoon, a delay, according to the conflict of evidence, of twenty-four to twenty-eight hours. By reason of the delay, the plaintiff complained that on his arrival the child had been born (dead), and his wife had suffered greater pain, physically and mentally, than if he had reached home in time, as he would have done, if the telegram had been delivered with reasonable promptitude, and for lack of his services and presence, and by reason thereof she suffered a premature delivery, and
(451) incurred a permanent and incurable physical injury therefrom.

(455) Verdict and judgment for plaintiff. Appeal by defendant.

J. W. Graham for plaintiff.
G. V. Strong for defendant.

CLARK, J. This is a petition to rehear the case reported in 106 N. C., 549.

Upon a careful review of the former opinion of the Court, we think the petition should be allowed. The fifth paragraph of the charge is a substantial compliance with plaintiff's sixth request to charge. There is no specified exception to the charge. The appellant cannot be heard to complain of an instruction not excepted to, especially when it follows, in substance, his prayer of instruction.

The Court was misled by the somewhat confusing "make-up" of the lengthy record into supposing that defendant's seventh prayer for instruction was passed over unnoticed in the charge, and, while the Court did not pass upon the correctness of the prayer, it held that the court

below should have granted or have refused it, so that the jury might have had the benefit of the construction of the law involved in the request. A second examination shows that, in fact, the instruction was given as asked by the defendant. It was an erroneous instruction, as has since been held in *Young v. Tel. Co., ante,* 370, but, as the error was in favor of the appellant, it cannot be cause of complaint by him.

There was no request to charge that the negligence of the defendant, as shown, was too remote to sustain the action, and an omission to charge upon any particular aspect of a case is not error (456) unless an instruction is asked and refused. *S. v. Bailey,* 100 N. C., 528, and cases there cited. In fact, however, the damages were not too remote, as we think.

A case similar in some respects to this is *Tel. Co. v. Cooper,* 71 Tex., 507. It is there said: "If it is made to appear from the testimony that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm on account of her own condition than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of the defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering." In that case it was a doctor who was telegraphed for, and here the husband, but the gravamen of the complaint is the same—"increased pain and mental suffering," by reason of the absence of the party telegraphed for, who would have been present had not the defendant company negligently delayed the delivery of the telegram.

The instruction as to nominal damages was not excepted to, and, besides, as the jury gave substantial damages, we cannot see how the appellant could have been prejudiced. These views require us to consider the other exceptions, which were not passed upon in the former opinion.

The first and second exceptions were to the evidence, and were without merit. The appellant, on the argument, properly abandoned the third exception, which was for a refusal to nonsuit the plaintiff, on the ground that he was a citizen of Virginia, and, therefore (as was urged below), incompetent to maintain this action in the courts of this State. *Walters v. Breeder,* 48 N. C., 64; *Miller v. Black,* 47 N. C., 341.

The fourth exception was to the ruling of the court that, under the evidence, there was *prima facie* an office of the Western Union Telegraph Company in Milton. The evidence of the agent there was that the office in Milton had the sign of that company over the door, and that the money received for sending or receiving messages (457)

was paid by him to the treasurer of that company. Also, it was in evidence that the defendant received the message at Danville for transmission to Milton. We find no error in this ruling. It would seem that it was made upon defendant's contention that there was no evidence to show that it was responsible for the office at Milton.

The defendant's first, second, third, fourth and seventh prayers were given. The sixth prayer was substantially given as above stated. The eighth and ninth prayers were substantially given in the charge, and the exception as to them was abandoned in this Court. The fifth exception was for refusal to give the fifth prayer, which was that, as the message was unrepeated, the defendant, as per terms on its blanks, was not liable for delay in transmitting unless guilty of gross negligence. The stipulation as to repeating messages has been held reasonable in some courts as to mistakes in transmission, but not as to delays. In *Lassiter v. Tel. Co.,* 89 N. C., 334, it is held that it is a reasonable requirement "to insure accuracy," but that the exemption from liability for nonobservance of such requirement is "not extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service, and which may occur where there is but slight culpability in its officers and employees." In *Pegram v. Telegraph Co.,* 97 N. C., 57, which was also a case of mistake in the message, the Court reaffirmed *Lassiter v. Tel. Co.,* but holds that what would be ordinary negligence in sending a message apparently of small consequence might be gross negligence where it was manifest that the message was important. It is held that "the stipulation on the company's blanks restricting liability for unrepeated messages is unreasonable and void where the complaint is not of a mistake in the message, but for delay
(458) or failure in delivery." *W. U. Tel. Co. v. Brosche,* 72 Tex., 654; 13 Am. St., 843. The more recent cases founded upon the more thorough investigation and thought given to the subject are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void. In *Smith v. Tel. Co.,* 83 Ky., 104, it is said: "Telegraph companies are public agents engaged in a *quasi*-public business; care and fidelity are essential to their character as public servants, and public policy forbids that they should abdicate their duties as to the public by a contract with an individual, who is but one of millions, whose business, perhaps, will not admit either of delay or contest in the courts, but who is compelled to submit to any terms that the company may impose, and the law should not uphold a contract by which public agents seek to shelter themselves from the consequences of their own wrong and neglect." In a still more recent case (*Gillis v. Telegraph Co.,* 61 Vt.,

461; 15 Am. St., 917), this is quoted and approved to its full extent, and cases supporting this principle, many in number, and from courts of the highest authority, are given.

It is sufficient, however, for us to say that the present is a case of a delay, not of a mistake, in the transmission, and that the nature of the message and the length of the delay (about twenty-four hours) both make it a case of gross negligence, unless accounted for to the satisfaction of the jury, which was not done.

There was no other exception than those we have passed upon, except the general and vague one "to the charge as given," which is too indefinite to give any information either to the appellee or the Court. According to the rulings of nearly all, if not all, appellate courts, and certainly of this Court, it does not call for consideration. *McKinnon v. Morrison,* 104 N. C., 354.

On a review of the exceptions of the appellants, we can find (459) no error committed in the trial below.

Per Curiam. Petition allowed.

Cited: Sherrill v. Tel. Co., 109 N. C., 531; *Brown v. Tel. Co.,* 111 N. C., 192; *Sherrill v. Tel. Co.,* 116 N. C., 658; *Hansley v. R. R.,* 117 N. C., 573; *Hines v. Vann,* 118 N. C., 7; *Lyne v. Tel. Co.,* 123 N. C., 132, 133; *Cashion v. Tel. Co., ib.,* 270; *Kennon v. Tel. Co.,* 126 N. C., 236; *Griffin v. R. R.,* 138 N. C., 59; *Shepard v. Tel. Co.,* 143 N. C., 247; *Helms v. Tel. Co., ib.,* 394; *Woods v. Tel. Co.,* 148 N. C., 10; *Cates v. Tel. Co.,* 151 N. C., 506; *Shaw v. Tel. Co., ib.,* 641, 643; *McDonald v. McArthur,* 154 N. C., 125; *Alexander v. Tel. Co.,* 158 N. C., 479; *Penn v. Tel. Co.,* 159 N. C., 315; *Smith v. Tel. Co.,* 168 N. C., 520; *Ledford v. Tel. Co.,* 179 N. C., 67.

MARY A. SUMMERLIN v. C. J. COWLES ET AL.

Appeal—Notice—Correcting Records—Mistake—Inadvertence of the Court.

Where this Court inadvertently appended to its opinion the words, "and a new trial must be had in the court below, and we so adjudge," and, at the next term, upon its attention to this being called, correction was made, without formal notice to the appellee: *Held,* he was not entitled, as a matter of right, to such notice, and especially when his counsel knew that a motion to correct the record on this point would be made, and the opinion itself gave him notice that the appended words were inadvertently added and not consistent therewith.

APPEAL from MERRIMON, *J.*, at March Term, 1890, of WILKES. The facts are set out in the opinion.

D. M. Furches (by brief) for plaintiff.
R. B. Glenn for defendant.

MERRIMON, C. J. This case came before this Court by a former appeal at the September Term, 1888, and was then decided adversely to the defendant (101 N. C., 473). It appeared from the record in that appeal that "the jury found the issue in favor of the plaintiff, but the court, being of opinion that, upon the facts proved, the (460) plaintiff was not entitled to recover, rendered judgment for defendant, and the plaintiff appealed." The decision of this Court was to the effect that the court below erred, in that it gave judgment for the defendant, and it simply reversed the judgment of the latter court. It was, however, added, by mere inadvertence, at the end of the opinion of this Court, after the words "the judgment is reversed," the other words, "and a new trial must be had in the court below, and we so adjudge." At the next succeeding term of this Court, the counsel for the appellant in that appeal called the part of the order above mentioned, added by inadvertence, to the attention of the Court, and it at once corrected the mistake by striking out the words "and a new trial must be had." No special notice of this correction was given to the appellee (the present appellant) before the same was made, but his counsel of record, who had argued the case for him, had informal notice that the plaintiff's counsel would bring the matter to the attention of this Court.

The judgment of this Court, as so corrected, was duly certified to the Superior Court. It appears, among other things stated in the case settled on appeal, "that at Fall Term, 1889, of the Superior Court, the plaintiff moved for judgment upon the certificate of the Supreme Court, as thus amended, which was refused by the court, the defendants' counsel stating that a petition was on file for a rehearing in the Supreme Court, which petition was afterwards refused. "At March Term, 1890, the plaintiff again moved the court for judgment, which motion is opposed by the defendants' counsel, on the ground that a new trial had been awarded by the Supreme Court at September Term, 1889, and that the subsequent proceedings in the Supreme Court were without notice to the defendants. Upon the verdict mentioned above in favor of the plaintiff, the court gave judgment in her favor, and the defendants appealed to this Court." The appellants' exception seems to rest upon the unfounded supposition that this Court had no (461) authority, without special notice to him, to strike out of its order

mentioned so much thereof as it did not intend to make or enter, and which was improperly entered by mere inadvertence. It certainly had such authority, and it was its duty to correct its records and make them speak the truth by inserting what did not appear, or striking out what improperly appeared. It might do so *ex mero motu,* or when the incorrect entry should be brought to its attention by the parties interested, or either of them, or any other person. The power of the Court for such purpose is inherent and essential. *Cook v. Moore,* 100 N. C., 294, and the cases there cited. When such mistake, by inadvertence, is that of the Court, as to its orders and judgments determined upon, and which it intended to enter, but failed to enter, according to its resolution and purpose, or entered improperly, and it had knowledge of the facts, or the mistake appeared by the record itself, notice to the parties to the action of the purpose of the Court to make the correction is not essential, because the Court, having heard the parties in the course of the action upon the merits, concerns itself to know what orders and judgments it will render, and to see that it enters the same truly, according to its resolution and purpose. The Court should, however, in such case, direct its proper officer to give the parties notice of such correction, if they were not still in court. It would be better and safer, nevertheless, to give notice to the parties before any such correction is made, particularly if it be at all important.

The correction made by this Court complained of was properly made. It is manifest, from the statement of the case and the opinion of the Court in the former appeal, that it did not intend to direct that a new trial be had. The verdict of the jury, in favor of the plaintiff, remained upon the record undisturbed. No question as to it was raised by the exceptions. The court below gave judgment for the defendant, notwithstanding the verdict. In that, this Court held there was error. The opinion shows that the purpose of this Court was (462) simply to reverse the judgment and let the court below proceed to give a proper judgment in favor of the plaintiff, upon the verdict. Besides, the Judges of this Court had knowledge of the fact that the purpose of the Court was simply to reverse the judgment of the court below. It was, hence, its duty to itself and to justice, without reference to the parties, to enter its judgment truly, and when it saw that by mere inadvertence an improper order, and one not intended, had been entered, to strike the improper part thereof from the record. Wherefore should the parties have been present to insist upon or oppose the correction? What could they have done to prevent the correction being made? What could the appellant have done to prevent the true entry? Nothing whatever. The case had been argued, and the Court simply proceeded to enter its judgment truly, as it had resolved to do. The

appellant cannot justly complain that he did not have notice of the correction as made, so that he might have taken such steps after the judgment as he might do. He had notice. It appears that he applied to rehear the case, and his application was denied. He suffered no prejudice. The appellant's exception is to the judgment, and very general. So far as we can see, it was founded only upon the ground of objection already adverted to. As we have seen, this Court had decided the case adversely to him, and reversed the judgment in his favor. The verdict of the jury was in favor of the plaintiff, and the court gave judgment (a proper one) in her favor. The appellant could not raise a second time the questions decided by this Court adversely to him. There was no occasion for a new trial of the issues of fact, nor had this Court granted such trial. It simply reversed the judgment given by the court below, and it follows, as a consequence, that that court should give a proper judgment in favor of the plaintiff, as it did do.

Affirmed.

Cited: Scroggs v. Stevenson, 108 N. C., 262; *Solomon v. Bates,* 118 N. C., 322; *Bernhardt v. Brown, ib.,* 711; *Board of Education v. Henderson,* 127 N. C., 9; *S. v. Marsh,* 134 N. C., 187; *Matthews v. Fry,* 143 N. C., 385; *Durham v. Cotton Mills,* 144 N. C., 714; *State's Prison v. Hoffman,* 159 N. C., 570.

(463)

STATE EX REL. E. B. DRAKE, ADMR., v. J. B. CONNELLY ET AL.

Appeal — Case — Countercase—New Trial—Death of Judge Pending Settling of Case on Appeal—Charge in Writing—Request in Apt Time.

1. The appellant served his case on appeal, and the appellee his countercase, both in proper time. The judge took the papers to settle the case, but died before it was done. The appellant moves in this Court for a new trial because the case has not been settled. The appellee asks to withdraw his case and leave the appellant's case to stand as the case on appeal: *Held,* the appellee's motion should be allowed.

2 When it appears, from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by this Court.

3. When it appears that the prayer for instructions appeared in the wrong place in the record, and the clerk, instead of copying it in the right place,

refers to it, and this reference is immediately followed by the words, "His Honor declined all special instructions and declined to put his instructions in writing, as requested, and defendants excepted," and this was followed by the charge of the court, this Court will read the case as if the prayer had been written out in full at the place of reference.

APPEAL at May Term, 1890, of IREDELL, from *Shipp, J.* The facts are set out in the opinion.

D. M. Furches for plaintiff.
W. M. Robbins for defendants.

SHEPHERD, J. The appellant served his case on appeal, and the appellee his countercase, both in proper time. The judge took the papers to settle the case, but died before it was done. The appellant moves in this Court for a new trial on the ground that the case has not been settled. The appellee asks to withdraw his case and leave the appellant's statement to stand as the case on appeal. We think the appellee's motion should be allowed. We do not see how (464) the appellant can object to the statement made out by himself.

It is very evident, from an inspection of the record, that the defendant's prayer for instructions does not appear in its proper place in the transcript prepared by the clerk. It is to be found on pages 16 and 17, and is immediately preceded by an order in the cause made at a former term by *Phillips, J.*, and is succeeded by the verdict of the jury at September Term, 1890. In the case upon appeal, at the end of the statement of the evidence, the clerk, instead of copying the prayer for instructions, refers to it as follows: "See pages 16 and 17." This is immediately followed by the words, "His Honor declined all said special instructions, and declined to put his instructions in writing, as requested, and defendants excepted." Then follows the charge of the court. We must, therefore, read the case as if the prayer had been written out in full at the place of the reference, and thus it would appear that it was made in apt time—"at or before the close of the evidence." The Code, sec. 414. As one of the instructions asked was that the charge should be put in writing and read to the jury, the refusal to do so was very plainly a violation of the above provision of The Code. The defendants are, for this reason, entitled to a new trial.

Error.

Cited: Jenkins v. R. R., 110 N. C., 442; *S. v. Young*, 111 N. C., 716; *Parker v. Coggins*, 116 N. C., 73; *Ridley v. R. R., ib.*, 924; *S. v. Dewey*, 139 N. C., 560; *Sawyer v. Lumber Co.*, 142 N. C., 163; *S. v. Black*, 162 N. C., 638.

(465)

THE FARMERS NATIONAL BANK ET AL. v. J. T. BURNS ET AL.

Appeal, when Granted—Supplementary Proceedings—Clerk of Superior Court—Interlocutory Orders.

1. No appeal lies to this Court from an order of the Superior Court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him.

2. In proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient, and made the order demanded: *Held*, that an appeal lay *at once* to the judge as a matter of right, and the clerk could not allow or disallow it.

APPEAL from *Graves, J.*, at October Term, 1890, of MOORE.

It appears from the record that on 28 September, 1885, the plaintiffs had a judgment against the defendants in the Superior Court of the county of Moore for $1,089.83, etc., and that the same was docketed; that afterwards, on 26 June, 1890, they began their proceedings supplementary to the execution against the defendants, and, as to the same, filed the affidavit of their agent, upon which is based their motion before the court (the clerk) for an order requiring the defendants to answer, etc., as required by law in such cases. The defendants insisted that the affidavit was in law insufficient, in respects specified, to warrant such order. The court decided that it was sufficient, and made the order demanded. The defendants excepted, and appealed to the judge. The court refused to allow the appeal.

Afterwards, the defendants filed their petition to the judge of the court, demanding that the writ of *certiorari* be directed to the clerk of the court, commanding him to send to him the papers, judgments and orders in such proceedings before him (the clerk), acting as and for the court. At October Term, 1890, of said court, the court made its (466) order, directing and requiring the clerk of the court to "send up to the next term of this Court a complete transcript of the proceedings in supplementary proceedings had before him in this cause." The plaintiffs excepted to this order, and appealed to this Court, assigning as error:

1. That the court should not have granted a writ of *certiorari* to the defendants at this stage of the proceedings, the defendants not being entitled to appeal from a refusal of the clerk to dismiss for want of jurisdiction, or for any other cause, and the writ of *certiorari* being substitute for an appeal.

2. The defendants were not entitled to said order upon their petition.

A. W. Haywood for plaintiffs.
John Devereux, Jr., for defendants.

MERRIMON, C. J., after stating the facts: The statute (Code, sec. 488, par. 1) confers upon the clerk of the Superior Court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. The order, when made, was to be treated and to have effect as that of the court, if no person interested and having notice made objection to the same. But it is expressly provided by the statute (Code, secs. 252, 253) that "any party may appeal from any decision of the clerk of the Superior Court (in cases and matters where he may act as and for the court) on an issue of law or legal inference, to the judge, without undertaking; . . . but an appeal can only be taken by a party aggrieved who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard therein, had no notice or opportunity to be heard, which fact may be shown by affidavit or proof." Such appeal certainly lay *at once* from the order complained of, in this case, because the affidavit objected to on the (467) ground of its insufficiency in law, and the order founded upon it, so far as appears, lay at the foundation of the proceedings supplementary to the execution. Indeed, it appears that the affidavit was essential, because the motion founded upon it was made after the execution was issued, and before it was returned by the sheriff (Code, sec. 488, par. 2). It may be that if the defendants' objections had been sustained, the motion of the plaintiffs could not have been granted at all, and the proceedings might have been abandoned. It may be that an appeal to the judge does not lie *at once* from every decision of the clerk "on an issue of law or legal inference" objected to by a party, but it certainly does in a case like the present one, when an objection affects the very existence of proceedings. We are clearly of the opinion that the appeal lay.

The clerk had no authority to allow or disallow the appeal. The complaining party had the right to take it, and to have the same entered. As the clerk refused to prepare a statement of the case, of his decision, etc., as required in such cases by the statute (Code, sec. 254), the court in term, or the judge, at chambers, might, upon proper application, direct, by simple order, the clerk—its own officer—to do as the law required him to do.

The plaintiffs appealed from the order of the court granting the writ of *certiorari* to be directed to the clerk, commanding him to send to the judge a transcript of the record of the proceedings, etc. The court did not examine the decision of the clerk complained of; that matter was

not before it. The purpose of its order was to enable it to review the decision of the clerk, and correct the error, if any should appear. The order appealed from was not in any proper sense interlocutory—it was merely incidental in the course of the action, and no appeal lay from it at once, or at all. The supposed appeal must, therefore, be dismissed.

Appeal dismissed.

Cited: Turner v. Holden, 109 N. C., 186; *Hillsboro v. Smith,* 110 N. C., 418; *Ledford v. Emerson,* 143 N. C., 538.

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(468)

JAMES A. LEAK, JR., ET AL. v. JOHN C. GAY ET AL.

Creditor's Bill—Homestead—Mortgagor and Mortgagee—Judgment Creditors—Junior Mortgages—New Debts—Residue After Sale—The Code—Constitution—Retrospective Laws—Laws Impairing the Obligations of a Contract and Vested Rights—Amendatory Acts.

1. The homestead interest is favored by the Constitution, and a mortgagor has a right to have his homestead exonerated by applying the proceeds of the excess above it to the payment of a prior mortgage debt in preference to other liens upon the homestead or upon his other lands.

2. No matter when the debts of the judgment creditors have been created, the debtor has a right to demand that the junior mortgages shall be satisfied out of the proceeds arising from sale of the excess above the homestead in exoneration thereof.

3. Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, $1,000 of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead.

4. Where judgments are a lien upon a mortgagor's homestead in the residue left after sale, he has, as against the judgment creditors, a right to secure their ultimate payment as the court may direct, the interest in the residue fund set apart as his homestead to be paid to him till his estate determines; or he has the option to take the present value of the homestead out of such residue, and this though it is less than $1,000. The fund so taken for the present value belongs to the homesteader absolutely, and the balance left is subject to immediate division among the creditors according to priorities.

5. The act of 1885, amendatory of the homestead law, and repealing the clause exempting homesteads from the lien of judgments, does not impair the obligations of a contract or interfere with vested rights by being allowed to operate retrospectively, so as to include judgments upon debts contracted before it became a law and while The Code, sec. 501 (4), was in operation.

6. So much of section 501 (4) of The Code as precedes the *proviso* must be considered as having been enacted with a view to the rule of construction contained in section 3766 of The Code.

7. Everybody is presumed to contract with a view to the power of the Legislature to alter and amend laws providing remedies.

8. The Code, sec. 3766, provides that when a part of the statute is amended, the new *proviso* is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of The Code, is subject to this rule of construction.

CREDITOR'S BILL, heard before *Bynum, J.*, at Spring Term, (469) 1890, of RICHMOND, on a report of a referee and exceptions thereto, relating to the disposition of the fund arising from the sale of a debtor's land where there were mortgagees and judgment creditors and the debtor claimed a homestead in the fund.

Little & Parsons (by brief) for plaintiffs.
P. D. Walker for defendants.

AVERY, J. All of the claimants concurred in the admission that James A. Leak, Sr., whose mortgage was executed and recorded before any other lien attached, had the right to receive his entire debt out of the fund. After discharging that claim, together with costs, the referee reported that the residue left would be $1,334.35. The contestants for it are the creditors whose judgments were docketed between the registration of the senior and junior mortgages, the junior mortgagee, James A. Leak, Jr., and the defendant John C. Gay, who claims the whole fund as proceeds of the sale of his homestead, which was allotted before the land was sold. If the defendant Gay had never executed either of the mortgage deeds, the judgment creditors—if it be conceded that they acquired any lien on the homestead at all—could have looked only to the sale of the excess over and above the land allotted for the present satisfaction of any portion of their claims. On the other hand, if he had executed only the junior mortgage, and if we admit that it was subordinate as a lien to the judgments, still the homestead itself could have been subjected for the payment of the debt secured in the (475) mortgage, while it would have been exempt from sale under execution issued on any of the judgments docketed before the mortgage was registered, provided always that it was executed so as to comply with the requirements of the Constitution, Art. X, sec. 8, and that is admitted.

The defendant Gay insists that, it being an undisputed fact that the debts upon which all of the judgments were recovered were contracted after the passage of the act of 1876-77, chapter 253 [The Code, sec.

501 (4)], and before the enactment of the law restoring the lien (chapter 359, Laws 1885), it would follow that a lien was neither created in their favor by docketing them, nor attached upon the subsequent enactment of the statute (of 1885) after they were docketed, and that his homestead right should be exonerated by applying the sum of $334.35, the excess of the fund over $1,000, to the payment of the debt of the junior mortgagee, James A. Leak, Jr., and, after satisfying the residue of his debt, the remainder of the $1,000—about $800, in round numbers—should be paid over to him in lieu of his homestead. If there is sufficient ground to support this contention, his appeal must be sustained.

It has been held that the homestead interest is one favored by the Constitution, and hence a mortgagor has a right to demand that it be exonerated and discharged from incumbrance by applying the fund realized from the sale of the excess to the payment of the mortgage debt in preference to other claimants who have liens, either upon the land in which the homestead is allotted or upon other lands of the debtor. It must be conceded, no matter when the debts of the judgment creditors were created, that, in a case like the present, the debtor has the right to demand that the junior mortgage shall be satisfied out of the excess of the fund over $1,000, so as to exonerate his homestead. *Butler v. Stainback,* 87 N. C., 216; *Curlee v. Thomas,* 74 N. C., 51. But the (476) claim of the junior mortgagee exhausts the excess, as it amounts to more than $500, and leaves $200 of it still unsatisfied.

Were we to concede that when a homestead has been once allotted as prescribed by law, it cannot be reassigned by metes and bounds at the instance of a creditor, the debtor may, nevertheless, sell or incumber that interest by observing the requirements of the Constitution, Art. X, sec. 8. Where, in order to satisfy a mortgage or a debt created before the ratification of the Constitution of 1868, the debtor's homestead is sold, in apportioning the fund arising from such sale the sum of $1,000 of the money must be treated as the homestead of the debtor, notwithstanding the fact that the whole of the debtor's land, including excess and homestead, sold for over $2,000 more than the sum offered by bidders for the excess when exposed separately to sale.

In *Wilson v. Patton,* 87 N. C., 318, where the whole of the debtor's land was sold under execution issuing upon an old debt, the sum of $1,000 of the proceeds of sale was treated as the homestead, as against new debts contracted since the ratification of the Constitution of 1868.

If we admit that the judgment creditors had a lien upon the land allotted as a homestead, still, in a contest between them and the defendant Gay, he had the option to secure the ultimate payment to them, in such manner as the judge might direct, of the residue left to represent

the homestead, after paying the junior mortgagee, and thereby secure to the beneficiaries under the homestead allotment the use of, or interest on, that sum (supposed to be about $800), till the time fixed for the enjoyment of the homestead should have expired, or, if he preferred to do so, he had the right to demand the payment to him of the present value (calculated according to our table) of his life estate in $1,000 (not $800), which value the referee reported to be $390. The defendant Gay chose to take the present value instead of the use of the whole sum, but insisted upon his right to receive the whole resi- (477) due absolutely and unconditionally.

As we have stated, although the allotment of the homestead may preclude all question as to its real value, yet, when the occupant subjects it, in the mode prescribed by the Constitution, to the lien of a mortgage, and ultimately to sale under its provisions, $1,000 in money, if it sell for more than that sum, must represent and be treated as the homestead itself, and will be so secured and invested that the "homesteader," or his family, can enjoy the interest so long as the right of enjoyment subsists, and his creditors can ultimately divide it according to priorities. But if the debtor elect to take the full present value of the right to enjoy the interest on the fund in future, the effect must be to render necessary an adjustment of rights between him and his creditors immediately upon the exercise of his option, so as to allow them also to receive the present value of their right, by a payment of the residue of the fund representing the homestead (left after deducting its value, ascertained by a calculation based upon life-tables) to them according to priorities, instead of awaiting the determination of the right of enjoyment of the homestead by the beneficiaries, and then dividing the whole fund representing it in the same way.

The disposition of the fund in dispute must depend, then, upon the question whether the act of 1885 operated retrospectively so as to give to the judgment creditors, from its passage, a lien upon the debtor's homestead. The judgment creditors contracted with a view, it is true, to the statute [Code, sec. 501 (4)] which exempted the homestead from the lien of judgments, but both creditor and debtor are presumed to have known that the Legislature might exercise its power, as it did, in passing the act of 1885 (ch. 359) by taking from the latter the privilege of exemption enjoyed by him while it was permitted by the law-making power.

If the amendatory statute (ch. 359, Laws 1885) neither falls (478) within the constitutional inhibition as a law impairing the obligation of a contract, nor interferes with a vested right of the debtor in its application to the contracts made while the act of 1876-77 was in force, then it would follow, if it appeared clearly to have been the legislative

intent to restore to preëxisting creditors the judgment lien in cases where it had been taken away by the latter act, that the courts must construe the law so as to carry out such manifest purpose, and declare that the homestead of the defendant Gay became subject to the liens of the plaintiffs who had judgments, according to priorities, upon the passage of the amendatory act. A statute may be, according to its express terms, retroactive in its operation, and yet not necessarily void. The Legislature is prohibited from enacting any law in conflict with the Constitution of the United States, or of the State of North Carolina. The restrictive inhibitions of the organic law, State and Federal, that are usually invoked to test the validity of a statute as to any retrospective operation proposed to be given to it, are those against passing laws impairing the obligation of a contract; *ex post facto* laws are those that provide for taking private property for public use, even without compensation. *Satterbee v. Matthewson,* 2 Peters, 380. When the effect of a law is to divest the vested right of property, except for the use of the public, and then only after providing for payment of its value, it will be declared void. But it is the creditor alone who has the right to insist that any law passed by the Legislature of a State which will, if enforced, diminish the value of his debt, take away his remedy without providing another equally as efficacious, or destroy his lien, is unconstitutional, because it impairs the obligation of the contract.

Statutory privileges and exemption, as distinguished from those conferred by the Constitution, are granted, subject to the power of the General Assembly to repeal or modify the act that gives them,
(479) and all private agreements are entered into, in contemplation of law, with full knowledge that such privileges or exemptions may be recalled when not resting in contract. Cooley's Const. Lim., star p. 383; *Bull v. Conroe,* 13 Wis., 238; *Moore v. Litchford,* 35 Texas, 185; *Harris v. Glenn,* 56 Ga., 94; *Sparger v. Campton,* 54 Ga., 185; *Balton v. Johns,* 5 Penn. St., 145; *Blakeney v. Bank,* 17 Serg. & Rawls (Penn.), 64.

The Legislature has the power to enact retroactive laws also, in order to add to the means of enforcing existing contracts. 1 Kent Com., 455.

A creditor has the constitutional right to demand that his lien shall not be destroyed, or his remedy in any other way impaired, but the debtor can claim no vested right of exemption. The privilege is granted to the latter subject to the right of the sovereign to recall it in the way prescribed in the organic law. *Harris v. Glenn, supra; Blakeney v. Bank, supra.* If, by giving to a statute a retroactive operation, it would divest any right of property that had already accrued, it should be construed to operate prospectively only, if at all. Sedgwick Stat. & Con. L. P., 195.

Upon the idea that the public good is to be considered paramount to private interests, and upon the principle that private persons act and contract with reference to the power of the Legislature and the risk of its exercise, it has been frequently held by this and other courts of this country that a retrospective law, making valid unauthorized acts of officers, may be upheld and enforced though the effect of enforcing it be to enable persons to establish rights to property, that they could not otherwise have maintained. *Belo v. Commissioners,* 76 N. C., 489.

The Code, sec. 501 (4), as amended by Laws 1885 (ch. 359), is as follows: "The property, real and personal, specified in subdivision 3 of this section, and the homestead of any resident of this State, shall not be subject to sale under execution, or other process, except (480) such as may be rendered or issued to secure the payment of obligations contracted for the purchase of the said real estate, or for laborers' or mechanics' liens, for work done and performed for the claimant of said homestead, or for lawful taxes, provided the statute of limitations shall not run against any payment owing by the owner of the homestead or homestead interest during the existence of such homestead or homestead interest, whether the same has been, or shall hereafter be, allowed, assigned and set apart under execution, or otherwise." Code, sec. 3766, is as follows: "Where a part of a statute is amended it is not to be considered as having been repealed and reënacted in the amended form, but the portions which are not altered are to be considered as having been the law since their enactment, and the new proviso as having been enacted at the time of the amendment." By the amendatory act, the words "to the lien of any judgment or decree of any court or" were stricken out between the word "subject" and the words "to sale," and the words following after the word "provided" were added to the section. So much of the section, in its amended form, as precedes the proviso must be considered as enacted with a view to the rule of construction contained in section 3766, and must be "considered as having been the law," since it was enacted at the session of 1876-77. Since it does not interefere with vested rights or impair the obligation of any contract, to give the present law the retroactive effect contemplated and required by the provisions of The Code, we must construe it just as though the clause destroying the lien of judgments as to homesteads had never been inserted in the original act, or reënacted as a part of The Code in November, 1883. However widely the text-writers and the courts may differ as to the true rule for testing the question whether a given statute, not objectionable on the ground of unconstitutionality, shall be allowed to operate retroactively, all concur that when there is a plain expression of the legislative intent, the law is to take effect accordingly. *S. v. Littlefield,* 93 N. C., 614; Potter's (481)

Dwarris, 162, note 9; Bishop on Written Law, sec. 82; 1 Minor's Ins., 26. The act of 1885 must be considered just as though section 3766 of The Code had constituted an additional proviso to it, and both must be construed together. *S. v. Massey,* 103 N. C., 356; ib., 97 N. C., 465. If any further agreement is needed to arrive at the true interpretation to be given to the present law, it will be observed that the proviso to the act which, under section 3766, alone took effect on the day of its enactment, or related to that day, discloses the purpose of the Legislature by suspending the statute as to homesteads already assigned, or to be allotted thereafter, to make the act apply to both. The result reached by the opinion of the Court in *Utley v. Jones,* 92 N. C., 263, must have been substantially the same as to the disposition of the fund in controversy, if a reference had been made to ascertain the present value of the debtor's life-estate in one thousand dollars. But the court failed to advert to the two facts that there was on the one hand no objection growing out of the constitutionality of the act of 1885 giving it a retrospective effect, and, on the other, there was, in The Code, a mandatory requirement to so construe it. There was, therefore, no error pointed out by the defendant Gay. Judgment in defendant's appeal must be

Affirmed.

Cited: Gulley v. Thurston, 112 N. C., 195; *Van Story v. Thornton, ib.,* 210; *Lowe v. Harris, ib.,* 484; *Mayo v. Staton,* 137 N. C., 684.

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(482)

JAMES A. LEAK ET AL. v. JOHN C. GAY ET AL.

Homestead—Present Value—Judgment Creditors—Exoneration—Constitution.

1. The restoration of the lien of a judgment, under the act of 1885, does not affect the judgment debtor's right to exoneration, or his power to encumber his homestead by a conveyance executed in compliance with section 8, Article X, of the Constitution.

2. Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead.

APPEAL OF JUDGMENT CREDITORS.

The facts are the same as in the other case, except the exceptions of the judgment creditors set out in the opinion.

Little & Parsons (by brief) for plaintiffs.
C. W. Tillett and P. D. Walker for Spencer.
J. D. Shaw for Lowdermilk.

AVERY, J. This is an appeal by two of the judgment creditors, J. S. Spencer & Co. and B. F. & H. C. Lowdermilk—

1. Because of the payment of the second mortgage out of the funds, proceeds of the sale of land, before their judgments, said judgments having been docketed before the registration of said mortgage.

2. Because the $390.34, the present value of defendant's homestead, should have been applied to payment of the second mortgage, and the balance of the proceeds of the sale, after deducting the first mortgage and cost of suit, to the satisfaction of the judgments docketed prior to the registration of the second mortgage, according to their respective priorities—the dates of docketing.

We need only to add to what has been said in the discussion of (483) the defendants' appeal that, though the act of 1876-77, as amended by the act of 1885, has been construed for the purpose of disposing of the excess over the homestead, as if the clause destroying the lien had never been inserted, the restoration of the lien, under the act of 1885, construed with section 3766 of The Code, does not affect the defendant's right to exoneration, nor his power to encumber his homestead by a conveyance executed in compliance with section 8, Article 10 of the Constitution. The appellants cannot complain of the election of defendant Gay, whereby they receive what is, in contemplation of law, the present value of what they would receive after the right of exemption, according to the calculation as to the probabilities of life, shall cease. There is no error, and the judgment is

Affirmed.

Cited: Bevan v. Ellis, 121 N. C., 235.

J. A. LEAK, JR., ET AL. v. J. C. GAY ET AL., PETITIONERS.

Little & Parsons (by brief) for plaintiffs.
P. D. Walker for homesteader.
C. W. Tillett for petitioners.

AVERY, J. This is a petition to rehear the appeal of J. S. Spencer & Co. and B. F. and H. C. Lowdermilk, *ante,* 482.

All the questions involved in both appeals in this case were discussed at length in the opinion filed in the appeal of defendant J. C. Gay, the homesteader. The fund left after satisfying the senior mortgage of J. A. Leak, Sr., was $1,334.35. For this sum the contestants in the court below were the junior mortgagee, J. A. Leak, Jr.; the homesteader, J. C. Gay, and the appellants in this case, J. S. Spencer & Co. and B. F. and H. C. Lowdermilk, who are judgment creditors with other judgment creditors named in the clerk's report. In the court below it was
(484) ordered that, out of this fund left after discharging the mortgage debt of J. A. Leak, Sr., the mortgage debt of J. A. Leak, Jr., should be first paid in order to exonerate the homestead upon which it was a lien. Out of the residue left after paying the whole of the junior mortgage debt, it was further ordered that the sum of $390.34, the present value of the life estate of John C. Gay, be paid to him in lieu of his homestead, and the residue, if any, should be paid to the judgment creditors. This Court held, in explicit terms, that the mortgage debt of the junior mortgagee, being a lien for which the homestead could be now subjected to sale, it would be first paid out of the fund for the relief and exoneration of the homestead. J. A. Leak, Jr., had not appealed to this Court.

The defendant Gay appealed because the court refused to order that the whole of the sum (which it was stated in this Court would amount to about $800) left after paying the debt of the junior mortgagee should have been paid over to him, instead of $390.34, the present value of his homestead. We held that he was entitled only to the sum allowed him in the court below, and that in his appeal there was no error.

The appellants in this case relied upon two assignments of error. Reversing the order in which they were set forth in the record, the second exception was to the judgment of the court below giving to the homesteader the present value of his homestead. The reasons for declaring the defendant Gay, after he had elected to take the present value of his homestead, entitled to that amount, and no more, were given in full in the discussion of his appeal.

The first exception we find, upon a more critical examination than was made when the petition to rehear was allowed, is based solely upon the ground that his Honor ordered that the junior mortgage debt be paid out of the fund of $1,334.35 left after paying the senior mortgage, in preference to the debts of the judgment creditors. The junior
(485) mortgagee was entitled to be so paid, and, in that, there was no error in the ruling of the court below, and there was no ground for a rehearing here.

Whatever sum was left after paying, first, the costs and the mortgage debt of J. A. Leak, Sr.; second, the mortgage debt of J. A. Leak, Jr.;

third, the sum of $390.34 to J. C. Gay, should have been paid over to the judgment creditors, and was so paid, if the decision of this Court was respected. If, after paying the junior mortgagee, there was not more than $390.34 left, of course, the judgment creditors could get nothing. In the defendant's appeal, we held that if there was such balance left, the homesteader Gay would not be entitled to receive it, because the effect of the act of 1885 (ch. 359), construed with section 3766 of The Code, was to restore the lien of the judgments as of the time of their rendition. But the restoration of the lien does not in the least affect the right of the defendant Gay to have the homestead exonerated by the payment of the debt of the junior mortgagee out of the excess, in preference to the claims of the judgment creditors. Neither J. A. Leak, Sr., nor J. A. Leak, Jr., appealed. The judgment of the court below, rendered by *Bynum, J.*, directed the fund to be distributed in the way pointed out in the opinion of this Court in the appeal of Gay. We therefore adhere to our former ruling. There was no error in the order of the court below directing the distribution of the fund.

Petition dismissed.

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(486)

JAMES ELLER ET AL., EXECUTORS, v. J. W. LILLARD ET AL.

Will—Construction—Executor—Advancements—Child's Part—Residuum.

A testator left his wife certain personal estate described to be hers absolutely, and certain real estate for life, and then bequeathed to her also " a child's share, equal with one of my children, of all the property not disposed of otherwise in this will"; and, after making a bequest of part, he further directed that "the balance of my bank stock be equally divided between my children, unless it can be more agreeably arranged between themselves." He further devised to the heirs of T. C. W., his grandchildren, a tract of land theretofore advanced to him (T. C. W.), and remainder in another tract, and added: "I mean the above-named heirs (grandchildren) are to have an equal share of my estate with the balance of my children" (naming them). The will mentions the name of those who had been theretofore advanced, and their amounts, among whom was T. C. W., whose advancement was valued at $5,900: *Held*, (1) that in an action by the executor to obtain construction of this will, it was not error in the court below to require the children and grandchildren to account to the widow for advancements in ascertaining her child's part; (2) it was not error to allow T. C. W., and others most advanced, to share equally in the bank stock—the residuum—without accounting to those less advanced.

APPEAL at September Term, 1890, of ASHE, from *Merrimon, J.*

It appears that David Worth died in the county of Ashe in December, 1888, leaving a last will and testament, which was duly proven, and the plaintiffs, the executors named therein, were duly sworn as such. This action is brought by these executors to obtain a construction of the said will in respects specified, against the devisees and legatees thereof. The following is a copy of so much of the will as need be reported here:

(487) "I devise and bequeath to my beloved wife Elizabeth the home tract of land and adjoining tracts, excepting the one-hundred-acre tract called the Prather tract, and about one acre, including the church called Worth's Chapel; also the bounty tract of land estimated at one thousand acres, the home tract, estimated at about four hundred and seventy acres, including one-half of the grist-mill, including one acre of land including the mill, for the term of her natural life; also, all my household and kitchen furniture of every description, all my farming tools necessary for farming purposes; also, my family carriage and buggy, with the appurtenances thereunto belonging; also two cows—her choice; also a child's share, equal with one of my children, of all the property that is not disposed of otherwise in this will, to be hers absolutely, and at her own disposal. I devise and bequeath one acre of land, including the church called Worth's Chapel, to the M. E. Holston Conference, South. I also devise and bequeath three hundred dollars of my bank stock in the bank of Abingdon, Va., to the said M. E. Holston Conference, South, the dividend to be annually applied to the support of the minister at Worth's Chapel. *I direct that the balance of my bank stock in said bank to be equally divided between my children unless it can be more agreeably arranged between themselves.* I direct that my stock in the cotton mills at Roswell, Cobb County, Ga., to be sold on a credit of nine months, with interest from day of sale, with bond and approved security, title reserved until paid. I devise and bequeath to the heirs of my deceased daughter, M. C. Wilcox, former wife of M. F. Wagner, deceased, viz., Lilla Wagner, now Wright, also Marianna Wilcox; also to the heirs of my deceased daughter, R. C. Cowles, viz., David W. Cowles, Carrie L. Cowles, and Cora A. Cowles; also the heirs of my daughter, J. L. Benham, viz., Deetle Benham and E. W. Benham; also to the heirs of my son, T. C. Worth, deceased, viz., Walter H. Worth, Elma C. Worth, Jennie M. Worth, and Joseph C. Worth, the tract of land that I advanced for the benefit of the last-named four children, whereon

(488) they now reside. I devise to R. C. Worth, widow of T. C. Worth, deceased, the tract of land of about two hundred and thirty acres, whereon she now resides, to be her property during her natural life, then to T. C. Worth's heirs as above named. I mean the above-named heirs are to have an equal share of my estate with the balance of my children—

the share that the mother or father, if living, would be entitled to, viz., E. C. Lillard, A. L. Lide, and A. E. Penn, after taking out the advancements heretofore made or hereafter made. M. C. Wilcox has received $1,920; E. C. Lillard has received $2,234; R. C. Cowles has received $1,455; T. C. Worth has received $5,980; J. L. Benham has received $1,596; Lillie Wagner has received $237; A. L. Lide has received $3,576; A. E. Penn has received $1,725. Reference may be had to a leather-back pocket diary in the iron safe for advancements made up to this date, or hereafter."

The following is so much of the judgment of the court below as is excepted to by the appellants:

"All the parties in interest being before the court, and represented by counsel, and the whole matter being considered, the said clauses of said will are construed as follows:

"1. That after paying the bequests to the church therein mentioned, the residue of the bank stock is to be divided equally among the children and grandchildren of the testator, the said grandchildren taking *per stirpes,* and, in this fund, that is, the bank stock, the widow of the testator is not entitled to share, nor is she entitled to have the said bank stock accounted for in any interest that she may take under this will, as said bank stock is held to be a specific legacy.

"2. That, in ascertaining the child's part devised to the widow of testator, she is entitled to require each of the children, and grandchildren representing children, to account for the advancements made by the testator in his lifetime, except as to advancements that have been disposed of otherwise in this will, to wit, the tract of land advanced to T. C. Worth at the price of $2,000, and any other (489) lands, if any, advanced to any other of the children."

The appellants assign as grounds of error that the court below required "the children and grandchildren of the testator to account to the widow for the advancements made to them by the testator in ascertaining her (the widow's) share of one child's part," and allowed "T. C. Worth and the others who have been most advanced to share in the bank stock without accounting for such advancements to those who have been less advanced."

No counsel for plaintiffs.
Q. F. Neal and W. H. Bower for defendants.

MERRIMON, C. J., after stating the facts: We are not called upon, nor would it be proper, to interpret the will before us, or particular clauses of it, further than may be necessary in reviewing the judgment of the court below in the respects embraced by the assignments of error. Our

province is simply to correct errors of the court below—not to go beyond that and interpret the whole will, or determine the rights of devisees or legatees otherwise than as these may be involved in the assignments of error.

The clear purpose of the testator was, first, to provide for his wife. His further purpose, to have his wife and children share equally in his property, except as to specific devises and bequests, is very apparent. And, with this view, he intended that his grandchildren of his deceased children should respectively represent their deceased parent and take the part the parent would take if living. Indeed, in his will, just after the naming of his deceased children, and after each, her or his children, he expressly declares, "I mean the above-named heirs" (the heirs—the children—of his deceased children mentioned) "are to have an equal share of my estate with the balance of my children—the share that the mother or father, if living, would be entitled to, viz., E. C. Lillard, A. L. Lide and A. E. Penn," who were his surviving daughters and only surviv-
(490) ing children, mentioned awkwardly in this connection. And, to make such equality as to his surviving children and the children of his deceased children, he intended that the surviving children and his grandchildren representing respectively their deceased parents, should account to and with each other for certain advancements which he specified in his will, so far as the same had been made at the time he executed it.

Such equality in sharing the property of the testator by his children and grandchildren is confined to the general residue of his estate—it does not, in the absence of direction to the contrary, extend to and embrace specific legacies. A specific legacy implies that the particular thing—property—bequeathed shall go to the legatee just as given, including the amount of measure thereof. *Starbuck v. Starbuck,* 93 N. C., 183. Hence, as to the special legacies, the testator did not intend that the co-legatees should account to and with each other for the advancements—he intended that these legatees should take the property so bequeathed just as he gave it—the law so implies in the absence of contrary intent expressed. And no such contrary intent is expressed. Indeed, in disposing of his general property—in that immediate connection—he directs that advancements be accounted for, thus showing his purpose to confine this direction to the residue of his estate. Hence, the objection that the legatees sharing in the specific legacy of the bank stock, who had received advancements larger than others sharing in it, were not required to account for such advancements is unfounded. No objection was made that the grandchildren were allowed to share in the legacy, and the exception raised no question in that respect.

The testator devises and bequeaths to his wife certain property specified, and, in addition thereto, "also a *child's share, equal with any one of my* (his) *children,* of all the property that is not disposed of otherwise in this will, to be hers absolutely and at her own disposal." He makes no express disposition of his property, real or personal, other than that specifically disposed of to his children, but he (491) declares that "I mean the above-named heirs (certain grandchildren) are to have an equal share of my estate with the balance of my children (meaning his surviving children), the share that the mother or father, if living, would be entitled to." He thus impliedly disposes of the residuum of his property to his children and grandchildren, and expressly specifies advancements that certain of them, particularly named, must account for. This is substantially in harmony with the statute of distribution of estates, and it seems that he so thought and intended that it should be. His language as to his wife clearly implies his purpose that she shall have "a child's share" of the residuum of his property—to put her on an equal footing with his children as to that, and he further points out and provides that a child's share shall be ascertained by requiring his children to account for specified advancements made at the time he executed his will, and that might be thereafter made before his death. If the children were not required to account for advancements, as specified in ascertaining a child's part to and with the widow, then she would not get "a child's share, equal with any one of my children, of all the property that is not disposed of by this will"—and she would not be on an equal footing with the children as to the distribution of that property. In ascertaining the intention of the testator, it is to be observed that all the provisions as to equality in sharing the property have reference to the residuum, and, in that connection, embrace the wife. It seems that the testator had in view the statute (Code, sec. 1483), which requires that children shall account to and with the "widow of the intestate in ascertaining the child's part of the estate." We are, therefore, of opinion that the court properly required the children to account to and with the widow for advancements, as specified in the will, in ascertaining her share of the residuum.

Affirmed.

(492)

W. S. BRYAN v. JOHN B. HODGES ET AL.

Entries and Grants—Warrants for Surveys—Rights of Purchasers—Notice—Parol Evidence—Evidence—Judge's Charge.

1. In an action to declare the defendants trustees for plaintiff's benefit, as to certain lands, the "entry" to which he had purchased from one of the defendants, he introduced in evidence a memorandum made at the time of paying part of the purchase-money, signed by this defendant and showing a balance of forty dollars due "on a certain land-warrant trade, 28 November, 1888": *Held, parol* evidence of what "trade" this paper referred to, and its terms, was admissible.

2. Entry upon lands, and obtaining a warrant for survey, confers upon the person entering no estate or interest therein, but simply the right to be preferred when the money is paid.

3. Such "inchoate equity," or "preëmption right," may be assigned by parol.

4. Purchasers of such an interest for value are affected with notice of all the facts respecting the rights of the vendor who made the entry within their knowledge, or which inquiry, after notice, would have disclosed.

5. Where the defendants, purchasers, were expressly informed by their vendor that the plaintiff was to get the grant out of the office of the entry-taker, and knew that plaintiff had the warrant in his possession, and that, in order to obtain it, he must be paid for it: *Held*, that there was no error in the charge of the court that, if the jury believed these facts, such defendants were charged with notice of everything affecting the plaintiff's claim which they might have discovered by inquiry.

APPEAL at Spring Term, 1890, of WILKES, from *Merrimon, J.*

The plaintiff alleged, in substance, that the defendant Pipes, having made an entry for the land in controversy, and having a right to take out a grant for the same, assigned it for value to the plaintiff, the plaintiff paying a part of the price agreed; that, after the land was surveyed, and duly certified, the papers were handed over to plaintiff to enable (493) him to obtain a grant from the State; that the plaintiff forwarded the same, with the necessary money, to the Secretary of State; that, on 15 December, 1888, the grant was issued, but in the name of said Pipes; that, after the transaction with Pipes, said Pipes conspired with J. B. Hodges and the other defendants to defeat the plaintiff's rights, and, in pursuance of said conspiracy, Pipes executed a conveyance to the said defendants; that these defendants had notice of the transaction between Pipes and the plaintiff. It is also alleged that plaintiff has tendered the said Pipes the balance of the purchase-money for said assignment, which he has refused to accept.

The prayer is, that the defendants be declared trustees for plaintiffs, and that they convey to him, and for other relief.

The answers deny the material averments of the complaint, and the defendant J. B. Hodges and others allege that they are purchasers for value and without notice.

R. B. Glenn for plaintiff. (497)
T. F. Davidson for defendants.

SHEPHERD, J. 1. We are unable to perceive any error in the admission of the oral testimony of the plaintiff as to the transaction between him and the defendant Pipes. The latter had made an entry of the land and obtained a warrant to survey the same. This conferred upon him "no estate or interest in the land, . . . but simply the right to be preferred when the money was paid and the other formalities required by the statute complied with." *Hall v. Hollifield,* 76 N. C., 476.

"The entry," says *Justice Avery,* in *Gilchrist v. Middleton, post,* 663, "creates an inchoate equity, which, upon the payment of the purchase-money to the State within the time limited by the law, will entitle the enterer to a grant." This "inchoate equity," or "preëmption right," may be assigned by parol, and in *Hall v. Hollifield, supra,* such a transfer is assimilated to the assignment by a purchaser of his bid at an execution sale. This being established, it must follow that the testimony was properly admitted unless the parties undertook to put their contract in writing. They did not do this, as the receipt is simply evidence of a part payment by the plaintiff pursuant to the oral agreement, and is not contractural in any respect.

2. The jury having found that the plaintiff purchased the (498) "entry" of the said Pipes and paid the purchase-money to the State, it becomes important to inquire whether the other defendants, who afterwards purchased of Pipes, are affected with notice of plaintiff's claim. There was evidence which tended to show actual notice, but the exception is to the charge of the court that if the jury believed the testimony of the two Hodges "they had notice of facts and circumstances to put (them) the defendants on inquiry as to the plaintiff's claim, and to affect them with notice of everything which they might have discovered by such inquiry." The principle of constructive notice, as stated in the instruction, is fully sustained by the authorities *(Bunting v. Ricks,* 22 N. C., 130; *Hulbert v. Douglas,* 94 N. C., 122), and it is only necessary to determine whether it was properly applied to the facts of this case. "A purchaser is not affected by vague rumors, hearsay statements and the like concerning prior and conflicting claims upon the same prop-

erty. . . . On the other hand, the proposition is established by an absolute unanimity of authority, and is equally true, both in its application to constructive notice and to actual notice, not proved by direct evidence, but inferred from circumstances, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put an ordinarily prudent man upon inquiry, then it may be a legitimate, and, perhaps, even necessary inference that he acquired the further information which constitutes actual notice." 2 Pom. Eq. Jur., sec. 597. If he does not, in fact, make inquiry, he is "affected with knowledge of all that the inquiry would have disclosed." *Ruffin, C. J.,* in *Bunting v. Ricks, supra.* Tested by the foregoing principles, we are clearly of the opinion that the evidence of the said defendants warranted the instructions as given by his Honor.

(499) These defendants were about to purchase the interest of Pipes in his alleged entry, and they were expressly informed by Pipes that plaintiff *"was to get it* (the grant) *out of the office."* They were also aware that the plaintiff and Pipes had been engaged in some transaction by which the latter had received money or goods from the former, and that the plaintiff had the "warrant" in his possession, and that, in order to obtain the same, it was necessary that the plaintiff should be paid. This is manifest from the statement of the defendants that, at the time of the execution of the bond for title and the first payment, Pipes told them that "he would take the money we paid and go and pay Bryan and bring the papers." Notwithstanding all this information, strongly tending to show that the plaintiff had an interest in the entry, the said defendants blindly purchased the alleged rights of Pipes without making any inquiry whatever. The bare statement of these circumstances must inevitably lead to the conclusion that the defendants were put upon inquiry. The fact that Pipes accompanied the information thus given with explanations tending to show that the plaintiff had no interest in the entry, did not in any way relieve the defendants from the duty of making due inquiry of the plaintiff, or otherwise investigating the nature of his claim.

This, it seems, would be otherwise where the information is obtained from third persons having no interest in the transaction, but where the information is obtained from the vendor, "the purchaser, according to the weight of authority, is not warranted in accepting and relying upon this explanation or contradiction. . . . The reason is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts." 2 Pom. Eq. Jur., sec. 601; *LeNeve v. LeNeve,* White & Tudor, L. C. Eq., 159, note.

No error.

Cited: Holden v. Purefoy, 108 N. C., 172; *Ross v. Hendrix,* 110 N. C., 405; *Loan Asso. v. Merritt,* 112 N. C., 246; *Kimsey v. Munday, ib.,* 827; *Hill v. R. R.,* 143 N. C., 566; *Bowser v. Westcott,* 145 N. C., 70; *Wilson v. Taylor,* 154 N. C., 218; *Wynn v. Grant,* 166 N. C., 45.

(500)

S. W. TRAVERS v. THOMAS DEATON.

Arrest and Bail—Motion to Vacate Order—Affidavits—The Code—Agency—Fiduciary Capacity—Findings of Fact by the Court.

1. In arrest and bail proceedings, a motion was made by the defendant to vacate the order of arrest. The court found that the facts were sufficient to sustain the order: *Held,* that the findings of fact by the court below are final, and will not be reviewed by this Court unless it be objected properly that there was no evidence to support them.

2. The Code, section 291, par. 2, referring to parties liable to arrest, is intended to embrace all cases where the relation of trust and confidence in respect of money received or personal property in possession by one party for the benefit of another is raised by contract.

3. Where the defendant agreed to receive and sell for plaintiff, for cash, and on time, certain guano described, himself becoming liable and indebted for its value at an agreed price, accounting and turning over to plaintiff the guano unsold and the proceeds of all sales: *Held,* (1) this constituted a fiduciary relationship embraced by The Code, sec. 291, par. 2; (2) if the defendant has converted such funds to his own use, he is liable to arrest.

MOTION to vacate an order for arrest of the defendant in arrest and bail proceedings, heard by *McCorkle, J.,* at Dobson, in SURRY, at chambers, during the August Term, 1890, of SURRY.

W. C. Douglass for plaintiffs. (503)
R. B. Glenn for defendant (appellant).

MERRIMON, C. J. This is an action at law, and hence we have no authority to review the findings of fact by the court below. Such findings are final, and must be accepted here as warranted by competent evidence, unless it should be objected in a proper way that there was no evidence to support the findings, or one or more of them. We can only review questions and matters of law in such cases arising upon the facts as found. *Burke v. Turner,* 85 N. C., 500; *Hale v. Richardson,* 89 N. C., 62; *Young v. Rollins,* 90 N. C., 125; *Coates v. Wilkes,* 92 N. C., 376, and there are many other like cases. If the appellant in-

tended to insist that there was no evidence of fraud, he should have excepted on that ground, and sent up the evidence, so that we might determine its character.

The statute (Code, sec. 291, par. 2) provides, among other things, that a defendant may be arrested "in an action . . . for money received, or for property embezzled or fraudulently misapplied . . . by any factor, agent, broker or other person in a fiduciary capacity," etc. This provision is plain and very comprehensive in its terms and purpose. It intends, certainly to embrace all cases where the relation of trust and confidence in respect to money received by, or personal property in the possession of, one party for the benefit of another, is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on
(504) the part of the defendant sustaining a fiduciary relation to the plaintiff.

Now, the defendant expressly agreed, for a sufficient consideration, that he would hold any of the unsold fertilizers mentioned, and all the proceeds of such as he should sell, in trust for the benefit of the plaintiffs in the payment of his debt to them, and further, to deliver to the plaintiffs the notes he might take from planters and others for such fertilizers sold to them by him, and to apply all proceeds of such notes as collected to the payment of his debt to the plaintiffs, whether the same had matured or not, to the extent such proceeds might be necessary for the purpose specified. The defendant, in his contract with the plaintiffs in respect to the fertilizers he bought from them, assumed, in a sense, an agency of them in respect thereto—he agreed that he would owe them for the same, and apply the proceeds of the sale thereof to the payment of his debt to them; that he would hold the notes and money he received on such account in trust for them for the purpose specified. As soon as he sold the fertilizers and received notes or money for the same he was at once charged with a trust as to the same in favor of the plaintiffs. The contract embraced, and the consideration thereof supported and made binding, all the material stipulations contained therein. So that, accepting the facts as found in connection with the agreement in writing, it is clear that the defendant might be arrested in this action for the alleged breach of his fiduciary relation to the plaintiffs. *Chemical Co. v. Johnson,* 98 N. C., 123; *Powers v. Davenport,* 101 N. C., 286; *Guano Co. v. Malloy,* 104 N. C., 674.

Affirmed.

Cited: Parker v. McPhail, 112 N. C., 505; *Boykin v. Maddrey,* 114 N. C., 98; *Fertilizer Co. v. Grubbs, ib.,* 472; *Hinsdale v. Underwood,*

116 N. C., 594; *Fertilizer Co. v. Little,* 118 N. C., 817; *Grocery Co. v. Davis,* 132 N. C., 98; *Stokes v. Cogdell,* 153 N. C., 182; *State's Prison v. Hoffman,* 159 N. C., 568; *Lumber Co. v. Buhmann,* 160 N. C., 387; *Gilmore v. Smathers,* 167 N. C., 443; *Drewry v. Bank,* 173 N. C., 666.

(505)

JOSEPH MAPHIS v. T. H. PEGRAM ET AL.

Probate of Deed—Registration.

The case of *Buggy Co. v. Pegram,* 102 N. C., 540, is decisive of this case, and this Court will not consider the questions involved therein a second time.

ACTION heard at October Term, 1890, of FORSYTH, by *McCorkle, J.,* upon the complaint and answer.

The material facts in this case are the same as in *Buggy Co. v. Pegram,* 102 N. C., 540, and the same questions are involved.

J. L. Patterson for plaintiff.
No counsel contra.

MERRIMON, C. J. This case brings in question a second time the validity of the probate of the deed held to be sufficient in *Buggy Co. v. Pegram,* 102 N. C., 540. That case is authority directly in point, and must govern the present one. Notwithstanding the earnest and elaborate argument of the appellant's counsel, we approve it as correctly decided, and do not feel called upon to add a word to what is there said.

Affirmed.

(506)

KESIAH RANDOLPH v. WILLIAM RANDOLPH ET AL.

Pleading—Demurrer—Legal and Equitable Defenses—Facts Sufficient to Constitute a Cause of Action.

1. Where a pleading sets out that property was conveyed to one R., at his instance, for the purpose of defrauding his wife, and that the consideration of the conveyance was her land: *Held,* sufficient facts were set out to constitute a cause of action.

2. Under the former practice in equity, advantage could be taken of lapse of time without plea, where it appeared upon the face of the pleadings that the cause of action was barred; but now there must be a plea in all cases, whether of an equitable or legal nature.

ACTION heard at Spring Term, 1889, of YANCEY, before *Armfield, J.*, on answer and demurrer.

The facts are set out in the opinion.

W. H. Malone for plaintiff.
J. F. Morphew for defendants.

SHEPHERD, J. The judgment recites that a demurrer was filed, but no such pleading to the amended answer appears in the record. Taking it, however, as a demurrer *ore tenus,* that the answer does not state facts sufficient to constitute a defense, or counterclaim, we are of the opinion that there was no error in the ruling of the court. The answer, while very inartificially drawn, states sufficient facts to establish a resulting trust in favor of the former wife, the mother of these defendants. Malone Real Property Trials, 505; Pom. Eq. Jur., 1031. It is alleged that the property was conveyed to Samuel Randolph at his instance, for the purpose of defrauding his wife, and that the consideration of the conveyance was her land.

(507) *Giles v. Hunter,* 103 N. C., 194, and the authorities there cited, have no application here, as in those cases the consideration was the money of the wife, which, under the former law, vested in the husband *jure mariti.*

It is true, as argued by counsel, that in equitable actions under the former system, advantage could be taken of the lapse of time without plea, where, upon the face of the pleadings, it appeared that the cause of action was barred. Under the present practice there must be a plea in all cases, whether of an equitable or legal nature. *Guthrie v. Bacon, ante,* 337.

We forbear any further discussion of the case, as the points are not very clearly presented, and we might prejudge other questions which may arise upon the replication or the trial of the action. Suffice it to say that upon the face of the answer we think that the demurrer was properly overruled.

Affirmed.

Cited: Albertson v. Terry, 109 N. C., 10; *Ins. Co. v. Edwards,* 124 N. C., 117; *Oldham v. Rieger,* 145 N. C., 258.

BOYDEN COX v. RILEY WARD.

Partition—Tenants in Common—Possession—Color of Title—Evidence —Charge—Parol—Lapsed Devise.

1. When a deed is offered in evidence, the court can ordinarily entertain no objection to its introduction, except upon the ground that it has not been properly registered. It is usual to pass upon its relevancy and effect when all the testimony is before the court.

2. Parol proof of purchase of land, and of parol agreement to allot a share thereof, are not admissible to establish title to land when the same is disputed and objection to such evidence is made.

3. Possession essential to establish color of title must be open, notorious, adverse and continuous for seven years.

4. Adverse possession, discussed by *Avery, J.*

5. When both parties claim under the same owner, it is not necessary to show title out of the State.

6. A devise to a child who died before the testator does not lapse, but, by force of our statute, goes to the issue of such deceased child.

7. Where the plaintiff declared for one undivided half, he can recover no more.

8. In a proceeding for partition, the commissioner should allot to any tenant the part he has improved, without taking the improvements into account.

APPEAL at Fall Term, 1890, of ALLEGHANY, from *McCorkle, J.* (508)

This action was for partition of lands, alleged by plaintiff to be held by him and defendant as tenants in constructive possession, each entitled to one individual half interest. The defendant denied plaintiff's title, and claimed sole seizin in himself and title under seven years' possession, with color of title, alleging that defendant claimed under one Alex. Osborne, who had long since sold to defendant.

The jury found that the plaintiff and defendant were tenants in common, each entitled to one-half the land in controversy.

Both parties claimed title under Moses Dixon, who devised to his four daughters, through one of whom (Drucy) Alex. Osborne inherited.

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

R. A. Doughton for plaintiff.
A. E. Holton and Q. F. Neal for defendant.

AVERY, J. The plaintiff claimed title to one undivided half of the land in controversy, while the defendant denied that plaintiff owned

(509) any interest, and set up sole seizin in himself. Both parties claim title through Moses Dixon, who died in 1857, having devised the land to Wesley Dixon and Preston Phipps, "to be sold and equally divided" between his daughters, "Lydia, Drucy's heirs, Jane, Nancy and Polly Adeline." It was admitted, on the argument, that, in consequence of certain agreements among the devisees, the land was not sold by the executors, and was to be treated, for the purposes of this action, as land, not money.

Adeline died before the testator, without issue. Drucy's heirs were Felix Center and Andrew Center, who conveyed their interest in the land in dispute to P. C. Phipps during 1870, their deed being registered 30 August, 1870. Lydia married Felix Osborne, and she and her husband both died before 1861, leaving as their only issue and heir at law, Alexander Osborne.

The plaintiff offered a deed from Alexander Osborne, conveying the land in controversy to himself, which was dated 8 March, 1888, and registered 9 March, 1888. The defendant objected to its introduction on the ground that it was irrelevant, unless the plaintiff could connect the title through other sources than the will of Moses Dixon, and, when the court overruled his objection, excepted.

When a deed is offered in evidence the court can, ordinarily, entertain no objection to its introduction, except upon the ground that it has not been properly proven and registered. Its relevancy and effect cannot, usually, be passed upon by the court till all the testimony has been heard, and then a party can raise the question of relevancy by prayers for instruction. *Vickers v. Leigh,* 104 N. C., 260.

The plaintiff offered also another deed for the land in dispute from Preston Phipps and wife Jane (one of the devisees of Moses Dixon), and P. C. Preston (the bargainee of Felix and Andrew Center) (510) and wife conveying the land to him (plaintiff), the conveyance being dated February, 1889, and registered 4 July, 1889. So that the plaintiff has submitted testimony tending to show that the undivided interests of three out of four of the devisees of Moses Dixon, viz., Lydia, Jane, and Drucy's heirs (Adeline having died without issue before her father's death) had passed to him.

The defendant introduced, as evidence of title, the following paper-writing:

ALLEGHANY COUNTY—State of North Carolina. 2 May, 1872.

An article of agreement between P. C. Phipps, of the first part, and Riley Ward, of the second part, in which the said P. C. Phipps makes a quit-claim deed to the part of the John Dixon tract of land lying north of the wagon road and a marked line, which was the division made by

Riley Ward and Preston and Columbus Phipps. In testimony I witness my hand and seal. (Signed by H. L. Phipps and P. C. Phipps.)

The paper had been registered on 2 September, 1890, while the court was in session. The defendant first proposed to testify that he purchased the land by parol from Alexander Osborne, and then proposed to offer proof of a division of the land, and an allotment to Alexander Osborne of his share of the same, by parol agreement. The plaintiff interposed objection to each of these propositions, which were sustained, and the defendant excepted.

Defendant then proposed to show, by his own testimony, that the purpose of the parol division was to allot to him the interest of Alex. Osborne in the Moses Dixon land. Objection by plaintiff. Objection sustained, and defendant excepted.

The testimony offered by the defendant, and which gave rise (511) to the three exceptions, was too palpably incompetent as evidence of title to require discussion. Counsel, on the argument, insisted that Alexander Osborne was not a party to the action, and that the objection to parol proof could only come from him. It is not necessary that he should be a party. His interest passed to the plaintiff, who, being in privity with him, can insist on any objection or defense that he could make. But our ruling rests upon broader grounds, being founded upon the familiar principle that no one can establish title to land in any action by oral evidence, if his title is in issue and objection is made to its competency. *Holler v. Richards,* 102 N. C., 545.

The evidence upon which defendant relied to prove title in himself by possession under color was the following:

Defendant testified that he had had possession of the land about eighteen years; that his possession consisted of having a field fenced about two years; that he had occasionally cut timber on the land; that he had had a blockade still-house in the woods or swamp, and near the line of another tract—Marion Dixon's land. There was no evidence as to how long he had the still-house on the land. He further testified that he had paid Alex. Osborne $100 for his interest in the land, and took a receipt for the money; that the receipt was lost during the last court; that the names of Osborne and wife were torn off the receipt; that the receipt had been in the possession of the defendant all the time until during this court, when it was lost. It was in evidence that the receipt read as follows: "Received of Riley Ward $100 for the Moses Dixon land." The month and day were torn off, but the figures 1869 were under the receipt.

A. F. Phipps, a witness for the plaintiff, says that he had been well acquainted with the land for more than thirty years; that the defendant

(512) had a field fenced on the land for one or two years; that the defendant had cut and hauled off some logs since this action began; that he saw a blockade distillery on the land at one time; that there was another possession on the land.

R. K. Finey, a witness for the plaintiff, testified that he lived on an adjoining farm and within three hundred yards of the land in dispute; that there was a blockade still-house in the swamp on this land, within six or eight feet of Marion Dixon's land, and that Marion Dixon stilled there, but that he never knew of any one else doing so; that the still-house was made by a hole dug in the bank on the edge of the swamp, with a roof over the hole; he had known the place for the last six years; that defendant had no possession on the land during that time, but that he had cut some timber on the land within the last year. There was no evidence that the plaintiff, at the time of his purchase, had any knowledge of the title or claim of defendant.

If it were conceded that there was an ouster, and that the paper-writing introduced by the defendant was sufficient as color of title, it would not be necessary (as both parties admit that Moses Dixon was the owner of the land) to show title to it out of the State, but it would be essential to prove open, notorious, adverse and unequivocal possession under such color continuously for seven years before the action was brought. *Ruffin v. Overby,* 105 N. C., 83; *Mobley v. Griffin,* 104 N. C., 112. "The testimony must, if believed, show the continuity of the possession for the full statutory period in plain terms or by necessary implication. Nothing must be left to conjecture. Occasional acts of ownership, however clearly they may indicate a purpose to claim title, and exercise dominion over the land, do not constitute a possession that will mature title." *Ruffin v. Overby, supra; Williams v. Wallace,* 78 N. C., 354; *Bartlett v. Simmons,* 49 N. C., 395; *Loftin v. Cobb,* 46 N. C., 406; *McLean v. Smith,* 106 N. C., 172. Cutting timber at intervals, as the defendant did, was not an assertion of title that continually exposed him to

(513) an action during the statutory period, and his constant liability to be sued for possession is essential evidence of his right to claim the benefit of the statute. Cultivating a field on the land for two years of the eighteen would not be sufficient. If there had been proof that the "blockade still-house," which was made by digging a hole in the ground in the edge of a swamp, within six or eight feet of Marion Dixon's line, and covering the excavation with boards, was used for seven successive years by the defendant, it would have remained for the Court to determine whether such possession was open and notorious. But there is no evidence that the house was ever occupied by any one except Marion Dixon, nor does it appear how long he operated the distillery, or whether he was holding under the defendant as his lessee or adversely to his

title. If, therefore, the first paper offered, or even the receipt, had been available as color of title, and the ouster had been admitted, there was not sufficient evidence of the possession to go to the jury. The statement of the defendant that he had possession for eighteen years was but the expression by him of an erroneous opinion of what constituted possession in contemplation of law, as appears from his subsequent account of the specific acts tending to sustain his claim of continuous adverse occupancy.

His Honor properly instructed the jury that the devise to a child who died before the testator did not lapse, but, by force of the statute, went to the issue of such deceased child.

It is not necessary to take up and discuss the charge of the court in detail. We see no reason for sustaining the defendant as to any error complained of.

The plaintiff claimed only one undivided half of the land, and could be declared the owner of no more. The defendant is not entitled to hold a particular part of the common property till the plaintiff compensates him for any improvement made on the land. This is a proceeding for partition, and if one of the tenants in common should make it appear to the court that he has made valuable improvements on (514) any part of the land, the commissioners appointed to make the partition may be directed to assign to him the portion of the land so improved, and to assess its value as if no such improvements had been made. *Collett v. Henderson,* 80 N. C., 337; *Pope v. Whitehead,* 68 N. C., 191.

We must not be understood as holding that there was evidence sufficient to show an actual ouster of his cotenant by the defendant. It is not necessary to pass upon that question, since, admitting for the sake of argument that there was an ouster and that the defendant exhibited color of title, he has failed to prove *prima facie* continuous adverse possession for seven years.

No error.

Cited: Vann v. Newsom, 110 N. C., 125; *Loughran v. Giles, ib.,* 425; *Hodges v. Wilkinson,* 111 N. C., 62; *Shaffer v. Gaynor,* 117 N. C., 21; *Everett v. Newton,* 118 N. C., 921; *Pipkin v. Pipkin,* 120 N. C., 162; *Drake v. Howell,* 133 N. C., 165; *Vanderbilt v. Johnson,* 141 N. C., 373; *Sipe v. Herman,* 161 N. C., 110; *Campbell v. Miller,* 165 N. C., 53; *Shermer v. Dobbins,* 176 N. C., 549.

GEORGE W. RAY ET AL. v. W. R. WILCOXON.

Bond for Title—Specific Performance—Failure of Title—Consideration—Reconveyance—Redelivery of Deed—Married Woman—Joinder of Husband—Privy Examination—Unrecorded Deed—Construction.

1. In an action to enforce a contract to convey land, specific performance will not be decreed where there is failure of title as to a part of the land. The contract must be so modified as that there may be an equitable adjustment between the parties.

2. Where a father conveyed to his daughter a tract of land by deed, and she promised, before marriage and without consideration, to reconvey and redeliver the deed thereto: *Held*, such promise cannot be enforced.

3. Where, after marriage, in pursuance of such promise, she executed a deed reconveying to her father, and also surrendered to him his deed, and this was also without consideration, and there was no joinder of the husband, nor privy examination of the wife: *Held*, no title was conveyed.

4. An unrecorded deed confers such an estate as may be conveyed or sold under execution.

5. One D. made a bond to convey W. a tract of land upon his paying a sum of money at a time in the future agreed upon, with interest at six per cent per annum. W. further agreed to maintain and clothe D. for his natural life, and to feed and take care of a horse for him. The contract contained this further stipulation: "Now, upon complying with the above contract on the part of W., said D. shall cause to be made a good deed to W. and his heirs and assigns to the above-described premises, and to pay W. $138 per year, it being the total amount agreed to, in lieu of the maintenance of said D.": *Held*, the proper construction of this instrument is, that W. was to have the land charged with the $138 per annum (the annual interest on the purchase-money), and that he be credited with this sum as the measure of the value of his services.

(515) APPEAL from *Bynum, J.*, at May Term, 1890, of ASHE.

The action is brought by certain heirs at law of one John Dickson, and they allege that the defendant Wilcoxon (who married Elizabeth, a daughter of said John, and who, with an infant sister, is a defendant), having moved with his wife to the house of the said John (who lived alone), procured from him, by fraud and undue influence, a contract for the sale of certain land. In the course of the trial they abandoned the charge of fraud and relied upon their allegation that there was a large balance due upon said contract, and asked judgment for the same.

The defendant Wilcoxon denied the fraud, and alleged that he had paid all the purchase-money.

The said contract is as follows:

Know all men by these presents, That I, John Dickson, of the county of Ashe and State of North Carolina, am held and firmly bound unto W. K. Wilcoxon and his heirs in the sum of $4,000, for the payment of which I bind myself, my heirs, executor and adminis- (516) trator. Signed and sealed this 11 February, 1882.

The conditions of the above obligation are such that, whereas the above bounden John Dickson hath this day bargained and sold, and contracted to sell and convey, unto W. K. Wilcoxon and his heirs and assigns all that tract or parcel of land whereon he now lives, in the county of Ashe and State aforesaid, on Buffalo Creek, adjoining the lands of Jacob Graybeal, Mrs. A. C. Davis, James Warren, William Elliott and others, for the sum of $2,000; $1,000 to be paid on or before 1 April, 1882, and the said Wilcoxon is to execute his promissory note for $1,300, bearing interest at 6 per cent from 1 April, 1882. And the said W. K. Wilcoxon agrees to maintain and clothe the said John Dickson in a comfortable manner during his natural life, and also is to feed and take care of one horse for the said Dickson.

Now, upon complying with the above contract on the part of the said W. K. Wilcoxon, the said John Dickson shall make, or cause to be made, a good deed in fee to said Wilcoxon, his heirs and assigns, to the above described premises, and pay to the said W. K. Wilcoxon the sum of $138 per year, it being the sum agreed to, the interest at 6 per cent on the total amount of the purchase-money per annum for the said lands, in lieu of the maintenance of the said John Dickson, then the above obligation is to be void; otherwise, to remain in full force and virtue.

A. C. MCEWEN. JOHN DICKSON.

M. J. GENTRY.

The above interlineations were made after signing, by consent of parties.

Attest: W. H. GENTRY.

The defendant then introduced and proved the execution of this paper:

In regard to the contract heretofore made between me and (517) W. K. Wilcoxon, it is, and was, a part of the same, that I was to pay all doctor bills for medical attention that I might need while I live, and if I fail to keep my health and strength as I have at the time the

trade was made, and I become so that I require more waiting on in my old age, then Wilcoxon was, and is, to be paid well for the same in a final settlement of my affairs, and to retain a proper sum out of what he may owe me for the land at that time.

JOHN (his X mark) DICKSON.

Witness: J. W. TODD.
30 March, 1885.

Defendant contended that the proper construction of the contract between Dickson and Wilcoxon was, that the said John Dickson was to pay the defendant W. K. Wilcoxon the sum of $138 per annum for his maintenance and keeping his horse, and the said sum was to be deducted annually from the $1,300 from the date of the contract until the death of John Dickson, and that, in addition to this, the said note of $1,300 was to draw no interest.

The court held, and told the defendant's counsel at this stage of the trial that he would so instruct the jury, that the proper meaning of the said instrument was that Wilcoxon was to have the use of the land and was to pay no interest on the $1,300 for the maintenance of John Dickson and his horse, and defendants excepted.

(522) *Q. F. Neal for plaintiffs.*
J. F. Morphew and W. H. Bower for defendant.

SHEPHERD, J. 1. As the plaintiffs have abandoned their allegation that the contract of sale was obtained by fraud, and as they are now seeking to enforce the same by collecting the balance of the purchase-money, it is necessary to inquire whether they, as the heirs at law of John Dickson, the vendor, can perform the said contract by executing a title to the lands mentioned therein to the defendant Wilcoxon, the vendee. This is important, for if, as is alleged, there is a failure of title as to a part of the land, the judgment of the court must be so modified that there may be an equitable adjustment between the parties.

The said Dickson, in July, 1878, conveyed a part of the land to his daughter, the defendant Elizabeth, who is the wife of the defendant Wilcoxon, and the question is, whether at the time of the execution of the contract of sale she had reconveyed or in any way surrendered her estate in the same to her father. The deed had not been registered, and on the morning of her marriage, in January, 1879, she promised her father to reconvey the land and to redeliver the said conveyance. Upon being further advised, she declined to perform her promise, and as there is no finding that it is based upon any consideration whatever (the Dog Creek tract not being connected with this transaction), it is entirely

clear that it cannot be enforced and that it did not in the least affect any interest which she had acquired. It appears, however, that after her marriage, in pursuance of the said promise, she executed a deed reconveying the land to her father, and also surrendered to him the deed which he had delivered to her. This was also without consideration, and there was no joinder of her husband in the conveyance, nor was she privily examined as to its execution. (523)

As the agreement made before the marriage was oral and voluntary, it could not have been enforced against the wife, and its subsequent performance can, for that reason, derive no support therefrom. Beyond all question, the reconveyance without privy examination or the joinder of the husband was void, and the point to be determined is, whether a married woman who is the grantee in an unrecorded deed can, by the sole and independent act of redelivery of the deed, practically convey the interests in land which she has acquired under the same.

If the unrecorded deed conferred upon her an *estate* in the land, either legal or equitable, it is plain that there is but one way by which she can convey it, and that is by deed and privy examination with the joinder of the husband. It is a well recognized principle that the law will not allow that to be done indirectly which it has forbidden to be done directly, and if a married woman can, by the simple redelivery of her unrecorded deeds, practically convey her equitable estate in realty, the very disability which the law has imposed will, to a great extent, be removed, and the safeguards which it has carefully thrown around her be broken down and abrogated.

It is contended, however, that an unrecorded deed confers no estate, and that it amounts to no more than a mere executory contract.

This, in our opinion, is a misconception of the law, for it is well established that such a deed is "a legal conveyance, and, although it cannot be proven in evidence until it be registered, and, therefore, it is not a present legal title, it has, as a deed, an operation from its delivery." *Ruffin, C. J.*, in *Walker v. Coltraine,* 41 N. C., 79. "It may," says the same high authority, "be set up in equity, whether voluntary or for value, and by it such an estate is conferred as may be sold under execution, and this even before the act of 1812." *Prince v. Sikes,* 8 N. C., 87. (524)

Its owner is a tenant of the freehold, and a recovery under a *precipe* against him would be good, and his widow may be endowed in the same. *Morris v. Ford,* 17 N. C., 412. Such a grantee is also deemed in equity to be seized of an equitable freehold. *Austin v. King,* 91 N. C., 286.

Elizabeth, then having an estate in the land, could not, after her marriage, do any act which would, in effect, divest such estate without privy examination and the joinder of her husband. Such was held to be the law by the Supreme Court of New Jersey in *Wilson v. Hill,* 2 Beasley, 143, and the decision, we think, is well supported by reason, as well as the general policy of the law as to the disabilities of *femes covert.* In that case, apart from the peculiar circumstances surrounding the transaction, the Court laid down the principle that the voluntary surrender of an unrecorded deed by a married woman, unaccompanied by deed and privy examination, was ineffectual to divest her estate. Such a surrender could have been made by Elizabeth while she was a *feme sole* (*Austin v. King, supra,* and the cases cited), but we are very sure that her capacity to do so ended when the disabilities of coverture attached. It would seem strange, indeed, if a *feme covert* could, by her independent act, divest herself of her real property when she is incapable of assigning her chattels without the written consent of her husband.

It is true that the defendant Elizabeth knew of the contract of sale, and made no objection, but it is well settled that such passive conduct cannot estop a married woman (*Weathersbee v. Farrar,* 97 N. C., 111), and especially is this so where it appears that she was entirely ignorant of her rights, and where there is nothing to show any fraudulent purpose on her part. We hold, therefore, that Elizabeth has never parted with the estate which she acquired under the deed of her father, and this instrument, being now registered, confers upon her the legal

(525) title to the land described therein.

2. As the case must be remanded for an adjustment of the equities growing out of the partial failure of title, and inasmuch as we are not informed whether the defendant desires to rescind the contract or have it enforced as to the other part of the land, we do not feel warranted in passing upon questions which may contingently arise hereafter. We think, however, that it is proper, in aid of the further proceedings, that we should construe the contract of sale, the terms of which are seriously disputed by the parties.

The true construction, we think, is this: It was at first agreed that Dickson should sell the land to Wilcoxon for $2,000; $1,000 to be paid 1 April, 1882, and the balance by note for $1,300, with interest at 6 per cent from 1 April, 1882, and Wilcoxon was to maintain Dickson in the manner prescribed. There is nothing ambiguous in this, but it was further agreed that Wilcoxon should pay Dickson $138 per annum, it being the interest at 6 per cent per annum on the total amount of the purchase-money for said land, in lieu of the maintenance, etc., and this, fairly construed, we think, means that Wilcoxon was to have the land for $2,300, charged with $138 (the annual interest thereon), and that

he was to be credited with $138 (equal to the interest) as the measure of the value of the services and charges of Wilcoxon in the maintenance, etc., of Dickson.

Had there been no failure of title, the account should have been so stated as to charge Wilcoxon with $2,300, and $138 annually (the interest thereon), and credit him with $138 annually (the stipulated value of Dickson's maintenance), and with any sums that may have been paid on the purchase-money, with interest thereon to the death of Dickson, and the amount due Dickson's estate would have been the balance found to be due at Dickson's death, with interest at 6 per cent from the date of that event.

It is hardly necessary to cite authority in support of the ruling of his Honor rejecting the oral testimony varying the terms of the said contract. (526)

The judgment is set aside and the case remanded, to the end that further proceedings may be had looking to an equitable adjustment of the rights of the parties.

Modified and remanded.

Cited: Cowan v. Withrow, 111 N. C., 309; *Miller v. Church,* 112 N. C., 628; *Arrington v. Arrington,* 114 N. C., 171; *Dew v. Pyke,* 145 N. C., 305.

STATE EX REL. WILLIAM T. ROPER ET AL. v. J. W. BURTON, ADMR., ET AL.

Executors and Administrators—Findings of Fact by Referee—Next of Kin—Administrator d. b. n.—Bond—Sureties—Distributees—Partition—Evidence—Interest—Statute of Limitations.

1. The findings of fact by a referee, approved and affirmed by the judge in the court below, where there is any competent testimony to support them, cannot be reviewed by this Court.

2. In an action by the next of kin against the administrator *d. b. n.* of the decedent and his sureties for his failure to collect or account for the proceeds from sales of certain slaves made by a former administrator: *Held,* that the liability of the administrator *d. b. n.* depends on the liability of the former administrator as such.

3. Where it appeared, in an action against the administrator *d. b. n.* of a decedent, that the former administrator, under an order of court in an old action brought by the next of kin, sold and hired out "for the legatees" certain slaves which had been set apart to them in partition had between them and the widow of such decedent, and took notes payable to himself

"as administrator," and collected and invested the proceeds of some of them, and the cash for slaves sold at once "as administrator"; but it further also appeared of record that the administrator sold the slaves for division: *Held*, (1) that there was sufficient evidence to sustain the finding of the referee that the old action was for *division* among the next of kin, and was not for *distribution* by the administrator; (2) the administrator did not act in his administrative capacity in investing the cash and proceeds of sale; (3) he and his sureties are not liable for his neglect to collect or account for the proceeds of sale; (4) the administrator *d. b. n.* and his sureties are not liable for failure to collect such notes and investments which came into his hands from the former administrator; (5) the administrator *d. b. n.* and his sureties are liable for such amounts as he collected by virtue of his office, and this without regard to the liability of the former administrator; (6) and it appearing further that the administrator *d. b. n.* did not use the money he did collect as such, and that he could not distribute it because the next of kin could not be ascertained, he was not chargeable with interest.

(527) ACTION pending in ROCKINGHAM, tried before *Gilmer, J.*, by consent of parties, at chambers, on 31 December, 1889, upon exceptions filed by both sides to the report of James T. Morehead, referee, etc.

L. M. Scott (Boyd & Johnston, by brief) for plaintiff.
(536) *R. B. Glenn for defendants.*

DAVIS, J. The principal question involved in the controversy before us is, was Jones W. Burton, administrator *d. b. n.* of Charles Roper, and the sureties on his administration bond, liable to the plaintiffs by reason of the failure or neglect of the said administrator *d. b. n.* to collect or account for the proceeds of the sales of the slaves made by Chalmers L. Glenn under the decree of the Court of Equity of Rockingham County, made at the Fall Term, 1859, of said court? And this will depend upon the further question, was Chalmers L. Glenn (and the sureties on his administration bond) liable, *as administrator,* for the (537) proceeds of the sales of said slaves?

It is insisted by the plaintiffs that the slaves were sold by Chalmers L. Glenn as administrator of Charles Roper, deceased, for settlement and distribution, and not for a "division" of the slaves among the next of kin, and that the referee erred in his ninth finding of fact, as set out in the second exception. If there was any competent evidence to support the finding of fact, it is too well settled to need citation of authority that the finding of the fact by the referee, approved and affirmed by the judge below, is conclusive and cannot be reviewed by this Court. Was there any evidence to support the finding and to show that Chalmers L. Glenn, not as administrator acting in the due course

of the administration of the assets of the estate, but as commissioner, appointed by and acting under the decree of court as such, to make the sales of the slaves for partition among the next of kin under the direction of the court?

The learned counsel who so ably argued the cause in behalf of the plaintiff says:

"Before partition could be asked for and made, the slaves must have passed from the possession and control of the administrator, Glenn, into the possession of the next of kin as tenants in common, and not as distributees. The assent of the administrator must be given to pass the property to the next of kin, and must appear by some visible sign or act. Here the next of kin were scattered and even unknown, and all who were known evidently regarded the slaves as in the possession and control of the administrator as such. There was no purpose to change such possession, except by sale, the proceeds of sale to be and remain in the hands of the administrator as such, under the security of his bond for the safe custody of the money. Glenn took notes for the purchase-money of the slaves in his own name as administrator, collected the money in part, and loaned some of it in his own name as admin- (538) istrator of Charles Roper. After the death of Glenn, the administrator *d. b. n.*, Jones W. Burton, received the notes and bonds as a part of the estate of the intestate, Roper, so considered and treated them, and returned them as such, and brought suit and took judgments on said notes and bonds as administrator of Roper, and collected some portions of it as the estate of his intestate."

It abundantly appears from the evidence that the slaves were not needed in the administration of the estate to make assets to pay debts, and it appears from the record that, at the November Term, 1857, of the County Court of Rockingham, the widow of Charles Roper being entitled to one-half of the slaves, commissioners theretofore appointed for that purpose allotted to the widow certain slaves (naming them), and certain other slaves (naming them) "to the legatees." And it furthere appears from the record that, for the years 1858 and 1859, the slaves allotted to the legatees were hired out by "C. L. Glenn, administrator for the legatees of Charles Roper."

It further appears that the next of kin were scattered in different States, and their names and residences could not all be ascertained, and certain of them, acting under the advice of learned and eminent counsel, filed a bill in equity for a sale of the slaves. *Judge Dillard* says in his evidence: "The negroes having been divided," a bill in equity was filed in the name of William M. Roper and others (next of kin of Charles Roper), "for the sale of negroes which had been set apart to the next of kin," etc.

The record shows that the application for the sale was not made by the administrator "for the purposes of paying debts, or distribution, or both, under chapter 46, section 17, Revised Code, but by some of the next kin of Charles Roper, for partition, as allowed in chapter 82,
(539) section 18, of the Revised Code, who alleged that, besides the plaintiffs named in the bill, Charles Roper, deceased, had two brothers and four sisters, who left the State of Virginia, "their former place of residence," twenty years or more since, and had not been heard from, either by the petitioners or by the said administrator, after "diligent inquiry," and are presumed to be dead. They further say that "slaves are now selling for a fair price, and, in view of the possibility of other next of kin of Charles Roper being discovered thereafter, they are advised, and the administrator, C. L. Glenn, concurs, that it would be best to sell the said slaves and distribute the proceeds, together with all the other personal estate, to them as such next of kin, under proper provisions for the benefit of others, should they be discovered," etc.

The administrator answered, and after admitting facts stated in the petition and asking the court "to see that he is amply protected before it shall decree" that the complainants are entitled to the whole of the estate, "upon the *presumption* that others of the next of kin are dead," he says that he concurs in the opinion "that it will be best to sell the slaves," etc.

There was a decree for sale, and a sale in pursuance thereto, as set out in the ninth finding. After the allotment and assignment of one-half of the slaves to the widow, and the other half "to the legatees," by an order of the court, it appears from the evidence that C. L. Glenn hired them out "for the legatees."

It will be observed that the slaves were not sold upon the application of the administrator, as provided in chapter 46, section 17, of the Revised Code. He had administered the estate, had paid its debts, and was ready to turn the slaves over to the persons entitled to them, and did deliver one-half of them to the widow and held the other half and hired them out "for the legatees," or distributees, until, upon *their* application, they were sold by him under a decree of the Court of
(540) Equity, and the record shows that he made the sale "for the legatees," acting under the authority of the court, and there was ample evidence to support the finding of fact, and, as was held in *Fanshaw v. Fanshaw,* 44 N. C., 166, "he and his sureties were certainly not liable upon his administration bond for his default," if there had been any, and it is but just to his memory to say that we think the record discloses the fact that the administrator, Glenn, acted with careful regard to the interest of the next of kin of his intestate, and the proceeds

of the sales of slaves made by him were as well secured as reasonable foresight could have secured them (certainly as well secured as the slaves would have been); and the losses, as shown by the evidence, occurred after he was killed, while in the Confederate army, on 17 September, 1862; and, upon the facts disclosed, it is by no means certain that, under the ruling of this Court in *Worthy v. Brower,* 93 N. C., 344, and *Grant v. Reese,* 94 N. C., 720, that there was any default for which, in any event, he or his sureties could have been held liable.

We think *Fanshaw v. Fanshaw, supra,* fully sustains the referee in his conclusions of law, and his Honor below in his rulings as to the non-liability of the administrator and his sureties on his administration bond. But it is said by counsel for appellant that, in *Fanshaw's case,* the Court held "that John Fanshaw, as administrator, had no rightful authority to sell the slaves until he had obtained an order of the county court for that purpose, and it is not pretended that he ever did obtain such an order." In our case he (Glenn) did obtain an order to himself, as administrator of Charles Roper, to sell the slaves. This is a double misapprehension. 1. Fanshaw did sell under the authority of an order of the court, as commissioner, and, although "he returned an account of the sales of the slaves as having been made by him as administrator," the Court held that he and his sureties were not concluded (541) by that return. 2. Glenn *did not obtain an order to himself, as administrator of Roper, to sell the slaves.* The record shows that the order to sell the slaves was made, not upon the application of Glenn as administrator, but upon the application of the next of kin; and, though he took the bonds of the purchasers to himself as administrator, he reported the sale as made by him "for the legatees," and did not report it as made by him as administrator, as was done in *Fanshaw's case,* and in that respect this case is stronger for the defendant.

But, without reference to the liability of Glenn and the sureties on his administration bond, it is insisted by the learned counsel for the plaintiffs that, as the notes were made payable to Chalmers Glenn as administrator, and after his death and the appointment of Burton as administrator *d. b. n.* in 1867, the latter received the notes into his hands as administrator *d. b. n.* as a part of the estate and assets of his intestate as rendered in his inventory, brought suit on some of the notes in his name as administrator *d. b. n.,* and, on going into bankruptcy, rendered a statement of them in his schedule of debts as due from Smith and himself to himself as administrator *d. b. n.,* and actually received dividends, as such administrator, from the assignee in bankruptcy, he is estopped and cannot be heard to deny his liability and the liability of the sureties on his bond therefor, and for this position he cites, among other authori-

ties, *Humble v. Mebane,* 89 N. C., 410, and *Burke v. Turner,* 90 N. C., 500. These cases only go to the extent of holding that where a guardian (and the same rule would be applicable to any other fiduciary) has received money by virtue of his office as guardian and in trust for his ward, he is chargeable with the money so received, and neither he (542) himself nor his sureties can be heard to say that he is not.

There is nothing in the ruling of his Honor below in conflict with this position. On the contrary, in accordance with it, the administrator *d. b. n.* and his sureties were held to be chargeable with the money actually received on account of the proceeds of the sales of the slaves, and this would have been so without reference to the liability of the original administrator; but when the liability for the slaves as assets in the hands of the administrator ceased, as it did—when they were surrendered as not needed to pay debts, and first divided between the widow and the next of kin, and afterwards sold for partition at the instance of the next of kin—they became, in a legal sense, *goods administered,* and the liability of the first administrator as such, and that of the sureties on his bond, ceased, and no responsibility or liabilities attached to Glenn other than as commissioner acting under and subject to the order of the court as to the collection and disposition of the proceeds of the sale of the slaves, as, and no more than, any other person appointed by the court to sell would have been, and any mistake as to his rights and duties on the part of the administrator could create no liability as against the sureties on his bond, except as to the sums *received* by virtue of his office. *Fanshaw v. Fanshaw, Humble v. Mebane,* and *Burke v. Turner, supra.*

This renders all the other exceptions of the plaintiffs immaterial, and relieves us of the necessity of considering them, except the eleventh, which relates to the failure of the referee and the court below to charge the administrator with interest on the sums named.

The referee finds as a fact, in substance, that the administrator *d. b. n.* did not use the money collected either from the assignee in bankruptcy or from the estate of Chalmers Glenn, the former administrator, and that he could not distribute the sum because all of the next of kin of Charles Roper, deceased, had not been ascertained. The evidence shows that the payment of the money to the next of kin was delayed (543) because of the fact that the names and residences of all the next of kin of Charles Roper could not be ascertained, and they were not ascertained till by the report in the present action, but the objection is not based upon the ground that there was no evidence to support the finding, or that the finding was upon incompetent evidence, and we can-

not review the finding of fact, except for those causes. Upon the facts found, the defendant was not chargeable with interest. *Grant v. Edwards,* 92 N. C., 442, and cases cited.

There was no error in the ruling of his Honor below of which the plaintiffs can complain, and the judgment must be

Affirmed.

W. L. SHERRILL ET AL. v. MARY D. CONNER.

Waste—Treble Damages—Dower—Reversioners—Discretion of the Court—The Code.

1. In an action brought by the reversioners for waste against the tenant in dower, the jury rendered a verdict for the plaintiffs: *Held,* that they were entitled to treble damages, under The Code, sec. 629, in the discretion of the court.

2. The Code, sec. 629, says the court *may* give judgment for treble damages and the place wasted, and this Court will not make such discretionary power obligatory.

APPEAL at September Term, 1890, of LINCOLN, from *Brown, J.*

The action was brought for waste by the plaintiffs, reversioners, against the defendant, tenant in dower.

John Devereux, Jr., for plaintiffs.
W. A. Hoke for defendant.

AVERY, J. The appeal of the plaintiffs raises but a single (544) question for our consideration.

It is provided by statute (The Code, sec. 629) that "in all cases of waste, when judgment shall be against the defendant, the court *may* give judgment for thrice the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted if the said damages shall not be paid on or before a day to be named in the judgment." This section is substantially the same as the law in force before the enactment of The Code (Revised Code, ch. 116, sec. 3; Revised Statutes, ch. 119, sec. 3), except two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries (545)

the action to determine whether he will give single or treble damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been meantime actually paid. The old statute was, manifestly, amended when The Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and to fixing the time for forfeiture of the place wasted, on failure to pay the amount recovered.

Counsel contended, on the argument, that this is a case in which the court should construe the word "may" in the statute as intended by the Legislature to mean "shall." It would, very obviously, be not only judicial legislation, but a repeal of a law passed by the General Assembly in 1883, were we, by the construction insisted on, to strike out the amendment, and restore the provision of the old statute of Gloucester as to the amount of damage for which judgment must be given. Even in England the courts have never gone so far in the liberal construction of statutes. *Parke, B.*, in *Jones v. Harrison,* 6 Exch., 332. Where the Legislature expresses its intent in unequivocal terms, the courts must give effect to it by interpretation, without regard to other rules of construction. *Bank v. Hole,* 59 N. Y., 53; *Chapin v. Crusen,* 31 Wis., 209; *S. v. Eaves,* 106 N. C., 752. It was not error in the judge below to exercise his discretion as to giving judgment for single or treble damages.

No error.

Cited: Hybart v. Jones, 130 N. C., 228.

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(546)

CATHERINE COSTEN v. JOHN L. McDOWELL.

Constructive Fraud—Undue Influence—Setting Aside a Deed—Vendor —Vendee—Findings of Referee—Exceptions—Transactions with Deceased Persons—The Code—Vouchers—Receipts—Evidence.

1. Where the court, pursuant to a verdict of the jury, set aside a deed for constructive fraud and undue influence in procuring its execution: *Held,* that the land was properly charged with the supplies and advancements made to the plaintiff's ancestor by the defendant, vendee, as a consideration for the conveyance.

2. A plaintiff cannot, with good grace, seek redress for fraud while she, or her ancestor under whom she claims, holds the price of such fraud.

3. A verdict that a deed was obtained by fraud and undue influence is not inconsistent with the idea that it is constructive fraud only.

4. The finding of the referee that certain payments had been made by the defendant to the plaintiff's ancestor, deceased, upon his own oral evidence, which was not objected to by plaintiff, will not now be disturbed by this Court.

5. The handwriting of the person who signed the vouchers need only be proved when relied on, under section 1401 of The Code, as presumptive evidence of disbursement.

6. Before the passage of this statute, the receipts of persons living were not strictly legal evidence to show a full administration. The statute makes them presumptive, not primary, evidence.

7. Evidence of the statement of a deceased witness, made during a trial, is not inhibited, under section 590 of The Code, as transactions with deceased persons.

8. It is true, as a general proposition, that land charged with debt is entitled to exoneration by the personal estate; but where the aid of this principle has not been invoked by the plaintiff, but, on the contrary, she has asked for the sale of the land for the discharge of the lien, the decree of the court ordering the sale will not be disturbed.

APPEAL at August Term, 1889, of CLEVELAND, from *Connor, J.* (547)
The facts are set out in the opinion.

M. H. Justice for plaintiff.
R. McBrayer and W. A. Hoke for defendant.

SHEPHERD, J. 1. The plaintiff, the sole heir at law of Nancy Baxter, alleges that the deed executed by the latter to the defendant was without consideration, and was procured by fraud and undue influence. It appears that the defendant was the general agent of the said Nancy (who was an infirm widow), and that in 1860 she conveyed her lands to him, reserving a life-estate in herself. It also appears that defendant continued to act as such agent (except when absent in the army during the late war) until the death of the said Nancy in 1884, and that, from time to time, he made advances in money and supplies, and for a considerable period supported her at his own home. The report of the referee, as corrected by his Honor, discovered a balance of $974.98 due the defendant on account of his said transactions during this long period, and the jury having found that the deed was procured by the fraud and undue influence of the defendant, the court set aside the same, but charged the land with the said amount, the true consideration for the said conveyance.

The plaintiff contends that there was error in charging the land with the above sum, and that the decree of cancellation should have been unconditional. Whether a Court of Equity will require a return of the consideration, as a necessary condition to the setting aside of a deed obtained by reason of actual fraud in the treaty, has been the subject of some diversity of opinion in a few of the States, but Mr. Bigelow, in his work on Fraud, after stating these differences, remarks with much force: "But it may be questioned if an injured man coming into
(548) a court to seek redress for fraud can be said to come with good grace while he holds in his hands the price of the fraud and refuses to return it. If he will honestly repudiate the fraud, he should do so *in toto.*" See, also, Kerr on Fraud and Mistake, 342. This view finds support in this State in *Stewart v. Hubbard,* 56 N. C., 186, where an assignment of an interest in land was obtained by false representation (actual fraud), and the Court, upon setting it aside, decreed a return of the consideration. No doubt seems to exist, however, in cases of constructive fraud (Bigelow, *supra*); and the principle of "indemnity and reimbursement" is clearly recognized and acted upon in *Futrill v. Futrill,* 58 N. C., 61 (a case strikingly similar to ours), where the conveyance was decreed to stand as a security for the amount actually due. To the same effect is *Franklin v. Ridenhour,* 58 N. C., 421. Now if we concede, for the sake of the argument, that the principle applies only in cases of constructive fraud, it is, nevertheless, very plain that the defendant in this action is entitled to its protection. The verdict that the deed was obtained by "fraud and undue influence" is not at all inconsistent with the idea that the fraud was constructive only, and upon a very careful perusal of the testimony we cannot but believe that it was upon this view of the case that the jury acted. In our opinion, they could not very safely have found actual fraud, and it will be noted that the charge of his Honor was almost entirely directed to the other theory. We are of opinion, therefore, that there was no error on the part of the court in holding that the land should be charged with the amount due the defendant, and it should be further observed that the decree, in this respect, is in entire conformity to the prayer of the plaintiff as set forth in her complaint.

2. We will now proceed to consider his Honor's rulings upon the exceptions of the plaintiff to the report of the referee. The
(549) report and accompanying testimony is not printed, and by this failure to comply with an important rule of the Court we are left, without the aid of counsel (for this part of the case was not argued), to grope through many pages of manuscript in search for the testimony and rulings applicable to the various points presented for review.

First Exception.—For that the referee "admitted three notes, A, B, and C, as evidence." The report shows the said notes were, in fact, excluded. Overruled.

Second Exception.—"Because the referee admitted the vouchers, one to twenty, as evidence, the same not being proven and established."

The vouchers were actually produced, and the defendant, without objection, testified that he had paid the various amounts mentioned in the same. It is true that the vouchers were not proved as such by evidence of the handwriting of the persons who signed them, but this is only necessary when they are relied upon under The Code, sec. 1401, as "presumptive evidence of disbursement." Before the passage of this statute the "receipts of persons living (were) not strictly legal evidence to show a full administration, and especially upon accounts" (*Ruffin, C. J.*, in *Finch v. Ragland,* 17 N. C., 137; *Drake v. Drake,* 82 N. C., 445), and the statute, while making them presumptive proof, by no means provides that they shall be *primary* evidence, and, therefore, actual payment may be established in the same manner as before. The referee was satisfied, upon the testimony of the defendant, that the payments claimed by him had been made, and we are not at liberty to disturb his findings. Overruled.

Third Exception.—"Because the referee allowed the account embraced in Exhibit 'E,' the same not being proven and established. Plaintiff alleges that this paper was introduced by Mr. Webb, one of her counsel, not as substantive testimony, but as a contradiction of defendant's evidence, and the same was so stated at the time."

The defendant was permitted, in the course of his examina- (550) tion in chief, to state the testimony of one W. D. Harriss, deceased, upon a former trial between these parties. He stated that the said Harriss testified that he was called upon to make a settlement between Mrs. Baxter and the defendant in 1880; that he took an account, which she admitted to be correct, and that she gave her note for the said balance, which note was subsequently renewed; that said Harriss also testified that Mrs. Baxter's mind was good at the time. Upon the cross-examination of defendant, he was asked by plaintiff's counsel to produce "the basis of settlement" made in 1880. The defendant produced the account marked "E," and the plaintiff thereupon put the same in evidence. There is nothing in the report to show that the account was introduced, as contended, for the mere purpose of contradiction. It appears to have been offered generally, and as its correctness may be inferred from the evidence of Miller and the admission of Mrs. Baxter, as testified to by the deceased witness Harriss, the referee was warranted in acting upon the same. Overruled.

Exceptions 4, 6, 7 and 8 were properly overruled by the court. They relate to questions of fact, and these cannot be reviewed here.

Exception 5 was sustained, and the report modified accordingly.

Exception 9.—"Because the referee admitted the testimony of the defendant as to transactions and conversations with Nancy Baxter, now dead." We can find no such testimony except that which was brought out by the plaintiff upon cross-examination. We presume that the exception refers to the admission of the testimony of the defendant as to the evidence of W. D. Harriss upon the former trial, which we have referred to in passing upon the third exception.

The witness was not testifying to any transaction between himself and the deceased Nancy, but only to what was stated by the deceased witness upon a public trial. This is not inhibited by section 590 (551) of The Code.

The defendant said that he could state the substance of the testimony of the said witness, and it was clearly admissible. *Jones v. Ward,* 48 N. C., 24; 1 Greenleaf Ev., 163, *et seq.*

We have carefully considered the remaining exceptions, and are of the opinion that they are without merit. They seem to be based upon the idea that the amount due the defendant is a mere general indebtedness and attended with its usual incidents, such as the applicability of the statute of limitations, the necessity for the presence of the administrator, etc.

We have seen that such is not the character of this indebtedness, and that equity requires its payment as a condition to the granting of the relief prayed for. It is true, as a general proposition, that land charged with debt is entitled to exoneration by the personal estate (*Pate v. Oliver,* 104 N. C., 458), but the plaintiff has, at no time during the progress of this litigation, invoked any such principle in her behalf. On the contrary, she explicitly prays that the amount due the defendant be ascertained, and that, in default of payment, the land be sold, the defendant paid out of the proceeds, and the balance paid to her. The court has so decreed, and we see no reason for disturbing the judgment. Furthermore, it appears from the judgment of the court that there is no indebtedness except the amount due the defendant, that there is no administrator or any personal estate, and that the plaintiff is the only child and heir at law.

Under these circumstances, it is not easy to understand why she can be prejudiced by the absence of an administrator as a party. There is no error.

Affirmed.

Cited: Orrender v. Chaffin, 109 N. C., 425; *Worth v. Wrenn,* 144 N. C., 662; *Rich v. Morisey,* 149 N. C., 49.

(552)

ROBERT SIMPSON AND WIFE v. ISAAC SIMPSON ET AL.

Action to Recover Land — Deeds — Subscribing Witness—Mortgage—Clerk's Certificate—Probate—Transactions with Deceased Persons—Evidence—Powers of Sale—Legal Title.

1. Where the surname of a subscribing witness to a deed was omitted in the clerk's certificate of proof by such witness, such deed will not be rejected in evidence when the *fact* of the execution and probate are not disputed.

2. A plaintiff, in an action to recover land, who claims under a deceased mortgagor, is not competent to prove, in his own interest, payments on the mortgage note made by such mortgagor.

3. In evidence of her chain of title, the *feme* plaintiff introduced a mortgage given to indemnify the mortgagors under whom she claimed against loss by reason of their suretyship to the mortgagee in a sum of money due by note which they had endorsed. She offered to show further by her co-plaintiff, to whom the note was endorsed payable, and in their own interest, that $50 was paid on the note before judgment: *Held*, the maker of the note and the mortgagor being dead, such testimony should be excluded, under section 590 of The Code, as being a transaction with deceased persons.

4. Where it appeared from the testimony that the land in dispute was bid off at the sale under mortgage at a small price (which was not shown to have been paid), pursuant to a previous agreement between the trustees conducting the sale and the bidder, who, at the instance of one of the trustees, transferred his bid to the vendee: *Held*, no title passed by such sale, because the land conveyed was held as security for debt.

5. Where the mortgagee has no power of sale granted to him, a sale made by him is not effectual to pass the legal title to the mortgagor.

6. A plaintiff, under a vendee under such sale, must bring an action to foreclose, and cannot recover possession of the land in an action simply for that purpose.

7. The conveyances by the mortgagees and their vendee do not pass a naked legal title, and such conveyances cannot operate as a foreclosure.

8. Where, in an action to recover land, the defendants show adverse possession under color of title for seven years, under known and visible lines and boundaries, continuous and successive, and next preceding the institution of this action, the plaintiffs cannot recover.

ACTION to recover land, tried before *MacRae, J.*, at Fall Term, (553) 1887, of UNION.

The plaintiffs claim title derived from Isaac Simpson, by virtue of a mortgage deed executed by him to W. T. Lemond and W. L. Simpson on 12 September, 1859, and through mesne conveyances to the *feme* plaintiff.

The defendants claim title as heirs at law of Isaac Simpson, and allege the payment of the debt secured by the mortgage deed and a reconveyance. They also rely upon the lapse of time and the statute of limitations. They also deny the validity of the deeds under which plaintiffs claim, and insist that they (defendants) have title to the land, and if not, they are entitled to have it sold under the mortgage to pay any sum that may be due on the debt secured thereby, and have the balance paid over to them, etc.

W. P. Bynum and P. D. Walker for plaintiffs.
Covington & Adams (by brief) and E. C. Smith for defendants.

(559) DAVIS, J. The first exception is to the sufficiency of the probate of the mortgage deed from Isaac L. Simpson. The name of the subscribing witness, as appears attached to the deed, was "Ivey L. Potter Simpson," and the certificate is that it was "proved before me by Ivey L. Potter, a subscribing witness thereto," etc. Assuming that the clerk, by mistake, or from any other cause, omitted the surname, the *factum* of the execution of the mortgage, or of its probate and registration, is not denied, and the objection was properly overruled. *Love v. Harbin,* 87 N. C., 249.

The second exception is to the competency of the plaintiff Robert Simpson to testify that "$50 were paid upon the said note before judgment. Nothing was paid afterwards," etc.

The mortgagor and maker of the note was dead, and we do not think that the plaintiff was a competent witness to prove, for any purpose necessary to support his action, that a payment had been made, or that none was made. They necessarily concerned "transactions" with the deceased about which he could testify, and might testify differently, if living, and we think he was rendered incompetent as a witness
(560) for any such purpose, both by section 580 and section 590 of The Code.

It was in evidence (the plaintiff Robert Simpson himself testified) that a sale of the land in dispute was made to W. L. Simpson, one of the mortgagees, and J. Q. Lemond, executor of the other, and that at the sale the land was bid off by S. H. Walkup for said William L. Simpson; that he did not know why Walkup did not take the deed to himself. It was further in evidence that W. L. Simpson and J. Q. Lemond, executors, etc., executed on 6 June, 1870, a deed to W. C. Ogburn; that Ogburn was not at the sale, and did not bid off the land, nor authorize any one else to bid it off for him; that W. L. Simpson, one of the mortgagees, asked him to let the deed be made to him; it

was so made, and he, on 11 February, 1878, more than seven years afterwards, conveyed it to the *feme* plaintiff, and that nothing was paid. The mortgagees, for whose indemnity the deed was made, had no power under the deed to sell or foreclose the mortgage by sale, public or private, and if they had, the evidence tends strongly to show *mala fides* in the sale; that there was, in fact, no *bona fide* sale to Walkup or Ogburn, who acted for and at the request of the mortgagee, Simpson. There appears to have been no consideration for the deed from the mortgagees to Ogburn, or from him to the *feme* plaintiff, and the evidence is sufficient to create much more than a mere suspicion of collusion between the mortgagees and plaintiffs, and the defendant was entitled, substantially, to the first instruction asked. We say "substantially," because there is no direct evidence that Walkup transferred his bid to Ogburn at the instance of Simpson, though there is no evidence of any bid except by Walkup.

If the mortgagees had power under the mortgage to sell, the effect of their deed of 6 June, 1870, if made fairly and without collusion, would be to foreclose the mortgage and the relation of mortgagor and mortgagee ceased, but if they had no authority to sell, and we think they had none, the legal title remained in them, and the land (561) could only be subjected, whether as a security for the payment of the debt to the male plaintiff, or in exoneration of the sureties thereto, by an action to foreclose the mortgage, and the *feme* plaintiff cannot recover possession of the land in this action.

But it is insisted that the deeds from the mortgagees to Ogburn, and from Ogburn to the *feme* plaintiff, if not valid to pass the title to her, conveyed at least the naked legal title, and, as the land is security for the payment of the male plaintiff's debt, this may be treated as an action for foreclosure to pay it.

Assuming that the mortgagors could have transferred to the male plaintiff the legal title held by them in exoneration of their liability, and that this would have put the naked legal title in him, and that, having the equity to have the land applied to the payment of his debt, he might bring an action in his own name, without joining the mortgagees against the mortgagor to foreclose (we do not say that this could be done), yet that certainly could not be done in this action.

There is no legal title of any sort in the male plaintiff, and this action is not brought to foreclose. On the contrary, it is brought to recover the possession of the land only, and that, not upon any claim of title by the male plaintiff, but upon the claim of title of the *feme* plaintiff, and the only relief demanded is the possession of the land and damages for retention, and not to foreclose the mortgage for the payment of the male plaintiff's debt, or for the exoneration of the sureties thereto, who

are not parties to this action; and, besides, the claim of the defendants set up in their answer that if not entitled to the land they are entitled to have it sold under the mortgage to pay any sum that may be due, etc., is denied by the replication. No such cause of action is alleged by the complainant, and there could be no such recovery as that to foreclose, etc., in this action. *Willis v. Branch,* 94 N. C., 142, and (562) cases there cited.

The judgment is both for recovery of possession by the *feme* plaintiff and that the defendants be declared mortgagees or trustees, etc., and that the land be sold. This is a judgment for both of the plaintiffs in double and conflicting aspects, and cannot be sustained.

We think there was, in several aspects of the case, evidence that should have been passed upon by the jury, under instructions from the court, and that there was error in refusing the first and fifth prayers for instruction, and the charge as given in the judgment rendered, and we need not consider whether if, in an action brought by the male plaintiff to subject the land as a security for the payment of his debt, the statute of presumptions would bar, and whether, in such an action, the mortgagees would be necessary parties, nor is it necessary to consider the other exceptions in the case on appeal.

Error.

Cited: McGowan v. Davenport, 134 N. C., 528.

T. A. BRISTOL, ASSIGNEE, v. J. H. PEARSON.

Vendor's Lien for Purchase-money — Waiver — Discharge—Receipt—Referee's Findings—Express Agreement—Allegations—Intention.

1. B. and M. sold a machine to R. under contract, registered, by which the title was to remain in them until the balance of the purchase-money secured by two notes was paid. The vendors then executed the following receipt: "Received of R. $175 in full payment of machine, etc., payments made as follows: $58.33 and two notes of $58.33 each, payable in sixty and ninety days." The last note has never been paid: *Held,* the finding of the referee that the title passed to the vendee and the lien was discharged, as a conclusion of law, cannot be sustained.

2. The vendor's lien is not waived, in the absence of an express agreement to that effect, by taking a note or other personal security for the purchase-money.

3. The intention to discharge such lien in this way must, it seems, be alleged in the complaint.

EXCEPTIONS to report of a referee before *Bynum, J.*, at cham- (563) bers, in Morganton, N. C., on 28 March, 1890.

The action was brought to have a sale of certain property assigned for the benefit of creditors, and in order thereto to have the rights of all parties settled. In order thereto, Brem & McDowell, of Charlotte, who claimed title to a certain shaper and collars, were made parties defendant, and set up their answer, claiming title under a conditional sale executed on 5 February, 1889. The other facts are set out in the opinion.

J. B. Batchelor, J. T. Perkins and John Devereux, Jr., for plaintiff.
S. J. Ervin (by brief) for defendant.

SHEPHERD, J. Brem & McDowell sold a certain shaping machine to Robertson, and, under the terms of the contract of sale (which was registered), the title was to remain in the former until the latter had paid the purchase-money.

The sum of $58.33 was paid in cash, and afterwards two simple promissory notes were given by the vendee for the balance of the purchase-money. Thereupon the vendors executed the following receipt:

"Received of J. W. Robertson $175, in full payment of shaping machine and bits, payments made as follows: $58.33 cash, and two notes of $58.33, payable 17 August, 1889, and the other in ninety days from date.

"This 17 June, 1889."

The notes were absolute promises to pay, but recited that they (564) were given in part payment of the said machine. The last note has never been paid. The question presented is whether the taking of the notes and the execution of the receipt had the effect of an actual payment, so as to vest the legal title to the machine in the vendee, and thus deprive the vendors of their lien. The referee does not find that such was the intention of the parties, but he concludes, as a matter of law, from the facts, which we have substantially stated, that the title passed, and the lien was discharged.

"It may now be regarded as a well-settled rule that wherever the vendor's lien is recognized at all it is not waived, in the absence of an express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase-money." *Winter v. Anson*, 3 Russ., 488; *Ex parte Peake*, 1 Madd., 346; *Selby v. Stanly*, 4 Minn., 65; *Garson v. Green*, 1 Johns, ch. 308; *Denny v. Steadly*, 2 Heisk., 156.

"The intention to take a bill (that is, the mere personal obligation of the vendee) in absolute payment for goods sold must be clearly shown.

and not deduced from ambiguous expressions, such as that the bill was taken 'in payment' for the goods, or 'in discharge of the price.'" 2 Benjamin Sales, 714.

"The presumption of law is against such satisfaction." *Hyman v. Devereux,* 63 N. C., 626.

In the leading case of *Teed v. Carruthers,* 21 Eng. Ch., 30, the mortgagee, after a cash payment of a part of the debt, gave a receipt to the mortgagor for two accepted bills of exchange, "*in full* of principal and interest due" upon a mortgage for £10,000. It was held that, "as between the mortgagee, the mortgagor, and the latter's assignees, by deed and in bankruptcy," there was no payment, and the court made a decree of foreclosure.

The foregoing authorities, and especially the case last cited (565) (which seems directly in point), effectually dispose of this appeal in favor of the vendor. If a purchaser, for value and for a present consideration, had been misled by the receipt, the result would be different.

In the absence of evidence and a finding that the transaction was intended as a discharge of the lien, we must hold, in accordance with the general weight of authority, that there was error in the ruling below.

It is further to be observed that, in cases like this, the intention to discharge, etc., must, it seems, be alleged in the pleadings. 2 Jones Liens, 1009; *Hyman v. Devereux, supra.*

Error.

Cited: Joyner v. Stancil, 108 N. C., 156.

T. J. SOUTHERLAND ET AL. v. S. L. FREMONT AND WIFE.

Negotiable Notes—Endorsement in Blank—Guarantor—Surety—Proof of Suretyship — Mortgage—Indemnity—Release—Equity—Preëxisting Debts—Notice.

1. Endorsements in blank upon negotiable instrument are presumed to be made cotemporaneous with the execution of such instrument.

2. Where an endorsee may be held to be also a guarantor, there is no question that, as between the parties, the *prima facie* contract of guaranty arising from such endorsement may be rebutted and the true relationship shown.

3. The agreement of a blank endorser of another's obligation, showing what liability he intended to assume, may, at least as between the parties and those holding with notice, be proved by parol.

4. Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing, executed some time thereafter by one to indemnify the other two, that they (the other two) "signed as cosureties" of the third: *Held*, that the character of suretyship in which all three signed was sufficiently established.

5. Where the trustee of a mortgage made to indemnify him and another (his cosurety) against loss by a third, executed to the maker a deed of release, without the knowledge of his cosurety, to the lands conveyed in the indemnifying mortgage: Held, the action to enforce the mortgage was not postponed until the deed could be set aside in an independent action.

6. The unlawful release or discharge could be avoided either by amendment or by replication.

7. The mortgagee of land conveyed to secure a preëxisting debt is a purchaser for value, under the statutes of 13 and 27 Elizabeth, but he takes subject to any equity that attached to the property in the hands of the debtor.

8. The implied promise (if any, or if enforceable) of the mortgagee, where the mortgage was made to secure preëxisting indebtedness, that she would postpone until default all other remedies, cannot be allowed to avail to defeat prior equities.

9. When, without notice of an equity, one enters into an indemnifying conveyance to secure an irrevocable liability, such conveyance will prevail over the equity.

APPEAL at February Term, 1890, of RICHMOND, from *By-* (566) *num, J.*

H. C. Jones and C. W. Tillett for plaintiffs. (568)
A. Burwell, P. D. Walker and J. D. Shaw for defendants. (569)

SHEPHERD, J. His Honor charged the jury that if they believed the testimony, S. L. Fremont was not liable to the plaintiff by "reason of the contract of indemnity" which is the subject of this action.

Putting aside, for the present, the defenses of the statute of limitations and that Mrs. Fremont was a *bona fide* purchaser for value, we will first examine into the correctness of this instruction with reference to the contention of the defendants that the obligation of S. L. Fremont was that of a guarantor, and that he was discharged from any liability thereon because of the *laches* of the plaintiff and other defenses peculiar to that species of contract.

1. The bonds executed by the railroad company respectively to Ledbetter and Leak on 3 August, 1875, were negotiable instruments, and

were endorsed in blank by the plaintiffs, F. M. Wooten and S. L. Fremont. It is presumed that the endorsements were contemporaneous with the execution of the bonds. *Tredwell v. Blount,* 86 N. C., 33; *Carroll v. Weld,* 13 Ill., 682; Daniel Neg. Instruments, 1757; *Cook v. Southwick,* 9 Tex., 615.

There is much diversity of opinion as to whether such endorsers are liable as guarantors only. Brandt on Suretyship and Guaranty, sec. 147, maintains the affirmative "in the absence of evidence as to the liability intended"; while, on the other hand, Daniel Negotiable Instruments, *supra,* says that "the very opposite presumption arises." See, also, 1 Parsons Cont., 206, cited with approval in *Baker v. Robinson,* 63 N. C., 191. The latter view is further sustained in *Daniel v. McRae,* 9 N. C., 590; *Dawson v. Pettway,* 20 N. C., 531, and other cases in our Reports.

(570) We do not see how *Crawford v. Lytle,* 70 N. C., 385, cited by the defendants, conflicts with the foregoing authorities, as in that case the endorsement was *subsequent* to the making of the note.

Even where the contrary is held, there is no question that, as between the parties, the *prima facie* contract of guaranty arising from such an endorsement may be rebutted and the true relationship shown. *Baker v. Robinson, supra.*

"It is well settled," says Brandt, *supra,* sec. 153, "that the agreement upon which the blank endorser of another's obligation signed, and the liability which he intended to assume, may (at least between the original parties, or those parties and a holder with notice) be shown by parol evidence, and he will be held only according to such agreement and intention."

It is difficult to conceive how the real agreement and intention in the present case could have been more clearly manifested than by the solemn declaration of Fremont himself under his hand and seal. This is contained in a deed of trust executed by him to F. M. Wooten on 31 May, 1876. This instrument, after reciting the bonds above mentioned as "being signed by the said S. L. Fremont, F. M. Wooten and Thomas J. Southerland as *cosureties,*" proceeds as follows:

"And, whereas, the said S. L. Fremont is desirous to indemnify and save harmless the said Francis M. Wooten and Thomas J. Southerland from any loss or damage they, or either of them, may sustain by reason of any failure on the part of said Fremont to pay the proportion of said debt of the said railway company for which said Fremont would be liable as between him and the said Wooten and the said Southerland, as *cosureties* with them, in the event the said railway company should fail to pay the said debts or any part thereof. Now this indenture witnesseth," etc.

The deed conveys certain land situated in Richmond County, (571) in this State, and was duly registered. The condition is, that if the said railroad company, the maker of the bonds, "shall fail to pay its two notes due, the one to J. W. Leak and the other to R. S. Ledbetter, as aforesaid, or any part of said notes, so that the said *sureties* on said notes shall be compelled to pay said notes, or any part thereof, then, if the said S. L. Fremont shall indemnify and save harmless the said F. M. Wooten and the said T. J. Southerland from any loss or damage they, or either of them, shall sustain by reason of any failure on the part of said Fremont to pay the proportion of the railway company for which he would be liable to said Wooten and Southerland by reason of being a cosurety with them on said notes . . . then this deed shall be void, . . . otherwise to remain in full force and effect."

S. L. Fremont, then, being a cosurety and not a guarantor, it must follow that the defenses resting upon the latter theory must fail, and the plaintiff, having paid the large balance due upon the bonds, will be entitled to recover unless some legal barrier is interposed by the defendants.

2. We will next consider the ruling of the court below upon the statute of limitations.

The purpose of this action being the subjection of the land by reason of the nonperformance of the covenant of indemnity contained in the deed of trust, and the statutory period of ten years not having elapsed, it would ordinarily follow that the action would not be barred. *Capehart v. Dettrick,* 91 N. C., 344. It appears that on 30 September, 1882, Wooten, the trustee, without the knowledge of the plaintiff, executed a deed of release to Fremont, which instrument had been registered at the time of the execution of the mortgage to Mrs. Fremont. The conditions of the trust deed, so far as the plaintiff is concerned, have never been performed. It is insisted that no action to enforce the trust can be maintained until this deed of release is set aside, and that the right to have it set aside constitutes an independent (572) cause of action which is barred in three years. It is also contended that the amendment to the complaint, with reference to the unauthorized release, did not relate to the commencement of the action. We do not concur in either of these views. Under the circumstances of this case, the impeachment of the unlawful discharge was only incident to the cause of action. The unlawful discharge might have been avoided either by replication or by the amendment of the complaint. In either form, the pleading would have related to the institution of the suit. The case of *Ely v. Early,* 94 N. C., 1, bears such a striking

analogy to ours, and the principles there laid down so plainly dispose of this contention of the defendant, that we think it unnecessary to further pursue the discussion upon this point.

As between the parties, it cannot be denied that the deed of release would have been set aside and that a strong equity was attached to the land in favor of the plaintiff. He has not lost this equity unless Mrs. Fremont is a *bona fide* purchaser, and here we are met with a question which has caused us much careful consideration.

3. There is no doubt that a mortgagee or trustee of land conveyed to secure a preëxisting debt or liability is a purchaser for value, within the statutes of 13 and 27 Elizabeth; but it would seem, says *Pearson, J.*, in *Potts v. Blackwell,* 56 N. C., 449, "that they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice, in like manner as a purchaser at execution sale takes subject to any equity against the debtor without reference to the question of notice." This doctrine is also declared in *Small v. Small,* 74 N. C., 16, where it is said that "the creditor who takes a deed of trust is not out of pocket one cent; so he stands in the shoes of the debtor, and takes subject to any equity binding the land in the hands of (573) the debtor." This is further sustained in *Day v. Day,* 84 N. C., 408, and other cases, and cannot now be regarded as an open question in this State. It is argued, however, that, although the mortgage of Fremont to his wife was given to secure a preëxisting liability, it is, nevertheless, unaffected by the foregoing principles, because, by its acceptance, the law implied an agreement on the part of Mrs. Fremont to suspend, until default, any other remedies which she might have had in respect to her liability as surety to her husband on the Buell debt. This implied promise is relied upon as a *new consideration* to defeat the important equity of the plaintiff. Conceding the principle declared in *Harshaw v. McKesson,* 65 N. C., 688, that the taking of a mortgage for an existing indebtedness implies a promise to suspend until default all personal remedies against the mortgagor, let us inquire what remedies Mrs. Fremont had, and whether they were, in fact, affected by her acceptance of the mortgage. Although she had not paid the debts for which she was surety, she could have maintained an action in the nature of a bill *quia timet* to compel her husband, the principal, to discharge the indebtedness (2 Story Eq. Juris., 849; *Burroughs v. McNeill,* 22 N. C., 297); or she might have required Buell, the assignee, to bring suit against the principal by requesting him, in writing so to do, as is provided in The Code, sec. 2097. These were her remedies. Were they suspended by the acceptance of the mortgagee? We think not, and for the following reasons:

First. The mortgage from which the promise is to be implied does not contain the slightest reference to the Buell debt, but is made to secure what purports to be the *absolute* indebtedness of Fremont to his wife. There being no apparent connection between the transactions, it is plain that no promise to suspend the remedies mentioned can be implied, and it is doubtful, in the absence of fraud or mistake, whether equity would, against the consent of the parties, allow (574) the instrument to be corrected.

Second. Suppose, however, that the correction had been made, or that parol evidence had been admitted (as was done) to show the real agreement, would that agreement have the effect contended for? We are of the opinion that it would not. There would then be no absolute debt, nor any particular time for foreclosure, but simply a mortgage to indemnify against any loss which Mrs. Fremont might, in the indefinite future, sustain. It would seem that an indemnity against an apprehended loss would not imply an agreement to forbear the taking of steps to prevent the loss from occurring. We hardly think that the principle of *Harshaw v. McKesson, supra,* applies, and we are not disposed to extend the doctrine of that case beyond the limits of actual precedent.

Third. The alleged implied agreement is executory. If the land mortgaged was subject to equities which would render it valueless as a security, there would be no consideration, and, therefore, such an agreement could not be enforced. Even if there had been an express covenant not to sue, based upon such a consideration, it would be of no avail, as equity would relieve against the covenant. "It is, moreover, plain that a release by a creditor will not entitle him as a purchaser, unless it is so worded as to take effect at once, for if it rests merely in the covenant, and the assignor's title fails, equity will give relief by declaring the covenant invalid. Such a covenanter is, at most, in the situation of a purchaser who has given a bond or other security, instead of paying." *Ludwig v. Highly,* 5 Barr., 132; *Bassett v. Norsworthy,* 2 White & Tudor's L. C., par. 1, 4 Am. Edition, notes 88. If, however, one without notice has entered into an irrevocable obligation, such as becoming bail for another, or the endorsement of negotiable paper which has been transferred before maturity or notice, there would be such a valuable consideration as would prevail over prior equi- (575) ties. *Freeman v. Denning,* 3 Sand. Ch., 358. If we are correct in the above reasoning, it follows that Mrs. Fremont was under no binding obligation to forbear the prosecution of any remedies which she might have possessed against her husband, and that there was no consideration for the mortgage other than the preëxisting liability as surety.

It may be said that the alleged agreement has been partly executed, inasmuch as Mrs. Fremont did not, in fact, prosecute her said remedies. We are of the opinion that such inaction alone, even in pursuance of a valid agreement, would not bar the plaintiffs' equity. It is not to be tolerated, say the text-writers, that what equitably belongs to one shall be given to another who has parted with nothing, and whose condition has not been altered for the worse. To preclude the equities of the plaintiffs, it must not only be shown that Mrs. Fremont took without notice and upon an agreement to forbear, but that by reason of such contract of forbearance she has sustained some real loss. Executory promises of this character are recognized as sufficient considerations to support legal obligations, as illustrated in the case of *Bank v. Bridgers,* 98 N. C., 67, but they cannot be allowed to defeat equities that have attached to land unless they have been "fully completed" (*Todd v. Outlaw,* 79 N. C., 243); and a mere part performance before notice cannot have this effect, if the owner of the equity can restore the *status quo,* or make proper compensation. So in the case of the purchase of land, the part payment before notice does not defeat the equity. The purchaser is protected only *pro tanto.* "If he has paid the whole, he will be protected for the whole; if part only, he will be protected for so much; if he has paid nothing, he is entitled to no protection." *Bassett v. Norsworthy, supra,* note 79. If the simple acceptance of
(576) a mortgage or trust deed to secure an existing debt or liability is to have the effect contended for, the distinction between present and preëxisting indebtedness, as to prior equities, will be practically abolished, since it rarely happens that a mortgage or trust to secure a preëxisting liability does not provide for foreclosure at a date subsequent to the actual maturity of the obligation as fixed by the original contract. A Court of Equity cannot attach such grave results to a mere technical consideration, and will not permit it to defeat an equity in favor of one whose real condition has not been substantially altered, and who has suffered no loss. There must be a

New trial.

Cited: Wallace v. Cohen, 111 N. C., 106; *Cowen v. Withrow,* 112 N. C., 737; *Lockhart v. Ballard,* 113 N. C., 294; *Walton v. Davis,* 114 N. C., 106; *Arrington v. Arrington, ib.,* 166; *Bank v. Adrian,* 116 N. C., 547; *Sherrod v. Dixon,* 120 N. C., 63; *Blanton v. Bostic,* 126 N. C., 421; *James v. Markham,* 128 N. C., 385; *Carpenter v. Duke,* 144 N. C., 293; *Bank v. Bank,* 158 N. C., 250; *Sykes v. Everett,* 167 N. C., 607; *Bank v. Cox,* 171 N. C., 81; *Starr v. Wharton,* 177 N. C., 325.

MARTHA E. HODGES v. THE NEW HANOVER TRANSIT COMPANY.

Damages—Negligence—Injury to Passengers—Railroad.

When it appeared in an action against a railroad company for damages for injury sustained by the plaintiff, a passenger, from a fall between the defendant's cars and a platform along by the side of them, that she was attempting to get a seat before the cars were lighted and some time before it was the usual time to light them and to give the signals of warning and preparation generally given—the first, fifteen, and the second, five, minutes before starting; and, without invitation from defendant's agents, the plaintiff attempted to get her seat in the dark, and was hurt while stepping from the platform to the cars, it was not made to appear that there was any defective construction: *Held*, (1) the plaintiff was not entitled to recover; (2) her injury resulted wholly from her own negligence.

APPEAL at April Term, 1890, of NEW HANOVER, from *Graves, J.*

C. S. Weill for plaintiff. (577)
George Rountree for defendant.

MERRIMON, C. J. We do not deem it necessary or useful to advert to the voluminous and numerous assignments of error in this case. We have examined the evidence with care, and in any just view of that produced on the trial by the plaintiff, or of that aided in any respect by that produced by the defendant, we think it clear that the injury sustained by the plaintiff, of which she complains in this action, was occasioned by casualty attributable solely to her own want of caution and her imprudence.

The railroad of the defendant company was used mainly to transport passengers from a point on the Cape Fear River, on one side of a belt of country about three miles broad, to a seaside summer resort on the other side. At the stopping place on the seaside there was a hotel and places of amusement near to the place, an elevated platform, where passengers regularly got on and off the defendant's passenger trains. During the stated intervals when the train was not running it stood alongside of and not far from the platform. The cars used were excursion cars—open—the seats extending across them, and there were steps alongside of these, and passengers would step from the platform onto such steps, and thence on the car to the seats.

On 2 August, 1889, a party of Sunday School children and some of their friends, including the plaintiff, went to the seaside resort mentioned for purposes of recreation and amusement, and they were transported over defendant's road. The party spent most of the day there

and remained until late in the evening—after night, and it was dark—quite dark, and raining lightly. There was no station house to receive passengers, nor were there seats on the platform, but passengers were allowed, as of right, to sit and walk on the broad piazzas of the (578) hotel, and to sit in the hotel office. Lights were kept burning at two or three places on or about the ends of the platform mentioned, but the cars were not lighted, nor put in order for passengers to start on the return trip.

Before the time to start on the return trip, on the night mentioned—how long does not clearly appear from the plaintiff's evidence, but it is fair to say from half to three-quarters of an hour (the evidence of the defendant made it longer than that)—the plaintiff and others went to the train to be sure to find seats and be ready to start when the time for starting should come. At the time the plaintiff so went to the cars lights were burning about the platform at the end and at the notice-board, giving light mainly from near the cars towards the platform, the hotel and thereabout; the cars were not then lighted, and, while they were alongside of the platform, they had not been put in readiness for starting—no signal whistle to start had been given. This was to be given, first, fifteen minutes, and then the second time, five minutes before starting. The plaintiff and others so went on the cars before the time of starting of their own purpose; the agents of the defendant did not invite or suggest to them to go on the cars, nor forbid them to go, before the signal to prepare to start on the trip should be given; there was no reason why they should do so, except the motive to get ahead of the crowd of passengers and occupy seats in advance of their company. While the plaintiff, under these circumstances, was stepping from the platform to the steps of the car "she fell between the platform and the cars." It was very dark at the time and place where she fell. This shows the full strength of her evidence. It appears, however, from the uncontradicted evidence produced by the defendant, that the platform was two and one-half feet high, and the steps of the car were two and one-half inches from it—it was used only to help get on (579) and off the cars; the waiting room was in the hotel, which was situated about twenty-five feet from the platform.

The burden was on the plaintiff to prove negligence of the defendant that gave rise to her injury. The evidence produced by her did not, taken as true, prove such negligence. The defendant was not, as contended, bound, at such place and under such circumstances, to fence in or inclose its platform and cars and trains to keep people from going on them, nor to keep a servant by them to warn people not to go on or about them. Persons—passengers—ought not to have gone on them except at the regular time and in the regular way, for the purpose of

going on the return trip; they went on them at other times in their own wrong and at their peril, in the absence of some default on the part of the defendant that was in and of itself dangerous. No default of that character appeared from the evidence. The accident seems to have been wholly attributable and to have been attributed to the want of light at the place where the plaintiff went on the car and fell. It was incautious, imprudent and negligence, gross negligence, of the plaintiff to attempt to go on the cars when she did without having a light sufficient. She went, or attempted to go, on the cars without necessity—out of order, at the wrong time, and in the dark. The defendant was not bound to light the cars until within a reasonable time before the time fixed to start. At that place it was reasonable and sufficient to light them and give notice to prepare to start fifteen minutes before time of starting. That would have given the excursionists ample time to get on the cars in order.

It does not appear from the plaintiff's evidence that there was a dangerous opening between the edge of the platform and the steps on the cars, nor does it appear that she fell through an opening to the ground—the evidence is meager in this respect, when she might have made it plain, and failed to do so. The evidence of the defendant, not contradicted, shows that there was no dangerous opening, such (580) as makes or implies negligence. While the plaintiff's foot or leg might possibly have gotten between the platform and the steps of the car, it could not ordinarily do so, nor without carelessness on the part of the person injured. So that, accepting the evidence of the plaintiff as true, she was not entitled to recover.

Affirmed.

F. W. SMITH ET AL. v. M. SUMMERFIELD ET AL.

Reinstatement of Appeal — Printed Record — Rules—Affidavits—Misunderstanding—Instructions of Counsel.

Where it sufficiently appears by affidavits that the appellant caused to be printed in due time the copies of the record required by rule of this Court, and that, misunderstanding the instructions of his counsel and the clerk of the Superior Court, to whom he applied for information, he sent only one printed copy to this Court and mailed others to counsel on both sides: *Held*, that, upon due notice and motion, the cause is reinstated.

MOTION to reinstate an appeal, heard in the Supreme Court at September Term, 1890.

W. C. Munroe, C. B. Aycock and W. T. Faircloth for plaintiffs.
C. M. Busbee for defendants.

CLARK, J. The appellant files affidavits of himself and others that he caused, in due time, the necessary number of copies of the record to be printed, as required by Rule 28 of this Court; that he applied (581) to his counsel and to the clerk of the Superior Court for information as to what disposition to make of them; that, misunderstanding the instruction received, and in good faith, he sent only one printed copy to this Court, and mailed others to the respective counsel on both sides, and he files, with the motion, the requisite number of the printed record. Due notice of the motion to reinstate was given under Rule 30.

These affidavits are not controverted, and there is no suggestion that this was done to procure delay, or that appellant acted otherwise than in entire good faith. The appeal must be reinstated. *Whitehurst v. Pettipher,* 105 N. C., 39.

This case differs from *Griffin v. Nelson,* 106 N. C., 235, in that here the appellant applied to counsel to learn what was necessary to be done in regard to sending up the transcript and perfecting his appeal for hearing in this Court, and only failed to do so from misapprehending the instructions given him.

Motion allowed.

JAMES M. HEGGIE v. THE PEOPLES BUILDING AND LOAN ASSOCIATION.

Corporations—Dissolution—Charters—Building and Loan Association —Shareholder—Judgment Creditors—Supplementary Proceedings—Fraud and Collusion—Limitations—The Code—Usury.

1. A judgment, whether just or unjust, conscionable or unconscionable, if regularly taken in a court of competent jurisdiction, may be enforced by execution or proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation or its creditors, except for fraud or collusion.

2. The corporation represents the shareholders in defending actions involving their rights and obligations, and a judgment against it, in the absence of fraud, binds them.

3. The action of the plaintiff, a judgment creditor, is not barred in three years after the corporation has ceased to do its regular business.

4. The Code, sec. 667, relates to corporations whose charters shall expire by limitation, or be annulled by forfeiture or otherwise.

5. The defendant corporation could not settle with its members by the application of assets to the retirement or redemption of the stock of the shareholders until it had first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors.

6. Where there is a valid judgment against the defendant corporation, from which no appeal was ever perfected, this Court will not consider whether the plaintiff is confined in his remedy to particular assets, such as certain equities in land held by it. The judgment affects all the assets until it is impeached for fraud or collusion.

7. Where the defense of usury was not set up by the defendant corporation to resist an action by the plaintiff, its creditor: *Held*, that the assignee, a shareholder, interested in the administration of the assets and in preventing an attempted priority given to the plaintiff, is estopped to impeach or to show such judgment was void on such ground.

8. The orders drawn in favor of the shareholders after the defendant had ceased to do its regular business as a corporation are not an equitable assignment, or equitable execution, or supplemental proceedings, to subject the stock so drawn upon the payment of the debt thereby created, nor do such orders so drawn constitute the owner of them a *bona fide* creditor.

9. The right to buy in and cancel its own stock may sometimes be exercised by a corporation, but not in derogation of the rights of *bona fide* creditors.

10. The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment.

11. Discussion by *Davis, J.*, of the relative rights of creditors and shareholders of a corporation.

APPEAL from *MacRae, J.*, sustaining a demurrer to an inter- (582)
plea filed by C. E. Cheatham, in certain proceedings supplementary to execution, rendered at the July Term, 1890, of
GRANVILLE. (583)

R. W. Winston for plaintiff. (590)
T. T. Hicks (by brief) for defendant.

DAVIS, J. Whatever may have been the nature of the plaintiff's claim, whether just or unjust, conscionable or unconscionable, his judgment, if regularly taken in a court of competent jurisdiction, and in accordance with the course and practice of the court, created a lien upon any property owned by the defendant corporation, and its payment may be enforced by execution, or, if execution be returned, unsatisfied, by proceedings supplementary to execution, as prescribed by section

488 *et seq.* of The Code, and the judgment cannot be attacked or impeached by any member of the defendant association, or its creditors, except for fraud or collusion.

The corporation represents the share-owners in defending actions involving the rights and obligations of the corporation, and, in the absence of fraud or collusion, binds them, and individual stockholders cannot assert or defend the rights of the corporation. *Moore v.* (591) *Mining Co.,* 104 N. C., 534; Cook on Stock and Stockholders, sec. 678; *Foundry Co. v. Killian,* 99 N. C., 501.

The plaintiff having obtained his judgment against the defendant association, the liability and rights of the corporation and of its members in relation thereto are settled.

But counsel for Mrs. Cheatham insist that the plaintiff's judgment is "irregular and void," because the action in which it was rendered was commenced in July, 1884, "more than three years after the dissolution of the corporation, and more than three years after it had ceased to do business under its charter, etc., . . . and no receiver was ever appointed," and for this he cites The Code, sec. 667, *et seq.; VonGlahn v. DeRosset,* 81 N. C., 467, and *Dobson v. Simonton,* 86 N. C., 492. This is a misapprehension. It is admitted that the company had ceased to do business under its charter, and that, in 1876, as stated in the affidavit of Mr. Hays, "it took measures for closing its business, and making settlement with its members as speedily as practicable," and this, as appears from the affidavit, was by applying the accumulated assets in the hands of the treasurer to the payment of the stockholders, to redeem or retire their stock, which procedure was, as it not unnaturally would be, "generally acceptable to the membership of the association," but the corporation could not settle with its members by the application of its assets to the retirement or redemption of the stock of the shareholders until it had first settled and discharged all of its liabilities. It is well settled, at least in this country, that the capital stock of the corporation is a trust fund, to be preserved for the benefit of corporate creditors, and no agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Waterman on the Law of Corporations, pages 126 *et seq.;* Cook on Stock and Stockholders, sec. 42; *Foundry Co. v. Killian, supra.*

A fortiori, would any arrangement or agreement by which the (592) assets of the corporation should be divided and distributed among the shareholders in payment for their stock, before its liabilities to creditors are settled, be void as to creditors?

The Code, sec. 667, relied upon by counsel, relates to corporations whose charters shall expire by limitation, or be annulled by forfeiture,

or otherwise, and provides that such corporations shall be continued as bodies corporate for three years for the purposes mentioned in that and the following sections, and has no application to a case like the present, in which the charter granted in 1872 had not expired or been annulled, and it appears from the record that payments were made by the corporation to Mrs. Cheatham after 1876 and as late as 7 February, 1889. Besides, H. C. Hicks, as appears by Mr. Hays' affidavit, "declined to have his stock (which was unredeemed) retired, . . . but insisted that the association should continue to do business in the manner indicated by the charter and by-laws until it should run its course to the end," and it would be singular if he, or one succeeding to his stock, could be allowed, at a much later period, to avail himself of that section of The Code, not only to defeat the application of the assets of the defendant corporation to the payment and satisfaction of a judgment against, but to subject the assets to the payment or (as the corporation considered it) the redemption or retirement of his stock, for which, as stated by Mrs. Cheatham in her complaint, he had not "paid in full the amount" of his subscription. What amount had been assessed and paid by the shareholders upon their stock does not appear, but the full amounts had not been paid.

It is further insisted for Mrs. Cheatham that it appears from the account stated, and upon which judgment was rendered in favor of the plaintiff against the defendant association, that the defendant association had been more than paid, and there was no necessity for the sale of the land, and the plaintiff's "remedy was against the land, (593) to recover it," and not against the association. Whether the plaintiff might have had such a remedy against the land we need not consider, as there was a judgment in his favor, in a court of competent jurisdiction, from which, though an appeal was taken, no appeal was ever prosecuted, and no member or creditor of the defendant association can attack or impeach it except for fraud or collusion, and there is not only no allegation of this but the whole record precludes all suspicion of it.

It is further contended by counsel for Mrs. Cheatham that C. C. Heggie, having been a member of the defendant corporation, was estopped, being *in pari delicto,* and could not allege usury against it, as was held in *Latham v. B. and L. Assn.,* 77 N. C., 145; and the plaintiff assignee of his equity of redemption was also estopped, and this defense was not set up by the defendant association, and Mrs. Cheatham, "being interested in the administration of the assets, and in preventing the priority attempted to be given to the plaintiff," and "not being a party to plaintiff's action, is not estopped to show the invalidity of his judgment," and that it is void. If invalid and void, as insisted

by counsel, the authorities cited were not needed to show that it might be "set aside at any time." That is well settled. But, as we have seen, in the case before us the judgment was not void. It was regularly rendered by a court of competent jurisdiction, both as to the parties and the subject-matter, and no fraud or collusion is alleged or shown.

In *Dobson v. Simonton,* 86 N. C., 492, cited by counsel, the judgments impeached were nullities, having been rendered when there was no such corporation as the Bank of Statesville in existence, either in law or in fact. No such bank ever had a *de jure* existence, and its *de facto* existence ceased on 1 June, 1876, a receiver was appointed, and judg-
(594) ments rendered on process which issued after the *de facto* existence of the corporation had ceased, and served upon its former *de facto* officers, were not valid, and might be impeached by any person interested in the administration of its assets. The case before us is, as we have seen, very different. Its charter had not expired or been annulled, and it was acting under the control of its regularly and legally constituted officers, with whom the appellant, herself a member of the association, was dealing as such, and who, so far from acting in concert or collusion with the plaintiff, resisted his claim, denied its validity and insisted "that there were no other or just claims against the association" except those of appellant.

Of course, if anything has been realized upon the execution in the hands of the sheriff, the defendant will be entitled to credit therefor.

It is further contended for appellant that the orders on which her action was commenced in November, 1889, are an equitable assignment of the funds on which they were drawn, and that her action "is an equitable execution or supplemental proceeding" to subject the same, which "appellant individually did receive in full payment of all her stock from the defendant John W. Hays, then acting for the defendant corporation, on 20 August, 1881, and she has not, in fact, since that day been a member of said corporation," which constituted her a *bona fide* creditor of the defendant corporation (which she insists was then defunct), with a lien upon its assets, she being a purchaser of said orders for value.

As we have seen, the orders were issued in payment for stock held by her and her intestates as stockholders "in said corporation," and not only the assets, but the capital stock as well, constituted a trust fund for the benefit of corporate creditors, and the corporation could not pay or assign to a stockholder, nor could a stockholder receive, any of the assets from the corporation for the retirement or redemption of his stock till after all the liabilities of the corporation have been
(595) discharged.

There is nothing in the record to show that the defendant corporation has ever been dissolved, or its corporate affairs settled in any way recognized by law and the appellant's stock continued to be liable for the corporate debts, and she and other stockholders were, and could only be, entitled by virtue of their stock, to share in the surplus after discharging all the liabilities of the corporation to its creditors.

It is further insisted by counsel for appellant that "the corporation had the right to buy, or to buy in and cancel its own stock, and to issue orders on its treasurer in payment therefor"; and for this position he cites a number of authorities; but upon examination it will be found that the authorities are not uniform, and, as is said in the note to sections 310 and 311 of Cook on Stock, etc., cited by counsel, quoting *Cappin v. Grunbus,* 38 O. St., 270, "we think the decided weight of authority, both in England and the United States, is against the existence of the power, unless conferred by express or clear implication," and the author, in the text, says: "If the sale is completed and the corporation afterwards becomes insolvent, the shareholder who sold the stock to the corporation is liable on the winding up, as though he never had made such sale." Cook, *supra,* and at section 309.

While the authorities cited hold that the corporation may purchase its own stock, the rule is subject to many restrictions, "one of which is that it shall not be done in such manner as to take away the security upon which the creditors of the corporation have a right to rely for the payment of their claims." It is further said, in one of the authorities cited: "In Illinois, the State where the right of the corporation to make such purchases is most clearly and decisively established, the collateral principle that such purchases are to be declared illegal and voidable at the instance of corporate creditors who are injured thereby, is distinctly stated and rigidly applied." Section 312; *Frazer v.* (596) *Ritchie,* 8 Brader (Ill.), 554. It is held by the cases cited that, conceding that, for legitimate purposes, the corporation can buy in its stock, we think no lien is created thereby upon its assets for the payment of the purchase-money, and none of the cases cited are in conflict with the well-settled principle that the corporation cannot buy in, or deal with its stock to the prejudice of creditors.

Counsel for the appellant further insists that, as shown by the affidavit of Mr. Hays, after the decision in *Mills v. Building and Loan Association,* the corporation adopted "a just and liberal method of settlement of its affairs," and "this is not an action to recover the price of stock subscribed for, but a contest between two creditors, the one attempting to enforce the payment of a just debt, the other to collect a

penalty, which equity abhors, and which was recoverable by somebody else, if at all," and the assets sought to be recovered were the property of the appellant before the plaintiff recovered his judgment.

Whatever may have been the original merits of the plaintiff's claim, after he had obtained judgment he became a judgment creditor, with all the rights, as against the defendant corporation and its shareholders, that any other judgment creditor might have, and the appellant is seeking to recover the value of stock subscribed, and for which, as appears from the record, there had never been payment in full, and which, as we have seen was liable to the demands of creditors. As to creditors, the liability of shareholders, to the extent of their stock, begins with the subscription, and can only end with a *bona fide* sale and transfer or the settlement of the affairs of the corporation.

However fair and just may have been the measures adopted by the defendant corporation "for closing its business and making settlement with its members," it appears from the report of the referee that, on 21 June, 1873, Heggie executed a mortgage to secure advances; (597) that, on that day, he received $622.21, and on 19 July, 1873, he received $138.69; that payments were made thereon from time to time, till 1 May, 1874, when the payments made exceeded the amount borrowed, with interest thereon, to the amount of $77.55, and thereafter the defendant corporation foreclosed the mortgage executed 21 June, 1873, by sale, and received the amount of $1,086 from the sale, and it is for the amount of the excess, with interest, that the plaintiff obtained judgment, and not a "penalty," but the "fines, penalties and forfeitures," so severely denounced in the case of *Mills v. Salisbury Building and Loan Association,* constituted the claim and defense of the defendant corporation.

Lastly, counsel say "appellant can never compel contributions from other stockholders opposed to the corporation, if she only is required to pay plaintiff's claim." This is a misapprehension. The appellant is not required to pay plaintiff's claim, but the judgment is against the defendant corporation, and the plaintiff is only seeking to subject its assets, to which appellant has no rightful claim till its liabilities are discharged. If the corporation and its stockholders, who should deal justly and fairly with her, shall fail to do so, it may be her misfortune, but that cannot affect the legal rights of a judgment creditor of the corporation.

Affirmed.

Cited: Clayton v. Ore Knob Co., 109 N. C., 389; *Harmon v. Hunt,* 116 N. C., 682; *Meroney v. Loan Asso., ib.,* 910; *Pender v. Speight,* 159 N. C., 616; *Gilmore v. Smathers,* 167 N. C., 444; *Drug Co. v. Drug Co.,* 173 N. C., 508; *Chatham v. Realty Co.,* 180 N. C., 503.

(598)

F. W. HUGHES v. THE COMMISSIONERS OF CRAVEN COUNTY.

Municipal Corporations—Debts of Counties, when Collectable—County Commissioners — Constitution — The Code—Property of Counties Necessary for Public Purposes—Railroad Stock—Mandamus— Equitable Fi. Fa.

1. In an action for debt of a county contracted in 1886 against the board of county commissioners, it appeared that the county owned a considerable amount of valuable railroad stock, and the complaint alleged that it was not necessary, used or useful in the dicharge of its corporate functions. It further appeared that the county was largely in debt, and had no property other than that mentioned, except what was necessary for its public functions. The plaintiff asked for judgment condemning a sufficient amount of said stock to satisfy the judgment. The plaintiff omitted in his complaint to refer the court to the *private* law which permits the county to subscribe to the capital stock of said railroad: *Held*, that the complaint did not state a sufficient cause of action.

2. The collection of the debts of a municipal corporation cannot be allowed to cripple its capacity to discharge its public functions.

3. Under the act of 1868, ch. 20 [The Code, sec. 707 (5 and 7)], a county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual.

4. Ordinarily, the only remedy of a judgment creditor against a county is a writ of *mandamus* to compel its commissioners to levy a tax to pay the debt.

5. A writ of *mandamus* will be granted only where one demanding it shows that he has a specific legal right, and has no other specific legal remedy adequate to enforce it.

6. An action may be maintained against the county commissioners establishing a debt against the county without asking for a writ of *mandamus*, where it appears that the county has property subject to trusts, or such as can be reached only by proceedings supplemental to execution.

7. Where it appears that a *mandamus* has been answered by the county commissioners and proven unavailable, because the constitutional limit of taxation has been exhausted to meet the current expenses; and it further appears that the county holds real estate, or other property not used or needful for its public functions, and, for any reason, such property could not have been subjected, except by an equitable *fi. fa.; it seems* that such property can be subjected for the discharge of the debt of a judgment creditor against the county, though it cannot be levied on and sold under execution.

(599) APPEAL from *Womack, J.*, at February Term, 1890, of CRAVEN, on the complaint and demurrer thereto *ore tenus*, with motion

by the defendant to dismiss the action. Motion allowed and judgment that the action be dismissed and against plaintiff for costs, from which judgment the plaintiff appealed.

The plaintiff alleged in his complaint—

1. That at May Term, 1886, one Joseph Nelson, in an action properly instituted and prosecuted in the Superior Court of said Craven County, recovered a judgment against the defendant—the board of commissioners of Craven County—for $1,518.54, with interest thereon from 14 May, 1886, and the costs of said action, as will more fully appear by reference to the record of said judgment in the said court, in judgment docket "C," page 236, No. 3,907, which judgment was obtained on indebtedness of said defendant, contracted since the adoption and ratification of the present Constitution of North Carolina.

2. That on 23 November, 1887, the said Joseph Nelson transferred and assigned the said judgment to the National Bank of New Bern, to secure the payment of the indebtedness of said Nelson to said bank, as plaintiff is informed and believes.

3. That thereafter the said Joseph Nelson assigned his interest in said judgment to Pattie S. Nelson, his wife, as plaintiff is informed and believes.

(600) 4. That on the ..... day of ....., 1888, the said National Bank of New Bern and said Joseph Nelson and Pattie S. Nelson, his wife, duly bargained and sold and transferred and assigned for value to the plaintiff the said judgment and the plaintiff is now the sole *bona fide* owner of the said judgment.

5. That the plaintiff has duly notified the said board of commissioners of Craven that he is the owner of said judgment.

6. That no part of the said judgment has been paid.

7. That the said defendant, the board of commissioners of Craven, is largely in debt, and has no property other than that required to carry on the public business, except as hereinafter stated, and that it takes all the money that defendant is allowed to collect from taxation to pay the current expenses of carrying on the county government as required by law, as plaintiff is informed and believes.

8. That the Atlantic and North Carolina Railroad Company is a corporation created by the laws of North Carolina, and is now engaged in carrying on business on its railroad running from Morehead City to Goldsboro, in the said State, as is allowed and required by its charter, to which reference is made.

9. That the said railroad company is composed of a large number of persons who own shares of its capital stock, which said shares of stock are valuable property.

10. That the defendant, the board of commissioners of Craven County, own and hold twelve hundred and ninety-three shares of the said capital stock of the said Atlantic and North Carolina Railroad Company (par value $100 per share), which said stock is worth a large amount of money, as the plaintiff is informed and believes.

11. That there has never been any dividends declared on said stock by said Atlantic and North Carolina Railroad Company, as plaintiff is informed and believes.

12. That the capital stock of said railroad company owned by (601) the said board of commissioners of Craven County as aforesaid, is in no manner necessary, nor is the same used, nor can be used, for the purpose of carrying on or performing its functions as a municipal corporation, or performing any of its duties as such corporation, as plaintiff is informed and believes.

Therefore the plaintiff demands judgment—

1. That a sufficiency of the said capital stock of said Atlantic and North Carolina Railroad Company, so held and owned by the said board of commissioners of Craven County, be condemned and sold to pay the said judgment owned by plaintiff as aforesaid.

2. That a receiver be appointed to take and sell said capital stock, or a sufficiency thereof, to pay off said judgment, and that out of the proceeds of said sale he pay off and discharge said judgment.

3. That the defendant, the Atlantic and North Carolina Railroad Company, be required to transfer on its books, to the purchaser or purchasers thereof, the stock that may be sold as aforesaid.

4. That the defendant, the board of commissioners of Craven County, be enjoined from disposing of any of its said stock until said judgment is paid, and that plaintiff have a lien on said stock until said judgment is paid, to secure the payment of the same.

For such other and further relief as plaintiff may be entitled to, and for costs.

The defendant moved for judgment *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action. Motion granted. Plaintiff excepted and appealed.

M. DeW. Stevenson for plaintiff.
Clement Manly for defendant.

AVERY, J., after stating the facts: A municipal corporation (602) exercises governmental duties under the powers delegated to it by the sovereign State, and cannot be destroyed or deprived of capacity to subserve the public purposes for which it was brought into existence, except by its creator. Hence it has been held that the Con-

gress of the United States could not pass a law levying a tax on the revenues or income of a town or city within one of the States, because the right to impose such a tax would involve the power to cripple or destroy the corporation, and would be as much a usurpation as levying a tax on the revenues of the State itself. *United States v. Railroad,* 17 Wallace, 322. But the State, of course, has the authority to prescribe what property a county or town may acquire, to provide specifically how its indebtedness shall be paid, and to subject all or a portion of its property to sale under execution, or in any other mode, at the instance of a creditor.

In the absence of special statutory regulations it has been declared upon principle, says *Dillon,* that the right to recover judgments and enforce them by execution, arose, by necessary implication, out of the privilege of suing and being sued, and that execution, when issued, could be levied upon strictly private property of the corporation, but not upon "property owned or used by the corporation for public purposes, such as public buildings, hospitals, cemeteries, fire-engines and apparatus, and water-works," and further, that judgments should not operate as liens upon any land or interest in land belonging to municipal corporations, except, such as may be subject to sale under the execution. 2 Dillon on Mun. Corp., sec. 576 (446). On the other hand, 1 Freeman Executions, sec. 22, says: "A judgment against a county or a municipal corporation is, ordinarily, no more than the mere establishment of a valid claim, which it is the duty of the proper officers to provide means of payment out of the revenues of the defendant. It is error to award or issue execution on such judgment. This rule is not of universal application." The same author, however (vol. 1, sec. (603) 126), says that, where a different rule prevails from that announced by him, "property held for public uses, such as public buildings, streets, squares, parks, promenades, wharfs, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and, generally, everything held for governmental purposes, cannot be subjected to the payment of the debts of a city." It it universally conceded that public revenues of a city or county cannot be seized and subjected to the payment of its debts, for the manifest reason that "to permit such seizure would necessarily lead to a suspension of the governmental functions of the corporation almost as effectually as the repeal of its charter," or the act creating it.

In the Circuit Court of the United States it was held to be "a general principle of law that the private property of municipal corporations (i. e., that which is not necessary to the performance of the functions of government) may be seized and sold for the payment of debts." *Hart v. New Orleans,* 12 Fed., 292.

In the case of *New Orleans v. Ins. Co.,* 23 La. Ann., 61, the Supreme Court of Louisiana held that the bonds of another corporation owned by the city of New Orleans were not essential to the existence of the municipality, nor to the useful and proper exercise of its functions, and were liable to be seized and sold under execution to satisfy a judgment against the city.

The Supreme Court of Alabama outlined the method of proceeding against municipal corporations, as follows: "But if the city owns private property not useful or used for corporate purposes, such property may be seized and sold under final process, precisely as similar property of individuals is seized and sold." *Birmingham v. Ramsey,* 63 Ala., 352.

The Supreme Court of West Virginia (in *Brown v. Gates,* 15 W. Va., 153) said, after citing with approval 1 Dil. on Corp., secs. 64 and 65, when the question was left entirely open by statute, that, "on principle, a municipal corporation should be exempt from lia- (604) bility of this character (viz., by garnishment), with respect to its revenues and the salaries of its officers, but where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of remedies which the law gives to creditors of natural persons and private corporations." That Court also lays down the rule, in reference to classes of property subject to and exempt from seizure under execution just as it is stated by *Dillon.*

The Court of Appeals of New York, after a very elaborate discussion of the whole subject, reached the conclusion, in substance (though it was said *obiter*), that property not useful or used for city governmental purposes, including even real estate, was not, like the revenues, the parks, public squares, etc., free from the lien of a judgment or liability to be subjected for its payment. *Darlington v. Mayor,* 31 N. Y., 164. See also *Holladay v. Frisbie,* 15 Cal., 630.

But, in *Gooch v. Gregory,* 65 N. C., 142, *Justice Dick,* delivering the opinion of this Court, after announcing that an execution cannot be issued, at the instance of a creditor, against a county, summarizes the powers granted to counties in North Carolina and the legislation from which those powers are derived, as follows: "Its power to contract debts and levy taxes is set forth in the Constitution, Art. VII. Under the act of 1868, chap. 20 [Code, sec. 707 (5 and 7)], a county may 'purchase and hold land within its limits and for the use of its inhabitants,' may purchase and hold such personal property as may be necessary to the exercise of its powers and make such order for the disposition or use of its property as the interests of its inhabitants require. Thus it appears that a county *can only acquire and hold property for* necessary *public*

(605) *purposes and for the benefit of all its citizens,* and the plainest principles of public policy prevent such property from being sold under execution for the advantage of an individual."

The plaintiff could not, therefore, under the rule established by this Court, insist upon issuing execution and selling the railroad stock. It is well settled, also, that, ordinarily, the only remedy of a judgment creditor of a county is a writ of *mandamus* to compel its commissioners to levy a tax to pay the debt. *Gooch v. Gregory, supra;* 2 Dillon on Mun. Corp. (3 Ed.), secs. 855 and 856; *Pegram v. Comrs.,* 64 N. C., 557; *Lutterloh v. Comrs.,* 65 N. C., 403; *Rogers v. Jenkins,* 98 N. C., 129. Where a plaintiff brings his action to recover a debt, and, in his complaint, demands a *mandamus,* as well as judgment for the debt, the courts issue first an alternative *mandamus,* and if the answer to it be insufficient, a peremptory *mandamus* is allowed. *Frye v. Comrs.,* 82 N. C., 304.

The writ of *mandamus* will be granted only where one demanding it shows that he "has a *specific legal right* and has no other specific remedy adequate to enforce it." *S. v. Justices,* 24 N. C., 430; *Winslow v. Comrs.,* 64 N. C., 223; Topping Mand., 18; *Biggs, ex parte,* 64 N. C., 202. Under the general rule, a creditor is restricted to that remedy in the collection of a claim reduced to judgment against a county because he cannot seize the revenues of the county, or levy upon and sell property essential or useful for corporate purposes without putting in jeopardy the very existence of the corporation, and the presumption is, in the absence of specific information, that the corporation holds no property not used or needed for public purposes, and has no means of meeting its indebtedness except out of the excess of its revenues over its necessary current expenses.

In *Winslow v. Comrs.,* 64 N. C., 218, *Justice Rodman,* in a very elaborate discussion of the question whether a debtor could maintain an action against the county commissioners for judgment estab-
(606) lishing his debt without asking for a writ of *mandamus,* suggests that where property of a county liable for its debts may be subject to trusts, or where it has property that can only be reached by proceedings supplemental to execution, and that must, under our former practice, have been subjected by filing a creditor's bill, or by invoking the aid of a Court of Equity in some manner, a writ of *mandamus* would not, from its very nature, be the appropriate remedy. *Rand v. Rand,* 78 N. C., 12; *Coates v. Wilkes,* 92 N. C., 376; *Hinsdale v. Sinclair,* 83 N. C., 338.

In *Coates v. Wilkes, supra, Justice Merrimon* says that proceedings supplemental to execution are "a substitute for, and take the place of,

the methods granting relief in equity in favor of a judgment creditor as against his judgment debtor, after he had exhausted his remedy at law by the ordinary process of execution," upon a return of *nulla bona.*

In *Hinsdale v. Sinclair, supra,* the rule is laid down that the affidavit in such proceeding must show three facts: (1) a want of known property liable to execution; (2) want of an equitable interest subject to the lien of the judgment; (3) existence of property unaffected by lien of the judgment, and not subject to levy. As already intimated by us, a writ of *mandamus* issues as a matter of course on application of the judgment creditor of a county, because no execution can issue against the county, and no lien attaches upon its real estate used for corporate purposes, according to the ruling of this Court, and, above all, because a county is presumed to hold only property necessary for the discharge of its public functions, and its revenues, which are applicable, primarily, to the payment of its current expenses.

It seems, therefore, that where a judgment creditor shows (1) that a writ of *mandamus,* which was granted to him as a legal remedy in lieu of execution, has been answered by a county and proven unavailable, because the county commissioners say that they have levied a tax (607) up to the Constitutional limit, and the whole fund arising from the levy is necessary to meet the legitimate current expenses of the corporation; (2) that the county holds real estate not used or needful for the proper discharge of its public functions, or any other property not necessary or useful for corporate purposes, and especially where, for any reason, such property could not have been subjected to the payment of the debt except by means of an equitable *fi. fa.* where legal and equitable remedies were administered separately, if it had been held, in the same plight and condition, by an individual. In *Gooch v. McGee,* 83 N. C., 64, *Chief Justice Smith,* in discussing the liability of a public corporation, quotes, with approval, the language of *Woodard, J.,* in *R. R. v. Caldwell,* 39 Penn., 337, as follows: "Lands bought, and not dedicated to corporate purposes, are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff in the same manner, and with the same effect, as the land of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase, or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale, and this on the ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than a creditor by legal process, but the exemption rests on the public interests involved in the corporation." So that it appears that precisely the same reason is assigned for protecting land from a

separate sale under execution, and for treating as a part of the franchise land necessary and used for corporate purposes by a railroad company, as is given for exempting property devoted to public purposes by a municipal corporation. It was because of the necessity of sustaining this principle for the convenience of the public that this Court,
(608) in the case last cited, in effect, overruled *S. v. Rives,* 27 N. C., 297. In section 707 (7) of The Code, authority is now given to the board of county commissioners "to purchase land at any execution sale where it shall be deemed expedient to do so, to secure a debt due the county"; and it is further provided that "the deed shall be made to the board of commissioners, and the board may, in its discretion, sell any land so purchased." Suppose that the board of commissioners should buy and improve town or city property, collect the rents, and hold it to await the improvement of the town, and meantime evade the payment of outstanding judgments against the county, on the ground that the tax levied up to the limit would not yield more than a sufficient revenue to support the county government. Surely, in that case, the judgment creditor could reach and subject such real estate, in some other way, if not by sale under execution. But in our case the plaintiff omits to refer us, in his complaint, to the private law which permitted the county of Craven to subscribe to the capital stock of the Atlantic & North Carolina Railroad Company, and, therefore, we are not presumed to know whether the county authorities have the power to sell the railroad stock, or whether the statute subjects the stock to any lien, such as to require the presence of any other parties interested in the proposed relief, or possibly to preclude the court from granting it. The authority to subscribe to the capital stock of a corporation is not one of the powers usually granted to counties, and it may be that the Legislature encumbered the stock in some way, or declared that it should be held, and any dividends arising from it must be devoted to some corporate purpose. The plaintiff ought to have described the nature of the property which he wishes to subject so fully that the court could understand the precise authority given to the county, and how the shares of stock are
(609) held. Having undertaken to show his right to the remedy asked, or to some relief, he should have set forth in his complaint such allegations of fact as, if admitted or proven, would have established his right to have the stock sold, and, as between himself and defendant, to have the proceeds applied to the discharge of his judgment. The plaintiff having failed to do this, we think there was no error in holding that the complaint did not state facts sufficient to constitute a cause of action. It is not necessary to decide whether relief could be granted on proper allegation in this action in any contingency.

Affirmed.

Cited: Durham v. R. R., 108 N. C., 401; *Bass v. Nav. Co.,* 111 N. C., 446, 448; *Pipe Co. v. Howland, ib.,* 632, 635; *S. v. Womble,* 112 N. C., 864; *Logan v. R. R.,* 116 N. C., 944; *Vaughn v. Comrs.,* 118 N. C., 639; *Wright v. Bond,* 127 N. C., 40; *Martin v. Clark,* 135 N. C., 179; *Hill v. R. R.,* 143 N. C., 597.

NATHAN McMILLAN v. THE SCHOOL COMMITTEE OF DISTRICT No. 4 (CROATAN).

Mandamus—Public Schools—Constitution—Separate Schools for Each Race—Croatan Indians—Slaves—Negroes—"Generation"—Board of Education—School Committee.

1. The Legislature is not prohibited by the Constitution from providing separate schools for the Croatan Indians, and the act of 1885, ch. 51, and the act of 1889, amendatory thereof, providing such schools, are valid.

2. The Legislature has power, outside of the constitutional grant, to classify pupils according to race.

3. Where it was admitted that the plaintiff, whose children were excluded from school, was a slave before 1865, the charge of the court below that he was presumed to be a negro is correct.

4. "Generation," as used by the statute, means a single succession of living beings in natural descent; and if, by tracing back four successive generations, through father or mother, we reach a negro ancestor of the plaintiff's children, they are excluded from the Croatan schools by the act establishing them.

5. The order of the Board of Education that plaintiff's children be admitted into the Croatan school furnishes no warrant for such admission when contrary to law.

6. Where the plaintiff, by *mandamus,* attempted to compel the admission of his children into a public school established for the Croatan Indians, there was evidence that plaintiff's father was a white man, and his wife, the mother of the children, was a Croatan Indian, and that the plaintiff was a slave before 1865. The plaintiff asked the court to charge, in effect, that, if the jury believed the evidence, their answer should be that the plaintiff's children were not negroes. The court refused, but charged that, if the plaintiff was a slave, there was a presumption that he was a negro: *Held,* no error.

MANDAMUS before *Shipp, J.,* at Fall Term, 1889, of ROBESON, (610) to compel the admission of plaintiff's children into a school taught in what was known as School District No. 4.

Plaintiff offered in evidence the following paper, which was excepted to by defendants, but allowed by the court:

It is ordered by the board of education that Nathan McMillan be assigned to Croatan District No. 4, and the committee of said district are hereby directed to receive his children into the public schools of said district. By order of the board of education.

This 3 September, 1888. J. A. McALLISTER, Clerk.

The following issues were submitted to the jury:

1. Are plaintiff's children Croatan Indians? Answer: "No."

2. Were plaintiff's children included in the census taken under
(611) the act of 1885? Answer: "No."

3. Are plaintiff's children of negro blood within the fourth degree? Answer: "Yes."

4. Did the board of education of Robeson County order plain-
(612) tiff's children to be received in said school? Answer: "Yes."

The plaintiff asked the following instruction:

"That if the jury believe the evidence as to the children of Nathan McMillan being negroes within the fourth generation, their answer should be in the negative as to the third issue."

The court declined to give the instruction, except in so far as it was given in the charge, and charged the jury as follows:

"That it being admitted that plaintiff himself was not a Croatan Indian, but only his wife, they must answer the first issue 'No.' They must be guided by the evidence as to the second issue, and that the main issue was the third, and they must determine from the whole testimony as to the third issue. If they believe from the testimony that plaintiff was a slave, the law would raise a presumption that he was a negro, it being a matter of common knowledge that none but negroes were slaves in this country. In order to find that the children of plaintiff are of negro blood within the fourth degree, they should consider that from the children to the father, the plaintiff, is one degree; from plaintiff to parent would be the second degree; from children to grandparent would be the third degree, and from children to great-grandparent would be the fourth degree; and if they believe from the evidence that plaintiff's father was a white man, they must also be satisfied from the evidence that plaintiff's mother was a negro, in order to make plaintiff's children negroes within the fourth degree, and thus within the prohibition of the Croatan act, above mentioned. If, from the whole testimony, they are satisfied that plaintiff's children are negroes within the fourth degree, they will answer the third issue 'Yes'; otherwise, 'No';
(613) they will answer the fourth issue 'Yes.'"

Plaintiff moved for a new trial, for refusal to give the instruction asked. Motion denied, and plaintiff excepted. Motion for judgment on fourth issue *non obstante veredicto*. Motion denied. Plaintiff excepted, and appealed from the judgment rendered.

T. A. McNeill and J. D. Shaw for plaintiff.
William Black for defendants.

AVERY, J., after stating the case: We think the Legislature was not prohibited by the Constitution from providing separate schools, to be governed by committees of their own race and taught by teachers selected by such committees, for those persons now residing in Robeson County who claim to be descendants of the friendly tribe of Indians known as Croatans, and that chapter 51, Laws 1885, as amended by chapter 60, Laws 1889 (which amendatory act excludes all negroes "to the fourth generation" from the privilege of attending said schools), is valid and should be enforced.

If it had not been provided in section 2, Article IX of the Constitution that the children of the white race should be taught in schools separate and distinct from those in which children of the colored race should receive instruction, but that there should be no discrimination in favor of, or to the prejudice of, either race, the same end might have been attained by enacting a statute embodying similar provisions, just as intermarriages between whites and negroes, or Indians, "to the third generation," were prohibited by Laws 1871-72, ch. 193, sec. 2 (Bat. Rev., ch. 69, sec. 2), which was enforced before the Convention of 1875 provided by section 8, Article XIV of the Constitution that "all marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive," should be forever prohibited. *S. v. Hairston,* 63 N. C., 451; *S. v. Kennedy,* 76 N. C., 251; *S. v. Watters,* 25 N. C., 455; *S. v. Reinhardt,* 63 N. C., 547. The right of the Legislature to enact such laws, in (614) pursuance of the Constitution, as shall give to the children of the white and colored races equal educational advantages, but in separate schools, has been recognized and declared by this Court. *Puitt v. Comrs.,* 94 N. C., 709. Railroad companies may assign to white and colored passengers different coaches, as innkeepers may assign them separate apartments, provided they furnish equal accommodations to both. *Britton v. R. R.,* 88 N. C., 536; *S. v. Steele,* 106 N. C., 782. The laws under which the Croatan schools were started gave to the children of that race equal advantages with the children of the colored race, requiring that the census should be taken in the same way and the school money divided according to numbers, for the benefit of the children of the

three instead of two races. It was in evidence, and admitted, that the plaintiff's children resided within a school district in which there was a school for negro children, and they would have been admitted into that school had they applied. The plaintiff is not calling in question the power of the Legislature to provide separate schools for three distinct races, but, on the contrary, he insists only that his children have been classified improperly and have not been given the opportunity to associate with others of the same caste in the Croatan school, his home being also within the geographical limits of their district. Where the statute of New York allowed the board of edueation to adopt regulations for the admission of pupils, so that they assigned all to schools affording equal advantages, and a colored man sought by *mandamus* to compel the admission of his children to a school where white children were taught, instead of that for colored children, to which they were assigned by the board, the two schools affording equal advantages, the Supreme Court of New York refused the *mandamus,* among other reasons, because a citizen was not allowed to select the school which his children should attend, in the face of a reasonable regulation made by the board
(615) of authority of law. *Dietz v. Easton,* 13 Abbott Pr. R., 164 and 165.

In the case of *Games v. McCann,* 21 Ohio, 210, *Judge Day,* delivering the opinion of the court, says: "Equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

It is clear that if the Legislature could give, by law, the power to an educational board to classify pupils according to race, as well as according to sex, the law itself could be so framed as to indicate in general terms upon what principle a board or committee should proceed in making a classification, and to secure equal advantages for each class. It is evident that there was a just division of the school fund among the three classes, that schoolhouses were built and teachers employed to open schools in them in reach of each class. The law was constitutional, and the board of education, with the coöperation of the school committee, seem to have acted fairly and justly in carrying out its provisions.

But the plaintiff insisted that, in some aspects, if not in any phase of the evidence, his children were shown to be Croatans and entitled to admission into their schools. "Generation," as used in the statute, means "a single succession of living beings in natural descent." If, by tracing

back four successive generations, through father or mother, we reach a negro ancestor of the plaintiff's children, then they are excluded, by the terms of the act of 1889, from the schools established for the persons whose claim to descent from the Croatan Indians has been (616) recognized by the Legislature. The contention of counsel that "generation" is used in the sense of degree cannot be sustained. It is true that jurors related within the ninth degree to one of the parties were declared subject to challenge, as at common law, in this State. *S. v. Perry,* 44 N. C., 330. But as the word "generation" has no technical meaning, we must consider it as used in the sense of a succession—its ordinary import—rather than of a degree of removal in computing descents. It being admitted that the plaintiff, whose children were excluded, was a slave before the year 1865, we think that the charge that he was presumed to be a negro was unquestionably correct. While they were in bondage there was no such thing known among the slaves as computing degrees of removal from white ancestors. For all purposes, the law regarded them all as negroes. If the plaintiff's children would be entitled to enter the separate schools of the Croatans upon any proof, in the face of the admission that he himself was a slave, the burden was on him to furnish the evidence, and he cannot complain of the ruling of the court which gave him the opportunity to do so. The jury found, under proper instructions, that the children of the plaintiff were not Croatans, that they were not included in the enumeration of the Croatans in taking the census under the act, and that they were, in fact, negroes within the fourth generation. But in response to the fourth issue, they found that, though they were negroes, the board of education issued an order that they should be admitted into the Croatan school, and the plaintiff assigns as error the refusal of the court below to render judgment in his favor upon the verdict. We have held, for reasons already given, that the Legislature had the power to pass an act classifying schools according to race, to provide separate schools for the Croatans, and to prohibit the admission into them of any negro "to the fourth generation." The board of education might make (617) regulations for the government of schools if the law gave the power to do so, but they were not authorized to override the law and compel the committee, in the face of the prohibition of the act of 1889, to admit children of negro blood "to the fourth generation" into the Croatan school. It seems that the General Assembly, after the recitation contained in the preamble to the act of 1885 of the claim of the persons living in Robeson County, concluded to recognize that claim and act upon it. The plaintiff himself insists that his children be allowed, as Croatans, to attend the separate schools provided for by the

acts of 1885 and 1889. We will not consider the testimony tending to show that those persons (the Croatans) were, in fact, of negro descent or were formerly called mulattoes.

For the reasons given, we think there was no error in the charge and rulings of his Honor upon which the assignment of error was predicated, and the judgment must be

Affirmed.

Cited: Hare v. Board of Education, 113 N. C., 15.

JAMES M. TREXLER, ADMR., v. LOUISA HOLLER ET AL.

Will—Construction—Fee Simple—Contingency—Qualifying a Fee-simple Estate.

A testatrix left certain property to one L. H., her sister, with provision that, should she die without lawful issue, the property so devised and bequeathed to her should revert back to her estate: *Held,* (1) that L. H. took a fee-simple estate, defeasible upon dying without issue; (2) the testatrix contemplated the happening of such contingency after her own death.

(618) ACTION for construction of will, tried at May Term, 1890, of ROWAN, by *Shipp, J.*

The testatrix of the plaintiff administrator. with the will annexed, among other provisions in her will, provided as follows:

"1. I will and bequeath to my sister, Louisa Holler, my red bedstead and bedclothing.

"3. I will and bequeath all the balance of my estate of every sort and kind to my brother, Godfrey Bescherer, Elizabeth Trexler, Margaret Ellis, Evelia Wilson, Christina Jackery, Louisa Holler, and the children of my brother John (as one share). This bequeath is to include money, notes, and everything else, to them, their heirs and assigns, forever, subject, nevertheless, to the following restrictions, to wit: That part or parts of my estate willed to my sisters, Elizabeth Trexler, Margaret Ellis, and Christina Jackery, to be to their entire use and control, or to the control of such persons as may be appointed by them, and not, in any event, to be subject to the use or control, or to the payment of the debts, of their husbands."

In a first codicil to this will she further provides as follows:

"Whereas, I, Sophia Berscherer, have made my last will and testament, in writing, bearing date 22 July, 1869, and have thereby made sundry devises and bequests, according to the then existing circumstances, but which circumstances having been materially changed, I do, by this, my writing, which I do hereby declare to be a codicil to my said will, to be taken and construed as part thereof, will and direct that in item 3 of said will the following changes and additions shall be made, so as to read, after the words 'restrictions, to wit': That part or parts of my estate willed to my sisters, Elizabeth Trexler, Margaret Ellis, Christina Jackery, Evelia Wilson, and Louisa Holler, to be to their entire use, behoof and control, or to be under the control of such persons as may be appointed by them, and not, in any event, to be subject to the use or control, or to the payment of the debts of their husbands, now or hereafter, by marriage; and should my sister, Louisa (619) Holler, die without lawful issue, then and in that event, it is my will and desire that the part or parts of my estate hereby willed to her shall revert to my estate, to be divided equally among the other legatees heretofore named in said will."

In a second codicil it is further provided, as follows:

"Whereas the executor named in the foregoing will, viz., Thomas E. Brown, has moved to Texas, I do now, in this my codicil, to be taken as part of my will, revoke said appointment, and in lieu and instead thereof do nominate, constitute and appoint Moses L. Holmes as my only executor of this, my last will and testament; and it is further my will and desire that, Margaret Ellis having become insane, wherever, in the foregoing will, bequests and devises have hitherto been made by me to Margaret Ellis and her children, that the disposition of said bequests and devises shall be entirely changed, so as to read, to Moses L. Holmes as trustee of Margaret Ellis, for her sole benefit and use and behoof during her natural life, and at her death said bequests and devises shall go to my sister Christina and her children and my brother John and his children, share and share equally and alike, and instead of giving any interest whatever in said devises and bequests to the children of Margaret Ellis, either directly or remotely, I do hereby bequeath to each of said children, Mary and James, the sum of $50 each, to be paid by my executor or his representative, out of my personal estate."

It is stated and agreed in the case stated on appeal:

"3. That the whole of said estate is, and will be, distributable in money to the legatees named in said will, of which the defendant Louisa Holler is entitled to a share of one-seventh part, amounting to about $1,200, when said estate shall be fully settled up.

"4. That the defendant Louisa Holler is the wife of the defendant George Holler and is about 52 years old and has never borne children.

(620) "5. That the defendant Louisa Holler claims that, under the provisions of said will, she is entitled to one-seventh part of said estate, absolutely, without any condition or restriction whatever.

"6. That the plaintiff administrator is advised and believes that said defendant is only entitled to receive the interest on the moneys aforesaid during her life, and that this court should appoint a trustee to effectuate said trust for her benefit during life, and for the benefit of the legatees in remainder in the event of her dying without leaving lawful issue, and he demands judgment accordingly."

The defendant Louisa Holler contended that under the said will she took an absolute estate as one of the legatees; and the administrator, that Louisa took only a fee-simple estate, defeasible upon her dying without leaving issue, and that a trustee should be appointed to hold the estate bequeathed to her, to pay her the interest thereon during her life, and after her death, in case she died without issue, to pay the principal to certain persons mentioned in said will.

His Honor was of opinion that Louisa Holler took a fee-simple estate, defeasible upon her dying without issue, and gave judgment accordingly, and appointed a trustee.

From this judgment Louisa Holler and her husband, George W. Holler, appealed.

T. F. Kluttz (by brief) for plaintiff.
Craig & Clement and Charles Price (by brief) for defendants.

MERRIMON, C. J., after stating the facts: The intention of the testatrix must prevail, and that intention must be gathered and ascertained from a just and reasonable interpretation of the will itself, giving due weight and importance to its several specific provisions, and these as affected or modified by other parts of it, if there be such, bearing
(621) more or less upon the same. Moreover, the interpretation must be made in the light of the rules of interpretation and principles of law applicable, the purpose being always to ascertain and effectuate the intention of the testator.

We are of opinion that the testatrix in this case did not intend that her sister, Louisa Holler, should take the property bequeathed to her absolutely if she should survive the testatrix. She took the property absolutely, her title to be defeasible, however, if she should die without lawful issue, whenever this might be, after the death of the testatrix. It might be otherwise, and, as contended by the appellants, if the clause of the will simply prescribed, "and should my sister Louisa Holler die without lawful issue, then and in that event it is my will and desire . . . (that the share I gave her is) to be divided equally among the

other legatees heretofore named in the said will." But the clause contains the other significant and important words, "that the part, or parts, of my estate hereby willed to her shall revert to my estate," etc. These words certainly imply that the testatrix contemplated that her sister should have the property in her possession and use the same as her own, and, in the contingency specified, it should "revert to my (her) estate, to be divided," etc. Clearly, it was not intended that Louisa should have the property in her possession and use the same in the lifetime of the testatrix. Then, if she had died in the lifetime of the testatrix, how could the "part or parts" of the estate so bequeathed revert as and for the purpose intended? Obviously, it could not so revert. In the absence of any provision in the will to the contrary, it must follow that the testatrix had in view, and reference to, the death of her sister Louisa, the *feme* appellant, after her own death and after her will should take effect. Moreover, the clause in question contemplates "that part or parts of the estate" that should so revert should be at once divided as directed, on the happening of the death of Louisa without lawful issue; but this could not be done in the lifetime of the testatrix; she must, (622) therefore, have intended that such division should take place on the happening of the contingency specified, after her own death. Such purpose further appears, in that the testatrix provides, in the first *codicil,* that the bequests to her sisters, including her sister Louisa, should "be to their entire use, behoof and control, or to be under the control of such persons as may be appointed by them, and not in any event to be subject to the use or control or to the payment of the debts of their husbands, now or hereafter, by marriage." This contemplates the use and control of the property after the will took effect and after the death of the testatrix.

The counsel for the appellants contended that if the testatrix intended that her sister Louisa should have only the use of the property bequeathed to her, she would have provided a trustee for her, as she did in the second *codicil* for her insane sister. This argument is not sound. She had a special reason for appointing the trustee for her insane sister—her insanity. This did not at all apply to Louisa. *Hilliard v. Kearney,* 45 N. C., 231; *Davis v. Parker,* 69 N. C., 275; *Murchison v. Whitted,* 87 N. C., 465; *Price v. Johnson,* 90 N. C., 593; *Buchanan v. Buchanan,* 99 N. C., 308; *Williams v. Lewis,* 100 N. C., 143.

Affirmed.

Cited: Kornegay v. Morris, 122 N. C., 205; *Whitfield v. Garris,* 134 N. C., 33; *Rees v. Williams,* 165 N. C., 208.

(623)

DAVID D. SHAVER v. G. W. HUNTLEY ET AL.

Removal of Causes—Proper Venue—The Code—False Imprisonment—Public Officers—Official Duty.

1. In an action for damages for false imprisonment, brought in the county of Rowan against certain public officers of the county of Anson, the defendants moved to have the action removed to the latter county, on the grounds that defendants were public officers, acting in their official capacity; that there were a number of material witnesses who could not attend trial on account of the distance and their poverty, and defendants were unable to pay their expenses: *Held*, (1) that the defendants are entitled to the removal allowed under The Code, sec. 191, unless they have lost their rights by failure to comply therewith; (2) that the making of their motion for removal before the expiration of the time allowed to file answer, and before answer filed, was in apt time; (3) the defendants were allowed any defenses they might have had, had there been no extension of time.

2. *Quære:* Whether defendants could not have had their demands passed upon before the Fall Term, and whether or not it was the duty of the court to find how the fact was, and determine the question of removal upon the uncontroverted affidavit of defendants.

APPEAL from *Bynum, J.*, refusing to remove this cause from Rowan to Anson, at August Term, 1890, of ROWAN.

The summons was issued and duly executed, returnable to the Spring Term, 1890, of Rowan. The record shows that at the return term (May Term, 1890), before *Shipp, J.*, the following entry was made: "Continued. Thirty days allowed plaintiff to file complaint, and thirty days thereafter to allow defendants to answer as of this term."

On 2 June, 1890 (within the time allowed), the plaintiff filed a verified complaint as of May Term, 1890, alleging, in substance, that
(624) in November, 1889, near the town of Wadesboro, in the county of Anson, while the plaintiff was in camp with his wagon and team, the defendants, with divers other persons unknown to the plaintiff, did make an assault upon him and beat and ill-treat him, and, without any warrant or other legal process, did violently seize, arrest, imprison and detain the plaintiff without any reasonable or probable cause, and, in the night-time, did detain and carry this plaintiff into the town of Wadesboro, and, without allowing him the benefit of a trial, and refusing to allow him to give bail for his appearance the next morning, against his protest, did incarcerate this plaintiff in the common jail of Anson County, where he remained for the space of about twenty-four hours—all of which acts were committed by the defendants, maliciously

and without probable cause, and were contrary to law and against the protest of plaintiff; that plaintiff was taken before a justice of the peace the next morning, charged, as he was informed, without probable cause, and were contrary to law and against license, and, upon a hearing, plaintiff was discharged and released from custody for the want of probable cause; that by reason of said assault, false imprisonment and unlawful acts of the defendants, the plaintiff has been injured, and he demands $10,000 damages, and costs, etc.

On 30 June, 1890 (within the time allowed), the defendants filed a verified answer to the complaint, denying its material allegation, alleging that they were public officers, acting in what they did under legal authority, and other matter in bar of the plaintiff's right to recover. They further say that this action is brought against said public officers, and other defendants who aided them, on account of acts done by virtue of their said office, as aforesaid, and the same is improperly brought in the county of Rowan, and should be removed to the county of Anson. There are a large number of witnesses in the case, all of whom, except the plaintiff and Hinson, reside in Anson County. (625)

Wherefore, defendants ask judgment:

1. For removal of cause to Anson County.

2. That the action be dismissed and they recover their costs.

Before the said answer was filed, to wit, on 24 June, 1890, the defendants served the following notice on the plaintiff:

"You are hereby notified that we will make a motion before his Honor, Judge Bynum, at the next term of the Superior Court, . . . to remove the above entitled cause from the county of Rowan to the county of Anson for trial, and we hereby demand said removal upon the ground and for the reason that said action has not been brought in the proper county, but should have been brought in the county of Anson."

The defendants (five in number) also say, upon affidavits, "that there are no less than ten witnesses in this cause whose testimony is material and important to the trial thereof, all of whom reside in Anson County and are persons without the necessary means of attending a court at so great a distance. All the witnesses to the transaction which is made the subject of this action reside in said county, except the plaintiffs in this and the action of L. M. Hinson and J. J. Lawrence, one of the defendants; . . . that all of the defendants are men of very small means and would be unable to secure the attendance of witnesses at such a distance, and affiants aver that the convenience of witnesses and the ends of justice would be promoted by a change of the place of trial of this action to the county of Anson."

The following is a statement of the case on appeal:

(626) "Before the time of answering expired, the defendants demanded, in writing, that the case be removed to Anson County, upon the ground that it had not been brought in the proper county.

"At August Term, 1890, of Rowan, the case was heard by Bynum, J., upon the motion of defendants for the removal of the cause to Anson County, upon the ground that the action was brought against public officers and others who, by their command, had aided them for acts done by virtue of their said office, all of whom resided at the time in Anson County.

"In support of this motion the defendants read their answer as an affidavit, which set forth the fact that the defendant J. C. Parsons was an acting justice of the peace of Anson County, and the defendant C. T. Coppedge, the marshal, or constable, of the town of Wadesboro, and that the plaintiff was arrested by virtue of a warrant issued by said justice and executed by said marshal, or constable, and that the other defendants who were present acted in aid and by assent of said officers, a copy of said warrant being attached to the answer in the cause, and that this action is brought against the defendants on account of acts done by virtue of their said office as justice of the peace and constable, and against the other defendants for aiding and assisting therein in arresting and detaining the plaintiff as aforesaid.

"The plaintiff filed no counter-affidavit denying these allegations of the defendants, but insisted that the action was brought against them as individuals and not as public officers, as appears from his complaint."

His Honor denied the motion and gave judgment accordingly, from which the defendants appealed to the Supreme Court.

(627) *No counsel for plaintiff.*
R. E. Little for defendants.

DAVIS, J., after stating the facts: The Code, sec. 191 (2), provides that actions "against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer," must be tried in the county where the cause, or some part thereof, arises. Section 195 provides that "if the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demands, in writing, that the trial be had in the proper county," etc. The allegations of the defendants, upon which they base their demand for a removal of the cause to Anson County for trial, are not denied, and must, therefore, be taken as true, and they are entitled, as a matter

of right, to the removal, under sections 191 (2) and 195 of The Code, unless they have lost that right by the failure to comply with the requirement of the latter section, or waived it by *answering* before demanding the removal.

It is well settled that where the court has jurisdiction of the subject-matter of an action, and it is brought in the wrong county, the objection to the venue must be taken in apt time, or it will be deemed to have been waived. It must be taken not only "before the time of answering expires," as required by section 195 of The Code, but it must be taken *in limine* and before answering to the merits. *County Board v. State Board,* 106 N. C., 81, and cases there cited.

Did the defendants, in the present case, take the objection to the venue in apt time, or did they waive their objection by answering to the merits before the demand in writing was made? By the order made at May Term the plaintiff was allowed thirty days to file his complaint, and the defendants were allowed thirty days thereafter to file their answer, and these were to be filed "as of May Term." The plaintiff filed his complaint on 2 June; on 24 June, before the time for answer- (628) ing had expired, and *before* their answer was filed, they filed their demand for removal, and gave notice thereof to the plaintiff, and in their answer, filed 30 June, they demand judgment "for removal of cause to Anson County." The answer was filed 30 June *as of* May Term preceding, and the demand was filed the 24th, before the answer, and before the time of pleading had expired, and as the defendants, of course, could not file their answer till after the complaint was filed, though it was filed as of May Term, so, from the very nature of the case, they had the right to file their demand for removal, before answering, as they did, and as of May Term. The thirty days time to file the complaint, and thirty days thereafter to answer, must (fairly construed) mean that the defendants were to be allowed that time to make any defense or objection to the complaint which they might have done if there had been no extension of the time to file complaint and answer as of May Term. If this be not so, the defendants have lost a right without any fault or neglect of their own, and which they could not have prevented by any reasonable diligence or foresight.

We think that this case is clearly distinguishable from *County Board v. State Board,* 106 N. C. In that case, it is true the motion to remove was made before the lapse of time allowed to answer had expired, but it was made after the answer was filed and the defendant had pleaded to the merits, and, besides, the demand was not in writing; in this case, while it is true the motion was not heard till the Fall Term, yet it was made in writing *before* the answer was filed, in *fact,* and before the time to answer expired, and, from the nature of the case, it must be

(629) considered as having been made as of May Term, before the answer was filed, and *continued* with the cause, and, to rebut any presumption of waiver by answering within the time allowed. Not only is the demand made in writing and notice thereof given before the answer is filed, but, in the answer itself, the objection is insisted upon, and objection and demand for removal appearing in the answer, "we might regard the answer in this case as such an application," as was said in *Rankin v. Allison,* 64 N. C., 674.

The plaintiff "insisted that the action was brought against the defendants as individuals, and not as public officers, as appears from the complaint," and this seems to have been the ground upon which his Honor denied the motion. This, we think, was an error, for, if made properly to appear, by affidavit or otherwise, that the defendants came within the provision of section 191 (2) of The Code, they were entitled to the order of removal, if demanded in apt time, which, under the circumstances of this case, we think was done.

The record presents other interesting questions, as whether "the courts, being at all times open for the transaction of all business within their jurisdiction, except the trial of issues of fact, requiring a jury," the defendants might not have had their demand heard and passed upon before the Fall Term, and whether it was not the duty of his Honor to find how the fact was, and determine upon the uncontroverted affidavits of the defendants, whether they were not entitled to the removal under The Code, sec. 195, subsec. 2, but, for the reasons given, we think the defendants were entitled to the order of removal, and we need not consider these questions.

Reversed.

Cited: Riley v. Pelletier, 134 N. C., 319; *McArthur v. Griffith,* 147 N. C., 550; *Lumber Co. v. Arnold,* 179 N. C., 276.

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(630)

W. L. SHERRILL ET AL. v. MARY CONNOR.

Waste—Liability of Life-tenant for Permissive Waste—Statute of Limitations—Permanent Improvements as a Set-off to Damages for Waste.

1. Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted that constitute such injury differ according to the condition of the country.

2. The clearing of land by life tenant is waste in England, but in this country it is left for the jury to say whether the life tenant has dealt with the land in a husbandmanlike manner and has observed the proportions of cleared and wood land as a prudent owner in fee would in the management of his own land.

3 A life tenant is liable for permissive waste, under The Code, secs. 624 to 630, if, through his neglect or wantonness, permanent injury is done to the inheritance.

4. But where it appears that the husband of the tenant in dower, and the ancestor of the plaintiffs, died in 1866, before his farm was accommodated to the changed condition of the country, and left a farm containing about 2,000 acres and lying in three counties, with barns and outhouses built, where the slaves engaged in the cultivation of the farm, and the stock necessary for the support of the slaves and family were provided for and housed near his dwelling, the courts will take notice of the change, and when tenement houses dotted all over the farm are substituted for the negro cabins located near the dwelling, will leave the jury to determine whether a prudent owner of the fee would, under the circumstances, have incurred the expense of keeping in repair a barn used originally for the protection of stock needed for the whole farm: *Held*, that it was error, in such case, to instruct the jury that the tenant in dower was liable for permissive waste in suffering such barn to fall into decay.

5. It was error, in such case, where damages were asked for the time elapsing from the year 1866 to 1885, when the action was brought, to instruct the jury that no statute of limitations applied.

6. Those of the plaintiffs who were not under disability were barred by the statute from recovering damages for waste permitted more than three years before the action was brought, but damages might be estimated for the whole time from the allotment of dower for the purpose of using the damage as set-off against permanent improvements placed on the land by the life tenant during the same period.

7. The jury could not allow damages for prospective waste, but damage can be assessed only up to the time of trial.

8. If the life-tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action.

APPEAL at September Term, 1890, of LINCOLN, from *Brown, J.* (631)

The complaint shows that Henry W. Connor, late a resident of said county of Lincoln, died in said county intestate on 15 January, 1866, leaving the defendant Mary L. Connor, his widow, seized and possessed of a large amount of real estate, a part of which was duly allotted and set apart to said defendant, his widow, on her dower; that the plaintiffs, one of whom was a minor, are the reversioners, claiming under the will of H. W. Connor, deceased, defendant's husband at the time of his death; that the plantation, at the time the defendant became possessed thereof as aforesaid as her dower, was in good condition and

repair, was very valuable, and was estimated by the jury who allotted it to her as dower, and was reasonably worth $25,000, and that the defendant has so negligently and wrongfully wasted and damaged the same, and permitted the same to become wasted and damaged, as hereinbefore alleged, and by cutting and destroying and carrying away valuable timber growing thereon, and by failing and neglecting to provide proper ditches and drainage of said land, and by her negligent and improper mode of cultivating the same, and by permitting and directing clearing original timbered land which was not needed for cultivation, and by negligently and wrongfully damaging, destroying and permitting to be damaged and destroyed the dwelling-house, outhouses and fences situated thereon, and by her negligent and willful failure
(632) to use the said plantation in a proper and prudent manner, the same has been thereby greatly and permanently injured, and the reversionary interests of the plaintiffs therein greatly and seriously damaged and reduced in value.

There was testimony tending to establish the facts alleged, and other testimony in rebuttal.

The other facts are set out in the opinion.

John Devereux, Jr., for plaintiffs.
W. A. Hoke for defendant.

AVERY, J. The defendant's first contention is that the judge below erred in instructing the jury that she was liable for permissive waste. Waste is defined to be a "spoiling or destroying of the estate with respect to buildings, wood or soil, to the lasting injury of the inheritance." The Statute of Marlbridge made the tenant in dower liable at common law for single damages, and that of Gloucester provided subsequently that he should forfeit the place wherein the waste was committed, and treble damages to him that had the inheritance. But we fail to find any express authority from the English courts to sustain the view that a tenant in dower is generally answerable for permissive as well as voluntary waste, though our own text-writers maintain that all life-tenants are liable, like insurers, for all injuries to buildings, whether purposely done or negligently permitted, except such as is caused by act of God or the public enemy, or by consent of the reversioner. While the courts of this country have generally adhered to the old definition of waste that we have already given, they have as uniformly maintained that what is permanent injury to the inheritance must, of necessity, depend often upon the circumstances attending a particular case, and that rules laid down in England for deter-
(633) mining what acts constituted waste there were not always appli-

cable in a new country, where the same acts might prove beneficial, instead of detrimental, to the inheritance. *Gaston, J.*, in *Shine v. Wilcox,* 21 N. C., 631, says: "While our ancestors brought over to this country the principles of common law, these were, nevertheless, accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste. . . . We also hold that the turning out of exhausted land is not waste." The Court, in that case, reached the conclusion that it was for the jury to determine whether, in clearing additional land or turning out that which had been exhausted, the tenant for life acted as a prudent owner in fee would have done had he been cultivating the land for a support or for profit. Substantially the same reasoning is adopted in other cases decided before and since that opinion was delivered, here and in other States. *Sheppard v. Sheppard,* 3 N. C., 382; *Ballentine v. Poyner, ib.,* 110; *Lambeth v. Warner,* 55 N. C., 165; *Crawley v. Timberlake,* 37 N. C., 460; *Davis v. Gilliam,* 40 N. C., 308; *Dorsey v. Moore,* 100 N. C., 44; *Hastings v. Crankleton,* 3 Yeates, 261; *Clemence v. Steere,* 53 Am. Dec., 621; *Wilson v. Edwards,* 2 Foster (N. H.), 517; *Harvey v. Harvey,* 41 Vt., 373.

In *King v. Miller,* 99 N. C., 583, the Court approved the charge of the judge below, in which he had said, in substance, that it must be left, in large measure, to the discretion of the jury to say whether the destruction of timber or giving up a cultivated field, and permitting bushes to grow and take possession of it, in the light of the evidence in the case, had proved a lasting injury to the inheritance. The late *Chief Justice* gave to the entire charge of the learned judge who tried the case the unqualified approval of this Court, and reiterated the general proposition that "while, in its essential elements, waste is the same in this country and in England, being a spoil or destruction in houses, trees and the like, to the permanent injury of the in- (634) heritance, yet, in respect to acts *which constitute waste,* the rule that governs in a new and unopened land, covered largely with primeval growth, must be very different."

We have quoted the language used in these cases by this Court, not because the point decided was identical with that involved here, but to show that the true test for determining what is waste, voluntary or permissive, is ordinarily involved in the question, whether in view of the evidence in a particular case, the act complained of was productive of permanent impairment of the value of the inheritance. In ascertaining whether a given act or omission falls within the rule, and subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed.

It appears from a review of the pleadings and evidence that Connor, the husband of the defendant and the ancestor through whom plaintiffs claim the reversion, was the owner of a large number of slaves and an extensive body of land, lying in two or three counties, and that his dwelling-house was the headquarters or base of his farming operations, and the place where his slaves resided in cottages ranged around his house, and the horses and mules necessary to work the farm, and cattle, hogs and sheep necessary to furnish food for the family and slaves were kept. This Court can take notice of the fact that the barns formerly used at such establishments have often, if not generally, proven too large to be kept up by an owner who survived the war long enough to accommodate himself to, and arrange his business in relation to the changed condition as to labor and alterations in methods consequent upon emancipation. When it became necessary to build tenement houses at suitable points for the accommodation of lessees of different sections of the estate, the negro cabin, the large smokehouse for
(635) the storage of bacon, and the large barn for the protection of all the stock needed, possibly to operate the entire farm, were no longer useful, and were often torn down, or suffered to fall into decay, and were replaced by others of a size suited to the new state of affairs. If it was proper when our ancestors were transplanted in America to look to the reason of the common law, and hold that under different conditions, in an undeveloped country, the clearing of land by a life-tenant should no longer be held *per se* to amount to waste, without regard to its effect upon the interest of a reversioner, there are reasons equally as potent for leaving a jury with explicit instructions to determine whether a prudent owner of the fee, if in possession in lieu of the life-tenant, would have suffered the barn or other building, unsuitable because of its great proportions to his wants in the new state of society, to have fallen into decay rather than incur the cost of repair.

Upon this subject the charge of his Honor was not sufficiently clear and specific, though it was, in the main, an elaborate and correct exposition of the law except as to this and one other point. The paragraph complained of was as follows: "It is the duty of the defendant to keep the barn and necessary and proper farmhouses and residence houses in an ordinary condition, and to repair them as much as is consistent with, and required by, the ordinary usage and care of such buildings. If the defendant sat by and permitted the roofs of the dwelling to rot, the barn to fall in, the outhouses to decay, etc., such negligence constitutes permissive waste, if thereby lasting injury is inflicted on the inheritance." Under this instruction, the jury must have inferred that the "barn, necessary outhouses and dwelling-house" must be kept, at all

events, in "ordinary repair," even if it were such a gigantic structure that a prudent owner of the whole fee would not have kept it in repair. The qualification appended to the next sentence does not affect this sentence, and the words, "as much as is consistent with, and required by, the ordinary usage and care of such buildings," convey the (636) idea that the repairs should have been of the kind usually made on such buildings, but that repairs to some extent must, in any event, have been made to the barn. The question whether the barn was such an one as a prudent owner in fee would have felt that he ought to keep up, in order to prevent permanent injury to the inheritance, was not passed upon by the jury.

In instructing the jury as to the amount of damage to be allowed for permissive waste, the judge left them to infer that, in any view of the evidence, some damage must be assessed for the failure to keep in repair "said buildings," without distinguishing between them. The qualification that they must ascertain what *lasting damage* had accrued would not, and could not, lead the jury to the conclusion that, if it were good husbandry or wise economy to allow a barn too large for the altered conditions growing out of a revolution to go to decay and substitute one in its stead, the defendant was not liable on account of failure to repair the barn. The accountability of life-tenants for permissive waste must, in the most favorable view of the law, subject them to no little hardship; but we think that the same rule should be applied as in alleged voluntary waste by cultivating meadow land, clearing woodland, or in abandoning the cultivation of land already cleared. The jury should be left, with more specific instruction, to say whether the omission complained of caused lasting injury to the inheritance.

Subject to the qualification that we have stated, we think that, under the law now in force (The Code, secs. 624 to 630), a tenant in dower or other life-tenant who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects herself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if she should meantime fail to pay the damage recovered of her. 4 Kent Com., (637) marg. p. 76; Minor's Inst., marg. p. 543; 1 Washburn on R. P., marg. p. 257; Scribner on Dower, 744; Lawson Rights and Rem., sec. 2856; *Clemence v. Steere, supra; Wilson v. Edwards, supra; Harvey v. Harvey, supra.*

We think that his Honor erred when he told the jury that, on account of the continuous character of the injury, no statute of limitations applied to the permissive waste. While we find no direct authority upon the question, the general principles governing the assessment of

damages, and the application of them in other analogous cases, lead us to a conclusion very different. If it be admitted (the demand being for the possession of the place wasted and damaged) that the action falls within the provision of section 267 (5) of The Code, still a recovery could only be had for the injury that may have arisen from want of repair up to the time of trial. When mulcted in damages by the verdict of a jury, a life-tenant is at liberty to pay the amount assessed, and provide against future liability by making repairs immediately. The jury cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. The tenant is at liberty to replace the roof, and restore the building to its original condition, and if he does so the decay is arrested, and the accruing liability ceases. If he chooses to allow the building to be injured still further by his inattention, and the value of the inheritance is thereby diminished, damage may be recovered (which the judge can increase three-fold) for the time elapsing since the former recovery in another action subsequently instituted.

We have held that a similar rule prevailed in the case of nuisances caused by flooding lands by water, and the principle laid down (638) by this Court is sustained by abundant authority. *Emery v. R. R.,* 102 N. C., 232; *Sherlock v. R. R.,* 115 Ind., 22; *Luther v. Winnisimmet Co.,* 9 Cush. (Mass.), 171; *R. R. v. Gilleland,* 94 Am. Dec., 97 (56 Penn. St., 445); Wood Lim., 371; Wood Mayne on Dam., 547.

It being apparent that, from the nature of the case, the liability for permissive waste to the same building may be the subject of separate action, where it is continued after one recovery, we can see no reason why his Honor should not have limited the extent of the recovery by the plaintiffs, laboring under no disability, such as prevented the statute from running, to three years before the action was brought. They had the right to bring an action and adjust liabilities at any time after dower was assigned in 1866. There would have been no greater inconvenience in ascertaining the exact status of a building at the time of assessment heretofore, if an action had been brought, than would arise should the plaintiffs, in future, find, on bringing another action, alleging that the defendant had suffered buildings to be injured still more for want of repair since the damage had been ascertained in this action.

But the jury would be at liberty to estimate the damage arising from permissive waste since the dower was first assigned for the purpose of a set-off against the value of permanent improvements placed on the land by the tenant in dower. If the damage for the time elapsing

between the allotment of dower and the bringing of this action should exceed the value of such permanent improvement, the plaintiffs, who are not barred, would be entitled to their proportionate share of the excess, while the other plaintiffs would be barred as to their ratable shares.

Error.

Cited: Jones v. Coffey, 109 N. C., 519; *Emry v. R. R., ib.,* 611; *Starnes v. Hill,* 112 N. C., 9; *Parker v. R. R.,* 119 N. C., 685; *Norris v. Laws,* 150 N. C., 605, 606, 608; *Thomas v. Thomas,* 166 N. C., 629, 630.

(639)

GEORGE W. BROWN ET AL. v. GEORGE RICKARD ET AL.

Action to Recover Land — Grant—Exception—Boundaries—Entries—Construction.

1. A grant to G. and E., conveying certain lands by definite metes and bounds, contained also these words: "Containing, in whole, 35,280 acres, 5,000 acres of which, being previously entered by citizens, is hereby reserved." Entry had been so previously made, definitely locating such reservation, and a grant thereon was subsequently made: *Held,* that the words, "hereby reserved," have the effect of excepting the 5,000 acres from the grant, and mean that such land should be left to be granted to the citizens who had entered it.

2. In an action for the recovery of the possession of such lands, a part of which was known and designated as the "Stevely lands," the plaintiff claimed title under a deed from the sheriff to land sold under execution against the "Estate Company." This corporation claimed under two deeds, each containing the following clause, describing the land conveyed to it: "The undivided shares of all the land remaining unsold and contained within the boundaries of the 30,080-acre tract granted by the State to G. and E.," etc. The *boundaries* in the grant referred to embraced 4,071 acres (the "Stevely lands") of the 5,000-acre exception—the *locus in quo: Held,* the exception in the grant applying to the boundaries as well as to the land itself, no part of the "Stevely lands" are conveyed in the deeds to the "Estate Company," and the plaintiffs acquired no interest in such lands by their purchase under execution.

APPEAL from *Merrimon, J.,* at Fall Term, 1890, of BURKE.

The material facts agreed upon and submitted to the Court are, in substance, these:

The defendants are in possession of the land designated in the pleadings as the "Stevely lands." The State issued its grant, dated 9 Decem-

ber, 1795, to James Greenlee, William Erwin and James Erwin, for 30,080 acres of land, described by appropriate metes and bounds, and this grant contained, in appropriate connection, a clause in these
(640) words: "Containing in the whole thirty-five thousand two hundred and eighty acres, five thousand acres of which, being *previously entered* by citizens, is hereby reserved."

The land so granted was afterwards duly sold on 28 July, 1882, by a trustee properly appointed and empowered to sell the same, and pass title thereto to Joshua Kidd, the purchaser.

Afterwards, on 16 August, 1884, said Kidd conveyed the fee in one undivided third of said land to the defendant William Battye.

Afterwards, on 3 January, 1885, he likewise conveyed another undivided third thereof to Christopher Robins and William Battye.

Afterwards, on 16 August, 1885, he likewise conveyed the other undivided third thereof to Christopher Robins.

On 14 April, 1885, the said Christopher Robins and his wife, and the said William Battye and his wife, likewise conveyed to Matthew Robins one undivided third of said land.

Afterwards, on 27 May, 1885, the said Christopher Robins and his wife likewise conveyed to the said Matthew Robins an undivided one-third of said land.

Afterwards, on 3 June, 1886, the said Matthew Robins and his wife likewise conveyed an undivided two-thirds of said land to "The North Carolina Estate Company (Limited)," a corporation, and this deed contained a clause, whereof the following is a copy—"hath bargained and sold, and by these presents doth bargain and sell and convey to the company, its successors and assigns, forever, the undivided two-third shares of all the land remaining unsold and contained within the boundary of the 30,080-acre tract of land granted by the State of North Carolina, in 1795, to James Greenlee, William and James Erwin, and situate in Burke County, State of North Carolina. Said tract of
(641) land is more particularly and fully described in the original State grant, and in a deed of conveyance from G. P. Erwin to Joshua Kidd, dated 28 July, 1882. The tract joins, on the south, the Branson heirs," etc.

Afterwards, on 4 June, 1886, the defendant, the said William Battye and his wife, likewise conveyed to said company an undivided one-third of said land, and the deed of conveyance contained a clause in the same words just above recited.

Afterwards, on 5 March, 1889, a judgment creditor of said company, whose judgment was duly docketed, sued out an execution thereupon; and on 6 May, 1889, the said land was sold as the property of this com-

pany, and on the next day the sheriff executed a deed therefor to the plaintiff G. W. Brown, the purchaser thereof. All the said deeds were duly proven and registered.

There was an *entry* of the land first above mentioned and designated as the "Stevely land" duly made on 27 May, 1795, before the said first mentioned grant was issued by the State, and the following is an exact copy of such entry:

"NORTH CAROLINA—Burke County.

27 May, 1795.

"Then surveyed for William Tate and Andrew Baird 5,120 acres of land on the waters of Henry's and Jacobs' rivers, beginning on a tall hickory on a ridge standing on a mass of earth thrown up by a tree's falling out of root, on or near Thomas Walker's line, and running east 20 poles, crossing Walker's Creek, whole distance 226 poles, to a small post oak on a ridge on or near George Walker's line; then south 30 degrees east 96 poles, crossing canebrake of Henry's River; then 332 poles to a fork of the same, whole distance 640 poles, to a (642) poplar and locust in a rich flat near a spring and near Jones' line; then south 20 degrees east 960 poles to a stake; then west 880 poles to a stake; then north to the beginning."

And thereafter said land was conveyed by grant from the State to said Tate and Baird on 8 July, 1796.

Of the land so entered and granted and designated as the "Stevely land," 4,071 acres are situate and lie within the boundary of the grant first above mentioned.

Before the several conveyances above mentioned to the said "The North Carolina Estate Company (Limited)," on 1 June, 1885, a commissioner, duly appointed and empowered in an action in the Superior Court of the county of Burke, sold the said "Stevely land," including that part thereof situate within the grant first above mentioned, and he executed a deed therefor to the defendants George Rickard, Christopher Robins, Matthew Robins and William Battye, the purchasers thereof, and afterwards Matthew Robins, on 4 January, 1888, conveyed to the defendant William Conforth an undivided one-fourth of said land.

The plaintiffs contended that, even granting that the *exception* in the grant first above mentioned under which they claim mediately is valid, still, and nevertheless, the two deeds, one executed by Matthew Robins and his wife and the other by William Battye and his wife, to the said "The North Carolina Estate Company (Limited)," embraced and operated so as to convey to it the title in fee to 4,071 acres of the "Stevely land," so situate within the boundary of the first mentioned grant.

(643) The Court declared its opinion to be that "The calls in the grant from the State of North Carolina to James Greenlee and James and William Erwin constitute not alone the boundaries of the 30,080-tract, but include 4,071 acres of the 'Stevely land.' The exception in the grant applies to the boundary as well as to the land itself; so that 'an undivided two-thirds share of all the land remaining unsold and contained within the boundary of the 30,080-acre tract' does not include any part of or interest in the 'Stevely land.'

"Therefore, the Court is of opinion, without considering any of the evidence objected to by the plaintiffs, that the plaintiffs acquired no title to or interest in the 'Stevely land' by the deeds of Matthew Robins and wife and William Battye and wife, mentioned in paragraphs 9 and 10 of the case agreed, and are not the owners of said 'Stevely land,' nor entitled to the possession thereof," and gave judgment accordingly for the defendant. The plaintiffs excepted, and appealed to this Court.

S. J. Ervin (by brief) for plaintiffs.
T. J. Perkins (by brief) for defendant.

MERRIMON, C. J. The purpose to except from the older grant mentioned some part of the land within its boundary is manifest. The exceptive provision of that grant is found therein in immediate connection with the detailed description of the land granted by metes and boundaries, and is in these words: "Containing in the whole 35,280 acres, 5,000 acres of which, being previously entered by citizens, is hereby reserved." The words "hereby reserved" can have no other reasonable meaning or purpose than that the 5,000 acres referred to, having theretofore been entered, were excepted from the grant—were not granted by it—that land was left to be subsequently granted to the persons who had entered the same. If it had turned out that, in fact, no previous entry of the excepted land had been made, the exception would have been void for uncertainty, and all the land within (644) the boundary would have passed by the grant. But it appears that such previous entry had been made, locating and describing the lands particularly and definitely by metes and bounds. The exception had reference to the previous entry—the latter gave the former certainty and definiteness, rendered it operative, just as if the land excepted had been described in the grant by location, metes and bounds. This exception had such reference to the entry, and must be taken in connection with it and the subsequent grant based upon it. So that, in this case, the older grant does not, and cannot, embrace the land so excepted. As the court below aptly said: "The exception in the grant

applies to the boundary as well as to the land itself." This must be so, because the location and boundary had been established by the definite entry and the subsequent grant thereupon. *Waugh v. Richardson,* 30 N. C., 470; *McCormick v. Monroe,* 46 N. C., 13; *Melton v. Monday,* 64 N. C., 295, throw light in this connection on the subject of void and valid exceptions in grants.

It is contended by the appellants that the mesne conveyance from Matthew Robins and his wife and that from William Battye and his wife to "The North Carolina Estate Company (Limited)," conveyed to the latter not simply the unsold lands embraced by the grant of older date mentioned, but as well and as certainly, also, so much of the land embraced by the grant of subsequent date mentioned as is situate within the boundary of the older grant, and within the exception to which reference has been made. We cannot so decide. The two conveyances, just above referred to, plainly and certainly refer to, and only to, and intend to convey "all the land remaining unsold and contained within the boundary of the 30,080-acre tract of land granted," etc. Express and careful reference is made in both of them to the older grant; like particular and careful reference, for the purpose of description of the land conveyed, is also made to the boundary of the grant, but not to the full boundary of it—the boundary is limited, so as to (645) exclude the land excepted from the grant, and to exclude all purpose to convey any interest therein. Else, why so limit the boundary? Why such studied particularity of description? If the purpose was to embrace the land excepted, why did the parties fail to specify "the boundary of the 35,080 acres granted?"

It is insisted, however, for the appellants that the boundary referred to in these conveyances is that particularly specified in the older grant, and that this embraces the exception therein, and designated in the pleadings as the "Stevely land," and, therefore, this land is embraced by the description, "all the land remaining unsold and contained within that boundary." But what was that boundary, as intended and made by the grant? It did not consist necessarily and merely of the external metes and bounds of the grant—it embraced, as well, its internal metes, bounds and limits, and hence it embraced also the location, the metes and bounds of the land excepted from the grant—the "Stevely land." It had such internal boundary. The grant referred to the excepted land—the entry thereof—its metes and bounds, and these became a part of its own boundary, as much as if the same had been specifically set forth in the grant itself. Hence, "all the land remaining unsold and contained within the boundary of," etc., implies the boundary including that that excludes the exception, that embraced the "Stevely

land." Such is the meaning of the terms and phraseology employed in the conveyances referred to, and such was the clear intent of the parties to the same.

Affirmed.

Cited: Currie v. Hawkins, 118 N. C., 598; *Lumber Co. v. Cedar Co.,* 142 N. C., 422; *Featherston v. Merrimon,* 148 N. C., 206; *Quelch v. Futch,* 172 N. C., 317; *S. c.,* 175 N. C., 695; *Williams v. Bailey,* 178 N. C., 633.

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(646)

WILSON A. HERMAN ET AL. v. CANDAN E. WATTS.

Owelty of Partition—Statute of Presumptions—Limitations—Motion in the Cause—Venditioni Exponas—The Code—Final Judgment.

1. A decree in proceedings for partition, had in 1861, adjudging owelty of partition against certain shares of the land divided, is subject to the statute of presumptions (Rev. Code, ch. 65, sec. 18), providing that "the presumption of payment, satisfaction of all judgments, decrees," etc., . . . "shall arise within ten years after the right of action shall have accrued."

2. The proper remedy to enforce such charges is by writ of *venditioni exponas* granted upon motion or petition in the original proceedings, and a new action begun should be dismissed, unless in possible cases involving complicated litigation.

3. The Code, sec. 9944, gives "any party interested" the right to have proceedings lately pending in the Courts of Equity and Pleas and Quarter Sessions, and not *determined* by final judgment, transferred to the Superior Court.

4. The judgment or decree was final, but the proceedings had not been determined because the judgment had never been enforced.

APPEAL at Fall Term, 1890, of ALEXANDER, from *Connor, J.*

It appears that David F. Herman, his three brothers and sister, were tenants in common of the land in question, and other lands; that the same were duly partitioned among them under proper proceedings had in the Court of Pleas and Quarter Sessions in and for the county of Alexander in the latter part of the year 1861; that the land was divided into five parts; that lot No. 1 was allotted to David F. Herman, and valued at $2,700; that this lot was charged with $360 in favor of lot No. 3, which was allotted to William Herman, and also with $434 in favor of lot No. 4, which was allotted to Leander Herman; that after-

wards William Herman died intestate and without issue, never (647) having been married; that his said brothers and sister were his heirs at law, and shared equally in the charge in favor of lot No. 3, allotted to him in his lifetime; that afterwards the said David F. Herman died, having first made his will (which was duly proven), in which he devised the lot No. 1, so allotted to him in his lifetime, to the defendant Watts, who was his wife and surviving widow, and who afterwards intermarried with Reuben Watts, who afterwards died; that afterwards Leander Herman died intestate, never having been married, and his surviving brothers and sister, and the only daughter of his deceased brother, David F. Herman, were his heirs at law, and shared equally in the charge upon said lot No. 1 in favor of said lot No. 4.

This action is brought by one of the surviving brothers of the said David F. Herman, and by the surviving sister, against the defendant, who was the widow of the said David, and to whom he devised the land designated as lot No. 1. It is alleged, substantially as above stated, that the charge of $360 and $434 on the last mentioned lot No. 1 have never been paid; that the same is now a charge upon the land, and the plaintiffs demand that their respective shares specified of such charge shall be paid by or before a day to be specified, and if not so paid, then that the land shall be sold, etc.

The defendant alleges and pleads that the said charge upon the land was actually and fully paid and discharged by her said first husband, David F. Herman, in his lifetime. She further pleads that, more than twenty-eight years having elapsed since the plaintiffs' alleged cause of action arose, the same is conclusively presumed to be paid; and she further pleads that more than ten years have elapsed since the final judgment and decree in the said partition proceedings, whereby the charge was established, and that the same is, therefore, presumed to be paid, etc.

The defendant moved to dismiss this action upon the ground (648) that the plaintiffs' remedy was by motion for a *venditioni exponas* in the partition proceedings now in the Superior Court of the county of Alexander. The court denied the motion, and the defendant excepted.

The defendant, among other things, relied upon the plea of payment and the presumption of payment, etc. The court declined to submit any issue involving the presumption of payment of the charge upon the land, etc., or to instruct the jury in that respect, and the defendant excepted.

There was a verdict and judgment for the plaintiffs, and the defendant appealed to this Court.

Jones & Kerner (by brief), A. C. McIntosh and D. M. Furches for plaintiffs.

R. B. Burke (by brief) and R. Z. Linney for defendant.

MERRIMON, C. J., after stating the facts: The decree of the late Court of Pleas and Quarter Sessions, in the proceedings for partition mentioned, charged the more valuable dividend of land designated as No. 1, and allotted to David F. Herman, with the sum of money specified in favor of the dividend of inferior value designated as lot No. 3, and allotted to William Herman; and likewise with the other sum of money specified in favor of the other dividend of inferior value, designated as lot No. 4, and allotted to Leander Herman. The sums so charged were, in effect, debts due from the dividend—the land itself—of greater value in favor of the other dividends respectively of inferior value, and the dividend so charged was alone liable for such debt; the person to whom it was allotted in the partition was not liable personally for the same, but the charge directly affected his property, and he was interested to see that the sums charged were paid to the dividends of inferior value, so as that the charge upon his land might be extinguished. (649) And so, also, the charges were in favor of the dividends of less value mentioned, but for the benefit of the persons respectively to whom such inferior dividends were allotted. They were entitled to have the money so charged, and to enforce the payment by writ of *venditioni exponas,* or in some other appropriate way. There was, therefore, a decree of the court directing the payment of the sums of money specified to be levied out of the dividend of land of superior value, if the money should not be paid by the owner thereof to the persons—the owners of the dividends of inferior value. The decree directed the payment of money to be levied out of the land upon which it was a charge of one party to the decree, if the money shall not be paid by him to another party to the decree entitled to have it, and so entitled by virtue of the decree.

The persons under whom the plaintiffs claim, and whom they represent, were parties to and entitled to have the sums of money specified in the decree mentioned, and they, respectively, might have enforced their right in the way designated while they lived, and the plaintiffs, succeeding to their rights in part, might have enforced the same as to themselves after they died. They were directly interested in the decree, and having it enforced according to law and the money due them under it paid.

The decree, therefore, comes within the statute applicable (Rev. Code, ch. 65, sec. 18), which provides that "the presumption of pay-

ment, satisfaction on all judgments, decrees, contracts and agreements had or made shall arise within ten years after the right of action of the same shall have accrued, under the same rules which now prevail." The decree in question might have been enforced at any time next after the term of the court at which it was granted and entered. Nothing appears to the contrary. Excluding, as required by the statute (The Code, sec. 137), the time that elapsed next after the decree prior to 1 January, 1870, much more than ten years elapsed after the (650) last mentioned day before the present action began. The statute above recited, therefore, raised the *presumption* that the decree as to the sums of money charged upon the dividend of land No. 1 owned by the defendant had been paid or satisfied. Such presumption was not conclusive. The plaintiffs had the right to prove the contrary, but the burden of proof was upon them. Hence, the court should have instructed the jury that, as it appeared that more than ten years had so elapsed, the presumption was that the decree had been paid or satisfied as to the sums of money claimed under and by virtue of it, unless the plaintiffs should show the contrary.

It was insisted for the plaintiffs that the statute of presumption of payment above applied does not refer to or embrace decrees of partition and charges upon the land for equality, and *Ruffin v. Cox*, 71 N. C., 253, was cited as authority in support of that contention. That case does not so decide. In the course of the opinion it was said *obiter:* "And the same authorities" (those there cited) "hold that there is no bar by the statute of limitations or presumptions in such cases"—that is, as to charges upon land to make equality in partition. But the cases cited do not decide that the statute of presumption of payment does not apply, but they—some of them—simply decide, and very properly, that the statute of limitations does not apply in such cases. Clearly, at the time these decisions were made, there was no statute of limitations applicable in such cases. Although it has not been expressly decided in any case within our knowledge that the statute of presumption of payment applied, it was strongly implied in *Sutton v. Edwards,* 40 N. C., 425, that it did. In that case it was expressly held that the statute of limitations did not apply, but *Nash, J.,* said: "The presumption of payment, under the circumstances of the case, does not arise. . . . There is, then, no point of time fixed by the evidence when the presumption of payment could arise." In *Walker, ex* (651) *parte, ante,* 340, we have decided that the statute of presumption of payment there invoked was rebutted. The court found as a fact that the charge upon the land had not been paid. The statute is broad and comprehensive in its terms and purpose, and we can see no just reason

why it should not apply to decrees directing the payment of money in making equality in partition cases. Indeed, there are obvious reasons of justice and policy strongly suggesting that it should.

Whatever may have been the method of procedure and practice in enforcing the charge of money upon the dividend of land of superior value to make equality in partition cases in the distant past, it is well settled, under the present method of civil procedure, that it should be done by writ of *venditioni exponas,* granted upon application, by motion or petition in the proceeding made by the party or parties interested. Such method is orderly, prompt and economical, and should be observed, unless in possible cases involving complicated litigation. *Waring v. Wadsworth,* 80 N. C., 345; *Halso v. Cole,* 82 N. C., 161; *Turpin v. Kelly,* 85 N. C., 399; *Dobbin v. Rex,* 106 N. C., 444; *Meyers v. Rice, ante,* 24, and *Walker, ex parte, ante,* 340.

The records and papers of all actions and proceedings of the late Court of Pleas and Quarter Sessions of the county of Alexander when the court was abolished were, by statutory provision, required to be deposited in the Superior Court of that county, and the statute (The Code, sec. 944) provides that "all suits, petitions and other proceedings pending in the late Courts of Equity and the late Courts of Pleas and Quarter Sessions, and not determined by final judgment or decree, and all cases wherein any act was decreed to be done, or deed to be executed, and said act was not done nor deed executed, may be transferred (652) to the Superior Court of the county in which they were pending, at the instance of the party interested. And said Superior Court shall have power to make all orders, judgments and decrees as shall be necessary for final adjudicating and settling the same." The purpose of this statutory provision was to embrace cases like the present one. The plaintiffs, seeing that the decree had not been performed in respect to the charges upon the land, should have made summary application to the court to have the partition proceedings transferred to the Superior Court—that is, to have the same brought forward and docketed in the Superior Court, and then have moved, upon notice to the defendant, for the writ of *venditioni exponas.* Upon the motion, the issue as to payment could have been raised easily, as in case of a motion for execution upon a judgment that has become dormant, and the judgment debtor alleges that the judgment has been paid, or raises any other proper defense. The present method of civil procedure does not tolerate, much less encourage, unnecessary actions. *Long v. Jarratt,* 94 N. C., 443; *Knott v. Taylor,* 99 N. C., 511; *Wilson v. Chichester, ante,* 386, and the cases there cited.

The counsel for the plaintiffs insisted that the partition proceeding was ended—that a final judgment therein had been entered, and, there-

fore, the plaintiff could not have the remedy by motion therein. It is true that the rights of the parties had been settled, and the merits of the subject-matter of the proceeding had been determined by a final decree, and no motion could be entered now to disturb that decree unless for irregularity, but the final decree had not been enforced, and it was orderly and proper to take any appropriate steps in the proceedings subsequent to that decree to enforce it. This is always done when need be. The final judgment must be enforced, ordinarily, in the proceeding or action, certainly in partition proceedings.

We are, therefore, of opinion that the action should have been (653) dismissed, and that the court erred in denying the motion to dismiss the same.

Error.

Cited: Pardue v. Givens, 108 N. C., 413; *Field v. Moody,* 111 N. C., 357; *Smith, ex parte,* 134 N. C., 499.

E. T. CLEMMONS v. W. N. ARCHBELL ET AL.

Certiorari—New Trial—Case on Appeal—Failure to Settle.

Where the case on appeal and exceptions were sent to the address of the judge who tried the case, but, owing to his being off on his circuit, reached him so late that he could not, from memory, settle the case, and his notes and *memoranda* filed with the clerk at the termination of the trial could not be found, after diligent search, and the appellant lost his appeal through no default of his: *Held*, he was entitled to a new trial.

APPEAL at Fall Term, 1889, of BUNCOMBE, from *Whitaker, J.*

The facts sufficiently appear in the opinion.

No counsel for plaintiff.
G. H. Snow for defendant.

DAVIS, J. This case is before us upon the return to a writ of *certiorari* directed to the clerk of the Superior Court of Buncombe County, commanding him to send up the record in the case, and the judge below "to send up a statement of the case on appeal." It appears from the record that, at December Term, 1889, of Buncombe, a judgment was rendered against the defendant, from which he appealed to this Court. The case on appeal was properly served within the time (654)

required by law, and amendments thereto were filed by the appellee, and the judge was required to fix a time and place for settling the case on appeal. His Honor, *Judge Whitaker,* who tried the case, says, in substance, that after he had left the Twelfth District and entered upon the duties of the First District the case tendered by the appellant, with the exceptions of the appellee, were sent by express to his address in Raleigh, and not received by him until his return in June, 1890, from holding his courts in the First District; that he had been engaged in the trial of a great many actions, and that the testimony of the trial in this case had so passed from his memory as to make it impossible for him, without the aid of his notes taken at the trial, to settle the case on appeal for the Supreme Court. The notes and memoranda made during the progress of the trial, showing the exceptions made by the parties, with his charge to the jury, were filed, at the termination of the court, with the clerk. He had applied to counsel for appellant and appellee, and the clerk of the court, and after diligent search the notes of the testimony in the case cannot be found. The clerk says he thinks the notes were never filed, and certainly are not now in the office.

It appears from the return to the writ of *certiorari* that it is impossible to get the case on appeal settled, and the appellant has lost his appeal through no fault or negligence of his. He has been guilty of no *laches,* and it has been frequently held that when an appellant has lost the benefit of his appeal without any negligence or default of his own, a new trial will be awarded. *Comrs. v. Steamship Co.,* 98 N. C., 163, and cases there cited. The appellant is entitled to a

New trial.

Cited: S. v. Parks, post, 821; *Ritter v. Grimm,* 114 N. C., 374; *McGowan v. Harris,* 120 N. C., 140; *S. v. Huggins,* 126 N. C., 1056.

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(655)

MONROE BROS. & CO. v. K. LEWALD.

Creditor's Bill—Proceedings Supplemental to Execution—Receiver.

1. Where an action in the nature of a judgment creditor's bill is pending, it is error to dismiss proceedings supplementary to execution instituted in behalf of another creditor against the same debtor.

2. Where several of such proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver

is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants.

3. Appeals from the clerk may be heard at chambers at any place in the district.

APPEAL from the clerk of CUMBERLAND, heard before *Bynum, J.*, at chambers.

"This cause coming on to be heard before the clerk, and being heard upon the motion of the defendant to dismiss the supplemental proceedings and order in the above entitled cause, and, after argument of counsel on both sides, it being made to appear to the satisfaction of the court that there is now pending in this court a creditor's bill in the name of Roberts & Hoge, in behalf of themselves and all other creditors of said K. Lewald, and that the same was pending prior to the institution of these proceedings, the court doth consider that, upon this fact, the said supplemental proceedings be dismissed, and that the order made in said cause be vacated, and the cost of these proceedings be taxed against the plaintiffs.

"From which judgment the plaintiffs appeal to the judge, and all the papers in the case are herewith handed up, this 16 January, 1890. Notice given to defendant's counsel."

The court rendered the following judgment:

"The above cause coming on to be heard on appeal from the order of the clerk of the Superior Court of Cumberland County, (656) and being heard by me at chambers in Carthage, Moore County, after due notice to the attorneys for the plaintiffs and defendant, and the counsel of both parties being present, after hearing the argument of both parties and reading the record produced before me, it is ordered and adjudged that the order of the clerk dismissing the supplemental proceedings made on 16 January, 1890, be and the same is overruled, and the order as made by him on 14 January, 1890, requiring said defendant to appear before a referee be and the same is declared to be in full force, except as to the time when the said defendant shall appear and answer, and the clerk will modify said order as to the time when the said defendant shall appear and answer, and, with said modification, the said order is declared in full force."

From this judgment the defendant appealed to the Supreme Court.

A. W. Haywood for plaintiffs.

N. W. Ray (by brief) for defendant.

SHEPHERD, J., after stating the facts: The plaintiffs obtained a judgment against the defendant and instituted proceedings supplementary to execution. The clerk dismissed the proceedings because, prior to their commencement, "Roberts & Hayes, in behalf of themselves and all other creditors" of the defendant, had commenced a "creditor's bill" against him in the said county, and that said action was still pending. In *Hancock v. Wooten, ante,* 9, we have endeavored to distinguish a "general" from a "judgment creditor" bill. The mere addition to the title "in behalf of all other creditors," etc., does not necessarily determine the true character of the action. In a general creditor's bill all of the creditors should be permitted to come in and be made (657) parties. In a judgment creditor's bill this is not required, and it may be instituted by one or any number of creditors who may choose to unite. They may invite others to come in and join them in the prosecution of the suit, but, unless they do so, the court cannot, by compelling, in proper cases, the joinder of new parties, or by consolidating the action with other proceedings, deprive the original suitors, or those who have with their consent united with them, of any priorities they may have acquired by their superior vigilance. The commencement of such an action creates a preference by way of equitable lien as to such real estate as is sought to be subjected, and a lien is also impressed upon choses in action and other personal property from the time they come into the custody of the court through a receiver or otherwise.

The preferences thus created operate, we repeat, only upon such property as is thus sought to be subjected, and, hence, it may follow that several of such bills or proceedings supplementary to execution may be prosecuted at the same time without interfering with each other. When, however, they do conflict, as where the same property is sought to be subjected, or where a receiver is appointed in one proceeding of property which is the subject of another, the court should order the proceedings to be consolidated, and they may thus be continued, preserving the respective priorities or preferences of the various litigants. Now, if we apply these principles to the present case, it is clear that his Honor very properly reversed the ruling of the clerk dismissing the proceedings.

The case does not contain any particulars as to the creditor's bill of Roberts & Hayes, nor have we any idea what property is sought to be subjected therein. In the absence of anything appearing to the contrary (the debtor being alive and sued as an individual), we must assume that it is a judgment creditor's bill, and this being so, it by no means follows that the latter, which may be directed against only a part of the debtor's property, is to exclude all other (658) proceedings. Even if they conflicted, neither should be dismissed,

but they should be consolidated as we have suggested. This would be otherwise in the case of a general creditor's bill, in which proceeding all persons interested must be made parties, and independent actions will either be dismissed or enjoined.

There is nothing in the objection that the appeal was heard by his Honor in the proper district, but in a county other than that in which the proceeding was pending. If all appeals from the clerk were required to be so heard, infinite delay and trouble would ensue. Such is not contemplated by the Code of Civil Procedure, ch. 5, where appeals in such cases are provided for.

Affirmed.

Cited: Smith v. Summerfield, 108 N. C., 288; *LeDuc v. Brandt,* 110 N. C., 291; *Ins. Co. v. R. R.,* 179 N. C., 259; *Lasley v. Scales, ib.,* 581.

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*RANDALL BOBBITT ET AL. V. J. F. JONES, ADMR., ET AL.

Administration—Trusts—Life-estate—Statute of Limitations—Remainder.

An executor under a will held certain funds as trustee for A for life, and in remainder for B, etc., and he filed a final account, showing a balance in his hands due the estate, but made no reference to the trust fund: *Held,* (1) that the trust did not devolve upon his administrator, and that the latter, not finding any fund designated as a trust fund, and not having recognized the trust or set apart any particular assets to meet its requirements, was not a trustee of an unclosed trust, and that A, B, and C were, as to such administrator, creditors only, and should have presented their claims as such creditors; (2) that the remainderman, as well as the life tenant, had a right to sue for the fund and have another trustee appointed to hold it for the purpose of the trust; that their right of action accrued within a reasonable time after the granting of letters of administration, and these having been granted prior to 1 July, 1869, the former law as to the settlement of estates was applicable; (3) the administrator, having filed his account in August, 1869, and paid over the balance to the distributees without taking refunding bonds, would not have been protected by the two-years statute of limitation prescribed in the Revised Code, but as this provision of the Revised Code requiring refunding bonds was repealed in 1868-69, and the settlement was made after such repeal and before the act of 1870 declaring the act of 1868-69 prospective only, but validating all *bona fide* settlements made under its provisions: *Held,* that, as the plaintiffs never presented their claims or sued for the same

*DAVIS, J., did not sit.

until 1889, they were barred by the statute of limitations; and (4) they would also have been barred by the seven-years statute, which does not require refunding bonds.

(659) APPEAL from *Boykin, J.,* at January Term, 1890, of FRANKLIN.

In October, 1850, Elizabeth Bobbitt died, leaving a last will and testament. By item 5 of that will it appears that she instructed her executor, James Collins, to sell all her property, real and personal, and to hold the proceeds arising from the sale, after paying her debts and specific legacies, in trust for the benefit, during their lives, of certain children (therein naming them), and after their death to pay it to their children, the grandchildren of the testatrix. The plaintiffs are the children of Frederick Bobbitt, one of the life-tenants.

In December, 1850, the will was admitted to probate, and letters testamentary were issued to James Collins. In September, 1853, he filed his final account, showing in his hands $1,718.79 after paying debts of testatrix and costs of administration, which sum was the proceeds of the sale of the property as devised by the will.

(660) In 1860 James Collins died intestate, and in December of the same year the defendant J. F. Jones qualified as administrator of his estate.

On 26 August, 1869, Jones filed his final account, showing a balance in hand, which he turned over to the widow of James Collins and to W. T. Collins, their only child. Their acknowledgment appears at the foot of the record of the final account. Jones did not take and file refunding bonds from the distributees for the benefit of after-discovered creditors.

During Jones' administration the plaintiffs or their ancestor never filed any notice of their claim with him. All of the plaintiffs were of full age, and none of them under disability.

In November, 1878, Frederick Bobbitt, the life-tenant, died, and this suit was instituted in March, 1889.

In the event that the lower court should hold that the lapse of time did not bar, it was agreed that the amount due should be ascertained by a reference to the clerk to state an account.

Plaintiffs appealed.

F. S. Spruill (by brief) for plaintiffs.
C. M. Cooke for defendants.

SHEPHERD, J., after stating the facts: The only question presented by the record is whether the claim of the plaintiffs is barred by the

lapse of time. If it is barred against the defendant Jones, the administrator of Collins, it must also be barred against the heirs of the latter, as it does not appear that the administrator or the sureties on his bond are insolvent, or that the land which descended to the heirs of Collins is charged with any trust, either express or constructive, in respect to the fund which is sought to be recovered.

Much of the learned and elaborate brief of the plaintiff's counsel was predicated upon the idea that the defendant admin- (661) istrator was the trustee of an unclosed trust, and it was urged that, for this reason, the statute of limitations or presumption could not avail him. We are unable to see how he occupied that relation. He was simply the administrator of Collins, who was the executor of Mrs. Elizabeth Bobbitt, and who, before his death, had filed a final account, showing a balance due the estate of his testatrix. As to this balance Collins was a trustee under the will, holding it for the life of Frederick Bobbitt and in remainder for the plaintiffs. This trust did not devolve upon his administrator, nor did the latter find any fund designated as a trust fund, nor is there anything whatever in the record to show that he ever recognized the said trust, or "set apart" any particular portion of the assets to meet its requirements. Hill on Trustees, 353.

It was his duty to collect all of the assets of his intestate and apply them in due course of administration. As to the defendant administrator, these plaintiffs and Frederick Bobbitt, the life-tenant, were creditors, and they should have collected the fund and had a new trustee appointed. *Benbury v. Benbury,* 22 N. C., 236.

All of them had a cause of action against the defendant adminisrator upon his qualification, and, like other creditors, they should have presented their claim within the period prescribed by law. This they failed to do, and now, after the lapse of nearly twenty years since the filing of the final account and settlement, they bring this action. As the letters of administration were granted in 1860, and the cause of action accrued to the plaintiffs prior to the first of July, 1869, this cause must be governed by the law as it formerly existed. The final account was filed 26 August, 1869, and the defendant administrator paid over the balance in his hands to the distributees of Collins, "and their receipt and acknowledgment of settlement appears on the record at the foot of the said final account." (662)

As the administrator did not take any refunding bonds, it is argued that he cannot avail himself of the limitations prescribed by the Revised Code. The seven years statute of limitations (sec. 11, ch. 65, Rev. Code), does not require the averment that such bonds have been taken *(Cooper v. Cherry,* 53 N. C., 323; *Glover v. Flowers,* 95 N. C.,

59), and as more than seven years have elapsed since the advertisement for the presentation of claims and the settlement and the commencement of this action, it must follow that the action is barred. Conceding, however, that the case is governed by the two years statute of limitation (sec. 12, ch. 65, Rev. Code), which required the taking of such refunding bonds, we are still of the opinion that the plaintiffs cannot recover, because at the time of this settlement the above requirement of law had been repealed. The repealing act was passed in April, 1869, and took effect on and after 1 July of that year. Laws 1868-69, ch. 113. It forms the basis of the present chapter of The Code on "Executors and Administrators," and, although it afterwards appeared that the said act was intended to be prospective only, it contained no provision to that effect, and the repealing clause (sec. 115) was absolute and unconditional.

Many doubts arose as to the effect of this legislation upon existing administrations, and, for the purpose of settling the question, an act was passed on 1 March, 1870 (Laws 1869-70, ch. 58), declaring that the said act of 1868-69 should apply to the estates of such deceased persons only whereof original administration was granted subsequent to 1 July, 1869. It was also provided that "if any person prior to the ratification of this act shall have *bona fide* administered any estate or any part of the estate of any deceased person whereof original administration was
(663) granted prior to said 1 July, 1869, under the said act of 1868-69, he shall not be guilty of *devastavit.*" The settlement by the administrator in this case having been made during the uncertain period mentioned, and under the said act, it must follow that the defendant is protected. The administrator, having made due advertisement, filed his final account in 1868-69, and paid over the balance due to the distributees, and the plaintiffs having failed to present their claims, we are of opinion that the rulings of his Honor should be

Affirmed.

WILLIAM GILCHRIST v. D. W. MIDDLETON.

Action to Recover Land—Tenants in Common—Ouster—Evidence—Grants—Entry—Pleading—Verdict—Judgment.

1. Where a plaintiff offered a grant issued in 1847 upon an entry dated in 1801, and the defendant introduced a grant covering the same land issued in 1842 on an entry made in 1801: *Held*, that the former grant was void

upon its face, because it was issued contrary to law after the entry had lapsed, and could be collaterally impeached upon the trial of the usual issues in an action for the possession of land.

2. Where a grant appears upon its face to have been executed regularly and in proper form, it is competent to attack it in any action involving title by showing that, in fact, it covered land not subject to entry, or was issued contrary to a positive prohibition contained in a statute; but for fraud in its issue, a grant can be impeached only by a direct proceeding.

3. Though a grant offered by a plaintiff be void, he may avail himself of another introduced by the defendant to show title out of the State, and establish his own title by providing possession under color for seven years subsequent to the date of the latter grant.

4. The sole reception of the profits by one tenant in common of land, or by his bargainee, under a deed purporting to convey the whole interest for any period less than twenty years, is not an ouster, nor is the verbal refusal to let his cotenant in, for a greater interest than such cotenant is entitled to hold, an ouster.

5. Where one tenant in common brings an action against his cotenant, claiming sole seizin in the land held in common, and the latter sets up in his answer a general denial of the title and right to immediate possession, as alleged, such denial is equivalent to a confession of ouster in ejectment, and precludes the defendant from afterwards setting up the cotenancy on the trial for the purpose of subjecting the plaintiff to the payment of costs.

6. In such cases, the excluded tenant in common should demand of his fellow who is in possession to be let in to the extent of his true interest, and, on failure or refusal of the latter, within a reasonable time, to comply with such demand, the former may maintain an action for possession.

7. Where a plaintiff wrongfully claims in his complaint sole seizin in himself, his cotenant in possession may subject him to the payment of the costs by averring in his answer what the undivided interest of each of the cotenants really is, and avowing his willingness, if proper demand had been made, to have let the plaintiff in and accounted for rents received.

8. One tenant in common is allowed to sue alone and recover the entire interest in the property against another claiming adversely to his cotenants as well as to himself, in order to protect their rights against trespassers and disseizors.

9. But where it appears from the proof offered to show title, or is admitted on the trial that a defendant who has confessed ouster by denying the plaintiff's title is, in reality, a tenant in common with the latter, it is the duty of the court to instruct the jury to ascertain and determine, by a specific finding, the undivided interest of the plaintiff, and to assess his damages in proportion to such actual undivided interest.

ACTION to try title to land and to recover possession, tried by (664) *Bynum, J.*, at February Term, 1890, of RICHMOND.

(677) *J. D. Shaw for plaintiff.*

Burwell & Walker, and Jones & Tillett (by brief) for defendant (appellant).

AVERY, J. Two grants were introduced, both of which covered the land in controversy. The one issued to Duncan McFarland, 13 January, 1847, on an entry dated 4 July, 1801, was offered by the plaintiff, while the other, introduced by the defendant, was issued to Duncan McLaurin 31 March, 1842, on an entry made in 1841.

The plaintiff offered, also, a deed from John McKay to J. B. Buchanan, dated 25 September, 1863, together with several mesne conveyances, connecting the plaintiff by a regular chain with said Buchanan, and offered testimony tending to show continuous possession under said deeds as color of title on the part of plaintiff through his tenant, and those under whom he claims, from 25 September, 1803, till 1862.

The defendant introduced a deed from Duncan McLaurin (the grantee in the patent of 1842) to Ferdinand McLeod, and also a subsequent deed from said McLeod to John L. Fairley, dated 16 April, 1858. It was in evidence, also, that John L. Fairley died before 1862; that Thomas Gibson qualified as his administrator, and died in 1872, and that the defendant was appointed and qualified as administrator *de bonis non* of said Fairley, 7 May, 1876. The defendant, as administrator of said Fairley, instituted a special proceeding in July, 1878, to sell the land conveyed by McLeod to him (which, it is admitted, covers the land in dispute, and is the same granted to McLaurin in 1842), and under a decree in said proceeding it was sold to make assets, when William H. McLaurin became the purchaser. The defendant, as administrator, conveyed to said McLaurin in pursuance of said decree of 17 March,
(678) 1879, and on the next day, 18 March, 1879, said McLaurin conveyed the same land to the defendant. For the purposes of this appeal, it was admitted that the estate of John L. Fairley descended to his five children, three of whose claims to the land are not barred, and two of whose claims are barred, by the statute of limitations.

The defendant also attempted to establish his title by a chain of mesne conveyances connecting him with the grant to Duncan McFarland. The well-settled rule is, that an entry of land creates an inchoate equity in it, which, upon the payment of the prescribed amount of the purchase-money to the State within the time limited by the law (Code, sec. 276; Rev. Stat., ch. 42, sec. 11; Laws 1808, ch. 759), will entitle the enterer to a grant, and where a junior enterer has, meantime, with actual or constructive notice of the older entry, procured a grant for the same land, the latter may be declared a trustee for the former, and compelled to convey the land to him. *Plemmons v. Fore,* 37 N. C., 312; *Feather-*

stone v. Mills, 15 N. C., 596; *Harris v. Ewing,* 21 N. C., 369. Where an enterer allows his entry to lapse before taking out his grant the entry becomes null, and any grant founded upon it is also void on its face, and, even without a direct proceeding to impeach it, will be treated by the courts as inoperative and insufficient to divest title out of the State, because it is apparent on inspection that it was issued without authority of law, when the efficacy of the entry was gone by the efflux of time, and, in this case, after the right of another, who had shown more diligence, accrued. *Stanly v. Biddle,* 57 N. C., 383; The Code, secs. 2767-2768; Rev. Stat., ch. 42, secs. 11-12; act of 1809, ch. 771; *Wilson v. Land Co.,* 77 N. C., 457; *Horton v. Cook,* 54 N. C., 270; *Bryson v. Dobson,* 38 N. C., 138.

Grants that appear upon inspection to have been issued in (679) the face of any positive prohibition contained in a statute, have been uniformly treated even in legal, as distinguished from equitable proceedings as utterly void; but courts of law, under the former practice, would refuse to hear testimony *dehors* a grant to impeach it for fraud in obtaining it, and would hear parol evidence to invalidate it only on the ground that the law forbade it to be issued. *Stanly v. Biddle, supra; Avery v. Strother,* 1 N. C., 558; *Stanmire v. Powell,* 35 N. C., 312; *Strother v. Cathey,* 5 N. C., 162; *Brown v. Brown,* 106 N. C., 451; *Harshaw v. Taylor,* 48 N. C., 513.

Judge Henderson, in *Tate v. Greenlee,* 9 N. C., 231, in discussing the question when a grant can be treated as invalid in the trial of actions of ejectment, says: "But, I cannot bring myself to believe, if the cause of its nullity is apparent upon its face, that the Court must shut its eyes against the defect and declare the grant to be valid. But if in such a case parol or other evidence *dehors* the grant is offered, it should be rejected, not because the grant, if true, is not sufficient to avoid it, but that the party comes unprepared to resist or controvert it." *Harris v. Norman,* 96 N. C., 59.

While the presumption is, when no defect of authority appears upon the face of the grant, that the executive officers who have the right to issue it have acted within the scope of their general powers, it is otherwise when, by reading it, it is manifest that the entry had become void before its issue. With such apparent defect of power in the maker, it becomes subject to the attack in the trial of issues involving the title to land, just as any deed may be impeached in such trials for want of capacity in the maker or of fraud in the *factum,* notwithstanding the fact that the grantor is the sovereign State. *Jones v. Cohen,* 82 N. C., 75; *Helms v. Green,* 105 N. C., 259; *Mobley v. Griffin,* 104 N. C., 112. The rule laid down by *Pearson, C. J.,* in *Harshaw v. Taylor,* 48 N. C., 513, is the familiar principle, that where an officer or tribunal has

(680) general jurisdiction the presumption is that they have acted within the purview of their powers, and that their acts were valid. But this presumption will not be allowed to prevail, even in a trial of issues involving only title to land, where it appears that the executive officers have issued a grant upon a lapsed entry, and the presumption of its validity, as against another grant free from such defect, is thereby rebutted. This proposition is not the less true because, in *Lovinggood v. Burgess,* 44 N. C., 407, it was held that a grant issued by the proper authority, and apparently valid, could not be collaterally attacked by showing *dehors* the grant some irregularity, fraud or mistake in the preliminary proceedings.

But treating the grant to McFarland as void, the plaintiff, though the burden was upon him in the incipiency of the trial to show title good against the world, is not precluded from taking advantage of the fact that the defendant had proven title out of the State by offering and locating the McLaurin grant. When, in addition, it appeared that Buchanan went into possession of the disputed land under the deed from McKay to him in 1863, and continued in possession, cultivating and clearing land, either in his own right, or as tenant of the plaintiff, or of the intermediate grantees, through whom the latter claimed until the year 1882, it followed, of course, that the possession under color of title, even exclusive of the time elapsing before 1 January, 1870, was sufficient to mature title in the plaintiff, except against persons laboring under some disability that suspended the operation of the statute of limitations as to their rights. It is admitted that the plaintiff's right of action against three of the heirs at law of Fairley is barred, while the statute was running as to the other two long enough to mature title in the plaintiff for their undivided interests. It is not necessary to consider any exception to the testimony, or charge of the court, growing out of the attempt on the part of the defendant to establish title through the void grant to McFarland, as he did not claim to have held posses-
(681) sion under the conveyances subsequent to the grant. Considering the McFarland grant as void, we are relieved, for that reason, if not upon other grounds, from discussing or passing upon the exceptions to evidence growing out of the attempt by the defendant to trace his title to that source, as well as those to so much of the charge of the court as related to the same subject.

We come, then, to the question, whether the denial of plaintiff's title and right to possession was, in law, an ouster by the defendant of his cotenant.

It is a well-settled rule of law that a tenant in common cannot maintain an action against his cotenant for the possession, or title and possession, of their undivided land, unless an actual ouster is proved or *admitted by the pleadings. Halford v. Tetherow,* 47 N. C., 393.

It is conceded that, in order to prove an actual ouster by conduct *in pais,* it must be shown that the tenant in possession, in refusing the lawful demand of his cotenant, or otherwise, asserted a dominion over the common property irreconcilable with the recognition of the rights of the latter. Hence, it has been held—

1. That the sole reception of the profits of land by one tenant in common is not an ouster, and will raise no presumption of an ouster against his fellows until he has enjoyed the exclusive profits of such rents for twenty years, and the grantee of a tenant in common, though he may hold possession under a deed purporting to convey the whole, stands, in this respect, precisely in the position of his grantor. *Linker v. Benson,* 67 N. C., 150; *Caldwell v. Neeley,* 81 N. C., 114; *Page v. Branch,* 97 N. C., 97.

2. That where a tenant in common of a tract of land demands (682) of his cotenant, who is in possession of it, the whole tract, instead of asking to be let into possession to the extent of his interest, the refusal to comply with such a demand is not an ouster. *Meredith v. Andres,* 29 N. C., 5.

3. That so long as the relation of tenant in common of land exists between two persons, an action of trespass will not lie in favor of one against the other for merely asserting dominion over the common property. *McPherson v. Seguine,* 14 N. C., 153.

In stating the foregoing well-established principles, we have given a summary of the points settled by all the authorities cited and relied upon by the defendant to sustain the position that the plaintiff, upon the admitted facts, or upon the proof and the pleadings, cannot recover, because there is no sufficient evidence of an ouster, and that the judge below should have so instructed the jury.

It seems, in this case, that neither party pursued the proper or advisable course in the attempt to assert his rights. The plaintiff, if he did not intend to incur any risks, ought to have made a formal demand to be put into possession as to two undivided fifths of the land with the defendant, and on refusal or failure within a reasonable time on the part of the latter to comply with such demand, he would have had the unquestioned right to maintain an action for possession. When the plaintiff brought suit, claiming the whole, and without giving any previous notice, the defendant could have answered that he was holding possession as a tenant in common for the benefit of both himself and the plaintiff, and had always been ready and willing to let in his cotenant to the extent of his interest, which was two-fifths, and to account for any rents received, if the plaintiff had made demand to be so let in, and for an account of profits. *Johnston v. Pate,* 83 N. C., 110. Upon the finding or admission that the interests of the parties were as averred in the

answer, the defendant would have been entitled to judgment for costs. Sedgwick & Wait T. of T. to Land, secs. 283 and 284. But the blunder of the plaintiff was cured when the defendant set up an unquali-
(683) fied denial of the claim of sole seizin on the part of the plaintiff. *Allen v. Sallinger,* 103 N. C., 17; *ib.,* 105 N. C., 333. When a defendant deliberately waives his right and disregards his opportunity to admit by answer or disclaimer the true interest of the plaintiff, and then attempts to deny the ouster, he cannot complain that he loses the benefit of the relation of cotenant by his denial of its existence. It has been generally, if not universally, held by the courts in this country that a denial of a plaintiff's title or right of entry, or an averment that the defendant held adversely against all persons or the claim of exclusive possession, with a plea of "not guilty," was an admission of actual ouster. *Harrison v. Taylor,* 33 Mo., 211; *Siglan v. Van Riper,* 10 Wend. (N. Y.), 414; *Miller v. Myers,* 46 Cal., 535; *Grier v. Tripp,* 56 Cal., 209; *Noble v. McFarland,* 51 Ill., 226; *McCallum v. Boswell,* 15 U. C. Q. B., 343; *Scott v. McLeod,* 14 U. C. Q. B., 574. In *Classon v. Rankin,* 1 Duer. (N. Y.), 357, *Chief Justice Oakley* laid down the rule that "a denial in the defendant's answer of all right, title and interest in the plaintiff, is an admission that his own possession is adverse, and may, therefore, be treated as a confession of ouster, superseding the necessity of proof upon the trial." It is true that *Judge Pearson,* in *Halford v. Tetherow,* 47 N. C., 393, after laying down the rule that "one tenant in common cannot sue his fellow, unless there is an actual ouster either proven or *admitted in the pleading,*" declares that putting in the plea of not guilty in ejectment, without entering into the consent rule, was not an admission of "an actual ouster," and in this respect differed from the Supreme Court of Illinois. But, conceding that the principle stated in that case was correct, this Court, in *Allen v. Sallinger, supra,* followed the rulings of the Court of New York, that, under the new procedure, where the title is in issue, a general denial of the allegations of the title, and especially of the right to immediate possession, is unques-
(684) tionably tantamount to the confession of ouster in the fictitious action of ejectment. So that the pleadings in this case place the plaintiff and defendant in precisely the same position as the parties in *Halford v. Tetherow, supra,* would have occupied towards each other if the fact had been set out in the record that they had entered into the consent rule, which *Judge Pearson* declared would have been an admission of ouster in the pleadings. It is not reasonable to suppose that the defendant, when it has been settled that the answer is to be construed as an admission of ouster, will any longer insist that it was erroneous to render judgment that the plaintiff be let into possession as to two undivided fifths, or to instruct the jury, that if they found that by continuous

adverse possession he had acquired title to that portion of the whole, they would find a wrongful possession on the part of the defendant to the same extent, and assess as the damages two-fifths of the rental value of the whole of the land. If defendant's possession was adverse, the only question that arises out of that admission is, whether there shall be a judgment against him for the sole and exclusive right to the land in dispute, and for the whole of the rents, or for the undivided fractional interest of which the jury find him the rightful owner. One tenant in common of land may sue alone and recover the entire interest in the common property, against another claiming adversely to his cotenants as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do, in order to protect the rights of his cotenants against trespassers and disseizors. But where it appears from the proof offered to show title, or is admitted, as in this case, that a defendant, who has confessed ouster by denying the plaintiff's title, is in reality a tenant in common with the latter, it is the duty of the court to instruct the jury, by a specific finding, to ascertain and determine the undivided interest of the plaintiff. This course obviates the danger of concluding the defendant by a general finding that the (685) plaintiff is the owner. The principle enunciated in *Allen v. Sallinger,* 103 N. C., 14, and approved in *Lenoir v. Mining Co.,* 106 N. C., 473, brought into perfect harmony the rulings of this Court in *Overcash v. Kitchie,* 89 N. C., 384, and in *Yancey v. Greenlee,* 90 N. C., 317, by showing how one tenant in common might sue a trespasser, who is infringing upon the rights of himself and his cotenants, and recover the entire land, or sue his cotenant, who simply refuses to recognize his right in his answer, and recover such interest as he may establish title for.

Even if we concede the right of the defendant to have the exceptions last filed passed upon, we think that we have disposed of every exception in the discussion of general principles. A large number of exceptions to the evidence grew out of the futile attempt on the part of the defendant to establish a chain of title through the void grant to McFarland, and, as already stated, need not be considered if the grant is void upon its face. There is

No error.

Cited: Bryan v. Hodges, ante, 497; *Gilchrist v. Middleton,* 108 N. C., 706; *Dickens v. Long,* 109 N. C., 171; *Averitt v. Elliott, ib.,* 564; *Jeter v. Davis, ib.,* 460; *Henning v. Warner, ib.,* 411; *Maxwell v. Barringer,* 110 N. C., 83; *Herndon v. Ins. Co., ib.,* 283; *Vaughan v. Parker,* 112 N. C., 101; *Foster v. Hackett, ib.,* 553; *Moody v. Johnson, ib.,* 811; *Boomer v. Gibbs,* 114 N. C., 86; *Hamilton v. Icard, ib.,* 539; *Water-*

works v. Tillinghast, 119 N. C., 348; *Bernhardt v. Brown,* 122 N. C., 590; *Carson v. Carson, ib.,* 647; *Dosh v. Lumber Co.,* 128 N. C., 89; *Winborne v. Lumber Co.,* 130 N. C., 33; *Holly v. Smith, ib.,* 86; *Shelton v. Wilson,* 131 N. C., 500; *Allred v. Smith,* 135 N. C., 450; *McAden v. Parker,* 140 N. C., 261; *Frazier v. Gibson, ib.,* 275; *Berry v. Lumber Co.,* 141 N. C., 393; *Fisher v. Owen,* 144 N. C., 652; *Dew v. Pyke,* 145 N. C., 305; *Weaver v. Love,* 146 N. C., 417; *Simmons v. Box Co.,* 153 N. C., 261; *Brown v. Hutchinson,* 155 N. C., 209; *Reynolds v. Palmer,* 167 N. C., 455; *Hilton v. Gordon,* 177 N. C., 344.

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VIRGINIA M. DEANS, ADMR., v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Negligence—Evidence—Trial—Jury.

1. Where a witness standing upon the side of the track, three-fourths of a mile from the plaintiff's intestate, testified that he saw him lying apparently helpless, as he thought, along the ends of the cross-ties, beyond the rails, when the engine that ran over and killed him passed the witness, running at twenty miles an hour: *Held,* that the judge, should have allowed the jury to determine whether the engineer could, by ordinary care, have discovered, from his elevated position on the engine, that intestate was lying helpless on the track, in time, by prompt and strenuous effort, to have saved the life of the latter without putting his passengers in jeopardy.

2. If the engineer discover, or, by reasonable watchfulness, may discover, a person lying on the track asleep, or drunk, or see a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it.

3. In such a case, the jury were at liberty to exercise their own common sense, and use the knowledge acquired by their observation and experience, without direct testimony from expert witnesses, in determining how many feet or yards of the track the engine must have traversed before the engineer could have put a complete stop to its movement without danger to those who were on the train.

4. Though the facts may be undisputed, yet, if two reasonable and fair-minded persons might draw inferences from them so different that, according to the conclusion of fact reached by one, there would be negligence, while that deduced by another would show the exercise of ordinary care, then the issue should be submitted to the jury.

5. The doctrine laid down in *Gunter v. Wicker*, 85 N. C., 310, and followed in a line of cases since, is in conflict with the principle enunciated in *Herring v. R. R.*, 32 N. C., 402, and the latter case is overruled.

ACTION for damages, tried before *MacRae, J.*, at March Term, (687) 1890, of WAYNE.

The issues were—

1. Was B. F. Deans killed by the negligence of the defendant?

2. Did he, by his own negligence, contribute to his death?

3. What damage, if any, is the plaintiff administratrix entitled to recover?

The plaintiff introduced the following evidence:

W. A. Deans testified that deceased was between thirty-three and thirty-four years old. "I went to the scene of the accident about 2 p. m. —half an hour after it occurred. The train usually passed that spot about 12 m. I found B. F. Deans (plaintiff's intestate) lying on the ground across the ditch, about ten feet from the track; his head was smashed to pieces, and there were signs on the rails of his having been run over on the side of the track on which the engineer sat in his cab. It is two miles from Goldsboro to the first curve in the road. The place where he was killed was between 300 and 400 yards from the first curve towards Goldsboro; there is gravel of a light color on the footpath on the outside of the rails, and people walk there. It was a showery day. I think I could have seen a man three-quarters of a mile off. Deceased had on a dark overcoat, but I don't recollect the color of his pants. The path I spoke of is between the ditch and the end of the cross-ties, and the roadbed is gravel, with a white sandy gravel. I don't know that it was slippery where he was killed." Witness further testified as to the value of the life of the intestate.

On cross-examination, the witness stated that deceased drank whiskey at times, he was not a drinking man during crop time, but after the crops were laid by, and he had realized therefrom, he would sometimes get on a spree, especially about the Christmas holidays, but did not get drunk every time he came to town. "When I got to his body on the day of the accident, to wit, 24 December, 1887, one Pate had (688) a small bottle of whiskey, and it looked as if about a drink had been taken out, and there was a broken glass on the ground which had the smell of whiskey about it. Deceased lived about a mile from the railroad. There is a county road running parallel from Goldsboro in that direction, to the deceased's house, which is a little nearer than the path" (above described).

P. Taylor testified: "On 24 December, 1887, I was engaged at the water station of defendant company; saw deceased early that morning

pass the station, going to town; people pass that way; he came back between 1 and 2 p. m., and I had some talk with him—say about twenty-five minutes; he went towards home on the railroad, and I went into the section house and sat down; the last time I saw him he was lying on the roadbed, before the train came, with his feet towards the ditch; I looked towards town, and saw the train coming between the station and water tank; when the engineer (Morris) came along I motioned to him three times; he was sitting in his seat, looking at me, when I motioned, but he did not seem to understand what I meant; I was standing on the ditch bank." (Witness motioned by raising his hand toward the engineer, who was looking out of the window of his cab.)

On cross-examination: "I think deceased was about three-quarters of a mile from me when I saw him; it had been raining some, the wind was blowing—a cold, rainy day, but not freezing; but a man could see very well, though it was a cloudy day; the rails were wet. When deceased left me near water station, I saw him about a hundred yards from me, walking on the narrow path outside the cross-ties; he had a pint tickler of liquor, and offered me some, but I would not drink; it was about two-thirds full, and he seemed to have been drinking, but seemed to know his business; he walked steadily when he left me; he took a drink at the water station, and another when he left me,
(689) in about fifteen minutes; the train that killed him did not stop at the water tank; I think the train was running about twenty miles an hour; have seen trains run much faster; never saw any one motion to the engineer; I knew the engineer; had been at the water tank about twelve months, and as the train passed that day the engineer blew his whistle when it got near to deceased; I could not see the deceased when the whistle blew; when I last saw him he was lying across the roadbed, not between the rails, but between the ends of the cross-ties and the ditch; I did not see his head on the rail; if I had, I would have signaled down the engineer, and stopped the train; I would have done this by placing my hat on the track; I did not do that because I did not know his head was on the track."

Upon the conclusion of the plaintiff's evidence his Honor intimated that he would instruct the jury to find the first issue in the negative, and, in deference thereto, the plaintiff submitted to a nonsuit and appealed.

C. B. Aycock for plaintiff.
W. R. Allen and Isaac F. Dortch for defendant.

AVERY, J. When this Court, in *Gunter v. Wicker,* 85 N. C., 312, adopted the rule laid down in *Davies v. Mann,* 10 M. & W. (Exc.), 545, that "notwithstanding the previous negligence of the plain-

tiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages," it was thenceforth aligned with one of two classes, holding widely divergent views as to the effect of contributory negligence on the part of a plaintiff, under certain circumstances, upon his right of recovery. That ruling has been expressly approved in a large number of later cases, and is now firmly grounded as a part of our system, in so far as it is distinct from (690) that of any other courts where the common law of England prevails. *Farmer v. R. R.*, 88 N. C., 564; *Turrentine v. R. R.*, 92 N. C., 638; *Aycock v. R. R.*, 89 N. C., 321; *Troy v. R. R.*, 99 N. C., 298; *McAdoo v. R. R.*, 105 N. C., 140; *Daily v. R. R.*, 106 N. C., 301; *Lay v. R. R.*, 106 N. C., 404; *Bullock v. R. R.*, 105 N. C., 180; *Carlton v. R. R.*, 104 N. C., 365; *Wilson v. R. R.*, 90 N. C., 69; see also, *Wymer v. Wolf*, 52 Iowa, 533; *R. R. v. Kellon*, 92 Ill., 245; *Meeks v. R. R.*, 56 Cal., 513; *Kenyon v. R. R.*, 5 Hun (N .Y.), 479.

In those States where the very opposite view was taken, it was held that where one went upon the track of a railroad company at a point other than a crossing where the public have a right-of-way, without special license, he was a trespasser, and could not recover for any injury inflicted upon him through the negligence of such company's agents or employees, unless it was wanton. *Mulherrin v. R. R.*, 81 Penn., 366; *Rounds v. R. R.*, 64 N. Y., 129; *R. R. v. Sinclair*, 62 Ind., 301; *Donaldson v. R. R.*, 21 Minn., 293; Beach on Con. Neg.; *Express Co. v. Nichols*, 33 N. J., 434.

In delivering the opinion in *Manly v. R. R.*, 74 N. C., 655, *Justice Bynum* foreshadowed, by an intimation the subsequent adoption by this Court, in *Gunter v. Wicker, supra*, of the principle stated in *Davies v. Mann, supra*, and after it had been approved in so many well-considered opinions, it became apparent that it would be illogical and inconsistent to adhere to the rule laid down in *Herring v. R. R.*, 32 N. C., 402, or the interpretation generally given to *Judge Pearson's* language by the leading text-writers of this country. In that case, the engineer might have seen two little negroes who were lying on the track asleep, according to conflicting testimony, from two hundred yards to a half mile, before his engine reached them. He did not actually discover that the children were asleep till he was within twenty- (691) five or thirty yards of them. The testimony showed, also that the train could have been stopped by the engineer within from seventy-five to one hundred yards. The judge below charged the jury that the railroad company was not liable for the neglect of the engineer to keep a lookout along the track except when he was approaching a crossing of a public road over the railway, and was not responsible for his failure to use the

appliances at his command to stop the train until he actually saw the children asleep on the track at a distance of twenty-five or thirty yards. This instruction was sustained by the Court in the face of the fact that the counsel for the plaintiff cited and relied upon *Davies v. Mann, supra.* The Court failed even to advert to the doctrine laid down in that case.

It must, therefore, have been the settled purpose of this Court, when the doctrine of *Davies v. Mann* was approved, to modify this rule whenever the point should be plainly presented, and that contingency has never arisen until the present time. We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine, he has a right to assume, without further information, that he is a reasonable person and will step out of the way of harm before the engine reaches him. *McAdoo v. R. R.,* 105 N. C., 153; *Daily v. R. R., supra; Parker v. R. R.,* 86 N. C., 221. It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake and is moving is in full possession of all of his senses and faculties.

But it has been repeatedly held by this Court that it is the duty of an engineer, while running an engine, to keep a careful lookout along the track in order to avoid or avert danger in case he shall discover any obstruction in his front, whether at a crossing or elsewhere.
(692) *Bullock v. R. R., supra; Carlton v. R. R., supra; Wilson v. R. R., supra.*

If the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track, asleep or drunk, or see a human being who is known by him to be insane or otherwise insensible to danger or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it. *R. R. v. Miller,* 25 Mich., 279; *R. R. v. St. John,* 5 Sneed (Tenn.), 504; *R. R. v. Smith,* 52 Tex., 178; *Isbell v. R. R.,* 27 Conn., 393; *Meeks v. R. R.,* 56 Col., 513. For similar reasons we have held that the test of negligence where livestock is killed or injured by a train is involved in the question whether the engineer, by keeping a proper lookout, could have discovered the animal in time to have prevented the injury. *Carlton v. R. R.* and *Watson v. R. R., supra.* In *Bullock v. R. R.,* the same criterion was applied where it was alleged that an engineer might have discovered that a wagon was stalled at a crossing, in time to prevent injury by stopping his train.

The pertinent portions of the testimony in the case before us may be gathered and grouped as follows, bearing in mind always that if, in the most favorable aspect for the plaintiff, there was a question raised that

it was the exclusive province of the jury to determine, then there was error. A witness on the roadside could see plaintiff's intestate lying on the side of the track three-fourths of a mile distant. He could not tell, from his position and at that distance, whether he was lying across the rail, but thought his head was on the roadbed beyond the ends of the cross-ties. When the engineer was passing, the witness waved his hand at him as a signal to be watchful. The engineer looked, but did not seem to comprehend what was meant. The train was running at the rate of about 20 miles an hour. The witness who made the signal had been engaged at the water tank for about eleven months and had been often seen there by the engineer, but had not made his (693) acquaintance.

Could the engineer by ordinary care have seen that the plaintiff's intestate was lying apparently helpless upon the track, with his head inside the rail, in time to have stopped the train before it reached him? Defendant's counsel contended that there was no testimony offered to show within what distance the engineer, using all available appliances, could have stopped the train, and, therefore, the jury could not consider the question whether he could have avoided inflicting the injury. With the data furnished by the evidence, it was the province of the jury, either with or without additional light from expert witnesses, to determine how many feet or yards of track the train must have traversed after the engineer reversed his engine and blew brakes before he could have put a complete stop to its movements without damage to those on the train. The jury were at liberty to exercise their own common sense and to use the knowledge acquired by their observation and experience in everyday life in solving the question whether the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that plaintiff's intestate was lying helpless across the rail, and whether by prompt and strenuous effort he could have saved his life without putting his passengers in jeopardy. *R. R. v. Miller,* 25 Mich., 292; *Nerbus v. R. R.,* 62 Cal., 322. Courts and juries acting within their respective provinces must take notice of matters of general knowledge and use their common sense where the evidence makes the issue of law or fact depend upon their exercise. Best Ev., 262, note F; Wood Railways, 1064, note.

If the facts had been undisputed, and such that only one inference could have been drawn from them, it would have been the duty of the court to decided whether there was negligence. But, upon the testimony before them in this case, the judge should have left (694) the jury to say whether they could deduce satisfactorily from the evidence the inference that the engineer discovered, or could by ordinary care have discovered, that plaintiff's intestate was lying, appar-

ently insensible, upon the track, in time to have avoided the injury, or whether they thought a preponderance of testimony was in favor of the inference that defendant's employees could not have averted the accident by exercising the diligence required by law. *Smith v. R. R.*, 99 N. C., 241; *Troy v. R. R.*, 99 N. C., 298; *R. R. v. Picksley*, 21 Ohio, 654. Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case, although there is no material conflict between the testimony of the witnesses examined, and, therefore, the jury should have been allowed to determine whether the engineer might have ascertained, by keeping a proper lookout, the real condition of the deceased, admitting even that he was drunk, and by timely exertion have saved him harmless, without peril to the passengers or other persons on the train. 2 Thompson on Neg., 1178 and 1179; Wood Railways, sec. 319, p. 1259.

Judge Cooley (on Torts, p. 670) says: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute."

The rule applicable to our case is, that though the facts may be undisputed, yet if two reasonable and fair-minded persons might draw inferences from them so different that, according to the conclusion of fact reached by one, there would be negligence, while that deduced by
(695) another would show the exercise of ordinary care, then the issue should be submitted to the jury.

We think that his Honor erred in declaring the testimony insufficient, in any aspect of it, to warrant the inference on the part of the jury that the defendant might have prevented the injury by the exercise of ordinary care. There must be a

New trial.

Cited: Browne v. R. R., 108 N. C., 42; *Meredith v. R. R., ib.*, 618; *Ward v. R. R.*, 109 N. C., 360; *Clark v. R. R., ib.*, 442, 444, 445, 451, 453; *Hinkle v. R. R., ib.*, 474; *McQuay v. R. R., ib.*, 588; *Emry v. R. R., ib.*, 596, 611; *Emry v. Nav. Co.*, 111 N. C., 102; *Norwood v. R. R., ib.*, 240; *Mason v. R. R., ib.*, 493; *Cawfield v. R. R., ib.*, 600; *S. v. Taylor, ib.*, 681; *High v. R. R.*, 112 N. C., 388; *Mason v. Lumber Co.*, 114 N. C., 723; *Smith v. R. R., ib.*, 739, 769; *Gilmore v. R. R.*, 115 N. C., 662; *Comrs. v. Lumber Co.*, 116 N. C., 735; *Sherrill v. Tel. Co.*, 117 N. C., 361; *Pickett v. R. R., ib.*, 631; *Chesson v. Lumber Co.*, 118 N. C., 69; *Lloyd v. R. R., ib.*, 1013; *Baker v. R. R., ib.*, 1020; *Tillett v. R. R., ib.*,

1041; *Styles v. R. R., ib.*, 1089; *Pharr v. R. R.*, 119 N. C., 756; *Purnell v. R. R.*, 122 N. C., 848; *Norton v. R. R., ib.*, 935; *Whitley v. R. R., ib.*, 989; *Bradley v. R. R.*, 126 N. C., 741; *Wright v. R. R.*, 127 N. C., 227; *McArver v. R. R.*, 129 N. C., 384; *Lea v. R. R., ib.*, 463; *Davis v. R. R.*, 136 N. C., 117; *Sawyer v. R. R.*, 145 N. C., 27; *Daniel v. R. R., ib.*, 55; *Rollins v. R. R.*, 146 N. C., 157; *Jenkins v. R. R., ib.*, 181; *Whitfield v. R. R.*, 147 N. C., 240; *S. v. R. R.*, 149 N. C., 478; *Snipes v. Mfg. Co.*, 152 N. C., 45, 47; *Haire v. R. R., ib.*, 764; *Edge v. R. R.*, 153 N. C., 215; *Cabe v. R. R.*, 155 N. C., 411; *Hanford v. R. R.*, 167 N. C., 278; *Norman v. R. R., ib.*, 41; *Hill v. R. R.*, 169 N. C., 741; *Davis v. R. R.*, 170 N. C., 586; *Horne v. R. R., ib.*, 652; *Brown v. R. R.*, 172 N. C., 607; *McManus v. R. R.*, 174 N. C., 737; *Borden v. R. R.*, 175 N. C., 178; *Costin v. Power Co.*, 181 N. C., 204.

T. D. CLEMENT v. W. W. COZART.

Administration—Sale of Land for Assets—Evidence—Pleading.

1. Where a personal representative files a petition to sell land for assets, it is essential that it should appear, by a direct allegation, or by implication, that the personal property has been exhausted without paying the indebtedness, or is insufficient to pay it.

2. An administrator *de bonis non* must proceed against the estate or bond of a former personal representative, or show that he would recover nothing and would only incur costs by prosecuting such suit, before license will be granted to him to sell real estate to make assets.

3. The exhaustion or insufficiency of the personalty must be shown in the same way, where the personal representative seeks to set aside a fraudulent conveyance by the decedent and subject the land to sale for assets, and a creditor, or creditors, proceeding under section 1448 of The Code, or under the general equity jurisdiction of the court, are required also to make and prove (if not admitted) the same allegations.

THE plaintiff appealed from the judgment refusing to declare the demurrer frivolous, rendered by *MacRae, J.*, at September Term, 1890, of GRANVILLE.

The defendants demurred to the complaint: (698)

1. That it does not appear from said complaint that the intestate, J. C. Cozart, was indebted to plaintiff's intestate, or any other person, at the time of the execution of the deed to Lunsford and Cozart, on 21 November, 1871. (699)

2. That it does not appear that the personal estate of the intestate, J. C. Cozart, was insufficient to pay his debts, or that the same has been exhausted in the payment of the same.

The court, being of the opinion that the demurrer was not frivolous, denied the plaintiff's motion for judgment as for want of an answer, but held that the demurrer should be overruled, and allowed the defendant thirty days in which to answer said complaint.

L. C. Edwards and J. B. Batchelor for plaintiff.
R. W. Winston for defendant.

AVERY, J., after stating the facts: It is too well settled to leave room for discussion that a personal representative must allege, in a petition to sell land to make assets, either that the personal property has been exhausted without discharging the indebtedness of the estate, or is insufficient to pay it. It is essential that the exhaustion or the insufficiency of assets arising or that will arise from the sale of personalty (700) should appear either by a direct allegation or by necessary implication from the facts stated in the complaint. *Shields v. McDowell,* 82 N. C., 137. Where a personal representative wasted or misapplied the fund arising from the sale of personal property, and died without making good the deficit, it was held that license to sell the land would not be granted to the administrator *de bonis non* until he had proceeded against the estate and bond (if one was filed) of his predecessor, or had made it appear that he could recover nothing, but must simply incur unnecessary costs by instituting and prosecuting such suits. *Lilly v. Wooley,* 94 N. C., 413; *Carlton v. Byers,* 70 N. C., 691; *Smith v. Brown,* 99 N. C., 377.

The provisions of section 1446 of The Code necessarily hinge upon those of section 1436, and, therefore, though it be admitted that it was a sufficient compliance with the requirements of the former section to allege that the conveyance was made with the intent to defraud subsequent creditors alone, still it must appear when the license to sell is asked for—that there is an unsettled indebtedness that cannot be paid out of the assets. The deed executed by James C. Cozart was valid *inter partes,* and the grantees, even if the conveyance was made with fraudulent intent, had the same right as the heir had to demand that the personal estate should be exhausted before the land should be declared subject to sale for his debt. If the action had been brought by the defendant as administrator, his petition must necessarily have contained precisely the same allegations with regard to the insufficiency of the personalty as though J. C. Cozart had made no conveyance and a proceeding had been instituted against the heirs of Cozart to sell the

land for assets, and, in addition, he must have distinctly alleged that the deed was executed with intent to defraud creditors. Instead of the allegation contained in the petition in this case, that his intestate "died possessed of a small amount of personal property, but to what value your petitioner is not informed, nor has he any means of knowing," the defendant administrator must have distinctly stated that there was, at least, according to his best information, a deficiency of (701) personal assets.

But the plaintiff contended that, as a creditor, he had a right to bring and maintain an action in the nature of creditor's bill, under the provisions of The Code, sec. 1448, without even a formal invitation to other creditors or an allegation that there were any other debts except that due to himself. That section is Laws 1871-72, ch. 213, sec. 1 (Bat. Rev., ch. 45, sec. 73), as amended by inserting the words "or civil action" after "special proceeding," as provided by Laws 1876-77, ch. 241, sec. 6, the effect of the amendment being to give a creditor his option to bring his action in the Superior Court, before the clerk or returnable at a regular term. So that, we are confronted with the question whether section 1448 can be construed as authorizing the plaintiff, on 20 June, 1889, to bring and afterwards to maintain this action in the Superior Court, founded upon an unpaid balance of a judgment rendered against defendant's intestate in 1886, when said intestate died in 1887, and letters of administration were granted to defendant on 27 April, 1888.

We think that the section mentioned unquestionably confers upon a single creditor, in behalf of himself (and other creditors, if there be any others), the right to bring a civil action to compel a personal representative to render an account of his administration and to pay to the creditors what may be due to each of them. *Haywood v. Haywood,* 79 N. C., 42. But the plaintiff does not rest his claim upon the ground that there were assets in the hands of the defendant (who had qualified as administrator only thirteen months before the summons was issued), and that defendant refused to pay over a sum in his hands properly applicable to the satisfaction of the plaintiff's judgment. He seems deliberately to have omitted any prayer even that an account be taken of the administration, when the law permits him to bring (702) his action for the express purpose of compelling the personal representative "to an account of his administration." If he had asked for an account before the expiration of two years from the time of taking out letters, without the further allegation that the defendant had in his hands funds that must be ultimately applied to the payment of his debt, for reasons set forth in the petition, a grave question would have arisen as to his *status* in court, when he was merely claiming the right to have his debt satisfied out of such fund.

But the purpose of the plaintiff, as disclosed in his complaint and avowed by counsel on the argument, is first to secure a finding that the deed made by defendant's intestate was fraudulent and void, and then to demand judgment that the defendant sell the land conveyed by his intestate, or so much of it as may be necessary to pay the judgment sued on. We do not think that section 1448 can be construed to empower a creditor or creditors to institute or maintain an action (where objection is raised by demurrer, certainly) to compel the personal representative to sell the lands of a decedent to make assets, unless it is alleged in the complaint that the personal estate is insufficient to discharge the debts, or has been exhausted and is no longer available for their satisfaction. It was not the purpose of the Legislature to enable an executor or administrator, simply because a creditor has instituted an action in the Superior Court (even where there is collusion), to obtain license to sell land belonging to the heir or devisee, or fraudulently conveyed to another by their testator or intestate, when, by taking an account, it may be made to appear that the personal estate is more than sufficient to satisfy all of the indebtedness. The liability of the land to be subjected to the payment of the debts, under the act of
(703) 1846, was secondary entirely, and is not incurred till it appears that there is an insufficiency of assets. *Wilson v. Bynum*, 92 N. C., 723.

If the plaintiff insists that he can maintain his action as a creditor's bill, not by virtue of section 1448, but because "The Code has not taken away from the Superior Courts any jurisdiction heretofore exercised by Courts of Equity, except in cases exclusively within the jurisdiction of justices of the peace," and because Courts of Equity formerly took cognizance of such bills, then he encounters the same additional difficulties. In the case of *Wilson v. Bynum, supra, Justice Ashe* delivering the opinion of the Court, says: "But when there is deficiency of assets, it is nevertheless the duty of the administrator to take the necessary steps prescribed by law to sell the real estate of his intestate for payment of his debts, and when he refuses to do so he may be compelled by the clerk of the Superior Court to perform the duty, or the creditor, as in this case, may bring an action in the nature of a creditor's bill against him and the heirs at law or devisees, as the case may be, for sale of land under the equity jurisdiction of the court. . . . Here the plaintiffs allege that they have a judgment against the estate of Charles McDowell, and the administrator declines to file a petition for the sale of the land; that the assets of the estate have been exhausted by the payment of debts and the emancipation of the slaves, and other casualties of the war, and that the defendants, devisees, have lands in their possession devised by Charles McDowell, testator." The error pointed out

by this Court, for which a new trial was awarded, was the refusal of the judge below to submit an issue to the jury involving the question whether the assets had been exhausted by the payment of debts, etc. If it was not material that the deficiency of assets should have been alleged, why did the Court hold that it was error to refuse to allow that question to be passed upon by the jury? It is well settled by a line of decisions in this State that only an administrator *de bonis non* can maintain an action for an account against the personal representative of the former administrator. *Merrill v. Merrill,* 92 N. C., 657; *Tulbert* (704) *v. Hollar,* 102 N. C., 406; *Wilson v. Pearson,* 102 N. C., 313. But where the administrator refuses to bring an action upon the bond of a former administrator, or declines, upon request of the creditor, and where there is a deficiency of assets to institute a proceeding against the heirs at law or devisees to sell land for assets, the creditor may maintain a creditor's bill by alleging such exhaustion or deficiency of assets, as well as such refusal to bring suit, and not otherwise, against both the recusant personal representative and the heirs or devisees, as the case may be. *Wilson v. Bynum, supra.* The objection that there was no allegation of a refusal on the part of the defendant to bring suit was not raised by the demurrer, nor is it one of the grounds upon which the motion to dismiss rests. If the demurrer had specified that ground, it would have given rise to an interesting question growing out of the fact that it appears from the pleadings that W. W. Cozart is a necessary party in his own individual right as a claimant of title to an interest in the land through the alleged fraudulent deed, and must, if he had instituted this suit in his representative capacity, have made himself a party. He could not, as an individual, attack the title under which he held. It is not necessary to pass upon this question here, however. The objection raised by the demurrer that there was no allegation of a deficiency of assets ought to have been sustained by his Honor.

In plaintiff's appeal, therefore, we hold that there was no error in refusing to treat the demurrer as frivolous.

Affirmed.

Cited: S. c., 109 N. C., 181; *Guilford v. Georgia Co.,* 112 N. C., 43; *Barcello v. Hapgood,* 118 N. C., 726; *Yarborough v. Moore,* 151 N. C., 119.

(705)

T. D. CLEMENT v. W. W. COZART.

Upon the facts set forth in the plaintiff's appeal, the defendant excepted to the judgment of the court overruling the demurrer, and appealed.

L. C. Edwards and J. B. Batchelor for plaintiff.
R. W. Winston for defendant.

AVERY, J. For the reasons given in the discussion of the plaintiff's appeal, we hold that there was error in overruling the demurrer of the defendant.

Reversed.

J. N. BENNERS ET AL. v. WILLIAM RHINEHART.

Judgment Debtor—Creditor—Execution Sale—Purchaser.

1. The purchaser at a sale made after the death of a judgment debtor under an execution issued before his death acquires a good title.

2. The fact that the purchaser is also the execution creditor does not render the sale void, and, if voidable, it must be set aside by a direct proceeding for that purpose, or upon answer setting forth facts sufficient to evoke the equitable interposition of the court.

ACTION tried at Fall Term, 1890, of HAYWOOD, before *Phillips, J.*, brought for the possession of an interest in a lot of land.

The plaintiffs obtained and docketed a judgment in 1878 against one Love, his homestead having been laid off in 1875, and the lot in question being a part of the excess above it. In 1886 he conveyed by deed
(706) his interest therein to the defendant.

Execution was issued on 6 June, 1887, the judgment having been kept alive by previous executions, and the execution debtor died on 7 June, 1887. The court adjudged the sale to be void. The plaintiffs took a nonsuit and appealed.

G. S. Ferguson (by brief) and W. B. Ferguson (by brief) for plaintiffs.
No counsel contra.

SHEPHERD, J. The execution under which the defendant purchased was issued before the death of the judgment debtor. The sale was made before the return day of the writ and after the death of the said debtor.

Did the purchaser acquire a valid title? We were not favored with an argument in support of the ruling of his Honor, nor have we been able to find anything in our statute law which conflicts with the decisions of this Court and other authorities sustaining the title of a purchaser under such circumstances.

In *Aycock v. Harrison,* 65 N. C., 8, *Reade, J.,* speaking for the Court, says: "Where there is a judgment, and a *fi. fa.* or *ven. ex.* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant die before the sale, and so he may when the *fi. fa.* or *ven. ex.* issue after his death, but is tested before. The reason is, that when the process issues or is tested before the defendant's death, the ministerial officer can take no notice of his death, but must obey the process, which, being tested before the death, binds the land." In *Halso v. Cole,* 82 N. C., 161, *Dillard, J.,* says: "If the execution had been sued in the lifetime of David Cole, or after his death, but with a test antedating his death, the sale might have been made under its mandate and the title would have passed." To the same effect is *Grant v. Hughes,* 82 N. C., 216, and cases there cited.

These adjudications find abundant support in Tidd's Prac., (707) 1034; Freeman on Executions, 37, and the very numerous cases cited by the latter author.

It is true that the purchaser in this case is the execution creditor, but, conceding that he is within the principle which affects such a purchaser with notice of all irregularities in the execution, the sale would nevertheless be voidable only, and, not having been set aside by any direct proceeding, and the pleadings containing no matter which calls for the equitable interposition of the Court (there being only a general denial), we think the purchaser acquired the legal title.

Reversed.

Cited: Thomas v. Hunsucker, 108 N. C., 724.

T. T. JENKINS, CASHIER, v. T. A. H. WILKINSON ET AL.

Guarantor of Payment—Guarantor of Collection—Promissory Note—Extension of Time for Payment.

1. A was indebted to B, and gave his promissory note, which, at maturity, he failed to pay. In consideration of a further extension of the time for payment, C executed a writing, promising to guarantee the payment of

the debt, provided B would hold a certain mortgage as collateral: *Held*, C was liable as a guarantor of *payment*, and not as a mere guarantor of *collection*.

2. A guarantor of *payment* is liable upon an absolute promise to pay, upon the failure of the principal debtor.

3. A guarantor of *collection* is liable upon a promise to pay the debt, upon condition that the guarantor shall diligently prosecute the principal debtor without success.

(708) APPEAL from *Brown, J.*, at Fall Term, 1890, of GASTON.

The complaint alleged that the defendant T. A. H. Wilkinson was indebted to him as cashier, and gave his promissory note, of which the following is a copy:

$800. GASTONIA, N. C., 5 January, 1888.

Ninety days after date, I promise to pay to the order of T. T. Jenkins, cashier, $800, negotiable and payable at the office of Craig & Jenkins, bankers, value received, with interest at the rate of 8 per cent per annum after maturity. Due 4 April, 1888. T. A. H. WILKINSON.

Wilkinson paid the interest up to 4 July, 1888, but was unable to pay the note at maturity, when payment was demanded. In consideration of further indulgence, the defendant Nancy Wilkinson executed a paper-writing, of which the following is a copy:

DENVER, N. C., 14 April, 1888.

MR. T. T. JENKINS, Gastonia, N. C.

DEAR SIR:—You will please grant my son, T. A. H. Wilkinson, all the indulgence that you possibly can give, in reason, on the note that you hold against him at your bank, and I will guarantee the payment of the debt, provided that you hold the mortgage which T. A. H. Wilkinson, my son, made to N. A. W. Wilkinson as collateral on said debt.

Yours truly, NANCY WILKINSON.

The plaintiff alleged further that he had performed all the conditions named by the guarantor, and that the debt had not been paid.

There was a verdict and judgment for the plaintiff. Defendant appealed.

(709) *C. W. Tillett for plaintiff.*

No counsel contra.

SHEPHERD, J. There is a plain distinction between a guaranty of payment and a guaranty of collection. "The former is an absolute

promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success." *Jones v. Ashford,* 79 N. C., 173; Baylie Sureties and Guarantors, 113.

This case belongs to the former of these classes, and the plaintiff, having complied with the terms imposed upon him by the contract, had a right to sue the defendant Nancy Wilkinson upon the maturity of the obligation.

Her agreement was not to pay after the plaintiff had exhausted the mortgage security, but it was absolute upon default of the debtor, and the requirement that the plaintiff was not to surrender the mortgage was only for her protection by way of subrogation, in the event of her being compelled to pay the debt.

No error.

Cited: Hutchins v. Bank, 130 N. C., 287; *Cowan v. Roberts,* 134 N. C., 419; *Voorhees v. Porter, ib.,* 601; *Mudge v. Varner,* 146 N. C., 149; *Johnson v. Lassiter,* 155 N. C., 52; *Sykes v. Everett,* 167 N. C., 608; *Crane Co. v. Longest Co.,* 177 N. C., 350.

(710)

FRANK S. PADDOCK ET AL, v. R. W. DAVENPORT.

Contract —Writing — Seal — Consideration — Damages—Specific Performance — Standing Trees — Personal Property — Offer of Sale — Acceptance.

1. In an action for damages for breach of a contract for sale of certain timber-trees standing on defendant's land, the plaintiff set up a writing, under seal, containing an offer to sell within sixty days. There was no consideration paid. Within the sixty days the plaintiff offered to go on the land and mark and pay for the trees, according to the terms of the writing. The defendant refused: *Held,* (1) there was a binding contract of sale; (2) the plaintiff's offer was a valid acceptance of the contract; (3) the ruling of the court below that it was void for want of consideration was error.

2. There being no consideration paid, the defendant's offer might have been withdrawn at any time during the sixty days before it was accepted by the plaintiff.

3. In an action for specific performance of a contract for the sale of timber-trees standing on the defendant's land, it appeared that they were to be

severed and converted into personal property; that they had no peculiar value, except the price had risen since the contract and these trees were becoming scarce; that there was a watercourse for convenience of transportation, and that plaintiff had purchased other trees near by: *Held*, the plaintiff was not entitled to such relief.

4. Specific performance will be granted where there is a peculiar value attached to the subject of the contract which is compensable in damages, and when the damages at law are so uncertain and unascertainable, owing to the nature of the property or circumstances of the case, that specific performance is indispensable to justice.

ACTION tried before *Phillips, J.*, for specific performance, at Fall Term, 1890, of CLAY, upon demurrer of defendant. Demurrer was sustained and plaintiffs appealed.

The plaintiffs alleged:

(711) 1. That, on or about 23 October, 1889, the defendant R. W. Davenport contracted in writing, under seal, for a good and valuable consideration, with one T. S. Arthur, giving to him, the said T. S. Arthur, the exclusive privilege for sixty days from the date of said contract of buying all the merchantable poplar, ash and cherry trees standing and growing on two certain tracts of land of said R. W. Davenport, at the price of fifty cents per tree for all merchantable poplar and ash trees, and $1 per tree for all merchantable cherry trees, said contract being in the following words and figures, to wit:

"Know all men by these presents, that for and in consideration of fifty cents per tree, on the stump, I, R. W. Davenport, of Clay County, North Carolina, have this day given to T. S. Arthur the exclusive privilege for sixty days of buying all of the merchantable poplar and ash, and $1 for cherry trees; that he, his agents or successors, may select and mark on my tracts of 300 acres of land, Nos. 13 and 2456, in District 18, on the waters of Shooting Creek, Towns and Clay County, Georgia, and North Carolina; the said timber to be paid for when it is marked up. I further give said T. S. Arthur, or his successors, the right of way, free of charge, over my lands by a practicable route to get their timber out, and the use of small timbers to build roads and load timber, and when the said timber is paid for, as provided for above, I, R. W. Davenport, herein bind myself, my heirs and lawful assigns to make said T. S. Arthur or his legal representatives a good and lawful deed to said timber. This 23 October, 1889.

"R. W. DAVENPORT. (Seal.)"

2. That tract No. 2456, mentioned in said contract, lies in Clay County.

3. That the said T. S. Arthur, for a good and valuable consideration, assigned and transferred to the plaintiffs all his interest in said

contract and the trees described therein. That by the terms of (712) said contract the trees were not to be paid for until they were marked up; that plaintiffs, their servants and their agents, before the expiration of sixty days from the date of said contract, went to the defendant R. W. Davenport and offered to select and mark all the merchantable poplar, ash and cherry trees which were standing and growing on the lands described in said contract, and pay the said R. W. Davenport for the same at the price named in said contract, but the said R. W. Davenport refused to permit the plaintiffs or either of them or their agents or servants to enter upon said lands for the purpose of selecting and marking said trees, and refused to comply with any of the stipulations contained in said contract. That plaintiffs were then and have ever been ready, able and willing to comply with their part of the contract, and are now ready, willing and able to do so. That since 23 October, 1889, merchantable poplar, ash and cherry trees have greatly enhanced in value and are very scarce, and it is impossible for plaintiffs to buy such trees now at fifty cents per tree for poplar and ash trees, and $1 per tree for cherry trees. That at the times herein above mentioned there were standing and growing on the lands described in this complaint 1,000 merchantable poplar trees, 500 merchantable ash trees, and 500 merchantable cherry trees, which defendant R. W. Davenport, by his breach of said contract, deprived plaintiff of taking, holding and possessing, greatly to the damage of plaintiffs, to wit, in the sum of $2,000.

4. That the defendant J. M. Thrash, with full knowledge of said contract, and with full knowledge of plaintiffs' rights to said timber and trees, has accepted a conveyance from the said R. W. Davenport for said timber and trees, and taken possession of said timber and trees by marking and branding same, and refuses to acknowledge the right of plaintiffs to said trees, greatly to plaintiffs' damage, (713) to wit, in the sum of $2,000.

5. That plaintiffs are informed and believe the defendant R. W. Davenport is insolvent, and a judgment against him could not be collected by due process of law.

Wherefore, plaintiffs demand judgment:

1. That defendant R. W. Davenport admit plaintiffs so that they may mark up said trees, and that he execute a good and sufficient deed or deeds to plaintiffs for same.

2. That defendant J. M. Thrash be declared a trustee for plaintiffs, and compelled to convey said trees by proper deed to plaintiffs.

3. For $2,000 damages.

4. For costs of action, and such other and further relief as may be meet and proper.

And for a second cause of action plaintiffs allege that they, relying upon the faithful performance of said contract by defendant R. W. Davenport, purchased a few other trees of like kind in the immediate neighborhood of said Davenport's land, so that they could be justified in getting said trees out for market or milling; that the lands of defendant R. W. Davenport, on which said trees stand, are in the neighborhood of other trees purchased by plaintiffs; are located on a good watercourse, and the trees on said lands are much more accessible and easily worked than the trees on the majority of land; that, owing to the large number of trees on defendant Davenport's land, the location of said land as to water, and the nearness of other trees purchased by plaintiffs, the trees on the lands of defendant Davenport would be very valuable to plaintiffs; that by reason of the breach of the said contract by defendant Davenport, and by reason of the taking possession of and holding said timber and trees by defendant Thrash, and by reason of the enhanced value of such timber and trees on such lands located as the land described in this complaint, and the great scarcity of such trees and timber located as the timber and trees on the lands of defend-
(714) ant Davenport, set forth in this complaint, and the impossibility for plaintiffs to secure and purchase such timber and trees on lands located as the lands set forth in the contract, plaintiffs have been greatly damaged, to wit, in the sum of $2,000.

Wherefore, plaintiffs demand judgment:

1. For $2,000 damages.

2. For costs of action and such other and further relief as may be deemed just and equitable.

DEMURRER.

The defendant J. M. Thrash, without waiving the many inaccuracies in the statement of facts, and the omission to state others, demurs to the complaint for that it does not state a cause of action against this defendant in this, to wit:

1. That the contract or covenant sued upon by the plaintiff is one inconvenient to the science and contrary to the policy of the law, and void.

2. That this defendant was not a party to the same, as appears from the contract set forth in the complaint.

3. That this defendant is not a proper party to this suit, as the contract set up in the complaint is, at most, a personal covenant on the part of his codefendant, and not such a contract as could be specifically enforced, even against the original parties.

4. That, as appears from the contract, the same was without consideration.

Wherefore, the defendant asks that plaintiffs' action be dismissed, and that the defendant recover of the plaintiffs the costs, to be taxed by the clerk.

The defendant R. W. Davenport, without waiving the many inaccuracies in the statement of facts, and the omission to state others, demurs to the complaint, for that it does not show a cause of action against him in this, to wit:

1. That the contract, or pretended contract, set forth in the complaint, as appears upon the face thereof, was without con- (715) sideration and void.

2. That the same is contrary to the science and against the policy of the law, and void.

3. That, as appears from the instrument therein set out, the contract is at most only a covenant, and not such as can be specifically enforced.

Wherefore, defendant demands judgment, whether he shall be compelled to answer the facts alleged in the complaint, and that plaintiffs' action be dismissed, and defendant recover his cost.

E. B. Norvell (by brief) and T. F. Davidson for plaintiffs.
John Devereux, Jr., for defendant.

SHEPHERD, J. Two causes of action are set out in the complaint—one for damages for breach of contract, and the other for its specific performance. The court held, upon demurrer, that neither of the said causes of action could be maintained.

1. As to the cause of action against the defendant Davenport, we think that there was error in the ruling that the contract for the sale of the trees was void for want of consideration.

A paper-writing sued upon is substantially an offer to sell the trees at a certain price within sixty days. There being no consideration for the offer, it could have been withdrawn at any time within the period mentioned before acceptance by the plaintiff. The offer, however, was not so withdrawn, and the plaintiff having accepted it within the stipulated time, it became a binding contract, for the breach of which the said defendant is answerable in damages. 1 Benjamin on Sales, 50, and the numerous cases cited in the notes. (716)

The offer of the plaintiff to pay the price and mark the trees was sufficient, in our opinion, to constitute a valid acceptance. There was, therefore, error in the ruling as to this cause of action.

2. The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiffs.

The true principle upon which specific performance is decreed does not rest, in all cases, simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law *assumes* land to be of this character "simply because," says *Pearson, J.,* in *Kitchen v. Herring,* 42 N. C., 191, "it is *land,* a favorite and favored subject in England and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, titles, deeds, valuable paintings, articles of unusual beauty, rarity and distinction, such as objects of *vertu.* A horn, which time out of mind had gone along with an estate and an old silver *patera,* bearing a Greek inscription and dedicated to Hercules, were held to be proper subjects of specific performance. These, said *Lord Eldon,* turned upon the *pretium affectionis* which could not be estimated in damages. So for a faithful family slave, endeared by a long course of service or early association, *Chief Justice Taylor* remarked that "no damages can compensate; for there is no standard by which the price of the affections can be adjusted and no scale to graduate the feelings of the heart." *Williams v. Howard,* 7 N. C., 80.

The principle is also applied (2) where the damages at law (717) are so uncertain and unascertainable, owing to the nature of the property or circumstances of the case, that a specific performance is indispensable to justice.

Such was formerly held as to the shares in a railway company, which differ, it was said, from the funded debt of the government in not always being in the market and having a specific value. Also a patent (34 Conn., 325), and a contract to insure (4 Sanf., ch. 408), and like cases.

The general principle everywhere recognized, however, is that except in cases falling within the foregoing principles, a Court of Equity will not decree the specific performance of contracts for personal property; "for," remarks *Pearson, J.,* in *Kitchen v. Herring* (*supra*), "if with money an article of the same description can be bought . . . the remedy at law is adequate." See, also, Pomeroy Spec. Perf., 14.

Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the Court. The trees were purchased with a view to their severance from the soil and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be

readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce *at the contract price.* The simple fact that they are near a watercourse does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased a "few trees of like kind" in the vicinity sufficient to warrant the equitable intervention of the Court.

We can very easily conceive of cases in which contracts of this (718) kind may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained.

As to the other cause of action, it is

Reversed.

Cited: Rodman v. Robinson, 134 N. C., 506; *Trogden v. Williams,* 144 N. C., 201; *Timber Co. v. Wilson,* 151 N. C., 158; *Winders v. Kenan,* 161 N. C., 632; *Thomason v. Bescher,* 176 N. C., 628.

W. L. LOWE v. J. A. ELLIOTT ET AL.

Certiorari—Case Upon Appeal—Judge's Charges—Exceptions.

1. Exceptions to all matters other than the charge must be taken at the time.
2. Exceptions to the charge, and for refusing to give special instructions, are in apt time if taken at or before the stating of the case on appeal, though the better practice is to assign all exceptions in making motion for new trial.
3. The appellant is entitled to have his assignments of error to the charge, and for refusing or granting special instructions, if set out by him in his statement of case on appeal, incorporated by the judge in the case settled. If they are omitted, *certiorari* will lie.

PETITION for *certiorari* filed in this Court. The facts are stated in the opinion.

P. D. Walker for petitioners.

J. B. Batchelor and John Devereux, Jr., contra.

CLARK, J. "The case stated for an appeal to this Court," in the words of *Ruffin, C. J.,* "is here taken to be absolutely true as to all matters

(719) which occur on the trial, or purport to have been acted on in the court from which the appeal comes." *S. v. Reid,* 18 N. C., 377; *S. v. Ephraim,* 19 N. C., 162, which are cited and approved in *S. v. Gooch,* 94 N. C., 982. As to such matters, a *certiorari* will not lie unless it appear by affidavit that, by inadvertence or mistake, the judge has committed an error which the petitioner has reason to believe the judge will correct if given the opportunity, and the writ will not, even in such case, be granted unless the grounds for such belief are set forth, so that the court may pass upon the reasonableness thereof. *Porter v. R. R.,* 97 N. C., 63.

Exceptions to evidence, and all matters other than the charge, must be taken *at the time* [The Code, sec. 412 (2)], or are waived. *S. v. Ballard,* 97 N. C., 443. But it is otherwise as to assignments of error in the charge, or for granting or refusing special instructions. These exceptions need not be taken on the trial. The Code, sec. 412 (3). In *McKinnon v. Morrison,* 104 N. C., 354, the Court suggested that it would be better for counsel to assign such errors on a motion for a new trial, so as to give the judge himself a chance to correct the errors, if any, committed in instructing the jury, but it conceded that the appellant had a right to withhold them till stating his case on appeal, but if not then stated, the exceptions would be waived, and could not be assigned here.

The assignment of errors in the instructions to the jury is the act of the appellant. It is *his* assignment of error, and must appear upon the face of his statement of the case on appeal. It is not a matter which must occur or not occur on the trial, and as to the occurrence or non-occurrence of which the judge must determine in settling the case.

It is true, counsel, in assigning error to the charge, or for granting or refusing instructions, may recite in his exceptions the charge differently from what the judge says it was. In such case the charge (720) as stated by the judge must govern, as was pointed out in *Walker v. Scott,* 106 N. C., 56. This difficulty will rarely occur, since prayers for instructions are required to be in writing (The Code, sec. 415), and the charge must also be in writing, if requested in apt time. The Code, sec. 414. When the charge is not in writing the judge's statement of what it was must govern, and the appellant will conform his exceptions thereto or lose his labor. Assignments of error in the instructions given or refused, when made by appellant in stating his case (Rule 27, 104 N. C., 923), he is entitled to have incorporated in the case, when settled by the judge. The recitals therein of the parts of the charge excepted to may make it desirable that the judge should state more fully and carefully, or correct his own statement of the charge. To that end the case will be remanded to him to incorporate

in the "case on appeal" the assignments of error to the charge, and in granting or refusing the special instructions which are set out in appellant's case on appeal, and with leave to the judge to correct and amend the case, as heretofore made up by him, in any other particulars which to him may seem just and proper.

Per Curiam. Motion allowed.

Cited: Boon v. Murphy, 108 N. C., 193; *Smith v. Smith, ib.,* 368; *Posey v. Patton,* 109 N. C., 458; *Hinson v. Powell, ib.,* 538; *S. v. Black, ib.,* 857; *Jenkins v. R. R.,* 110 N. C., 442; *Broadwell v. Ray,* 111 N. C., 457; *S. v. McKinney, ib.,* 685; *S. v. Frizell, ib.,* 724; *Hemphill v. Morrison,* 112 N. C., 758; *Mariner v. Lumber Co.,* 113 N. C., 54; *Allen v. McLendon, ib.,* 320; *Cotton Mills v. Abernathy,* 115 N. C., 409; *S. v. Varner, ib.,* 745; *S. v. Adams, ib.,* 783; *Riggan v. Sledge,* 116 N. C., 92; *Light Co. v. Light Co., ib.,* 121; *Blackburn v. Ins. Co., ib.,* 826; *Tillett v. R. R., ib.,* 939; *Bernhardt v. Brown,* 118 N. C., 709; *Bank v. Sumner,* 119 N. C., 592; *S. v. Harris,* 120 N. C., 578; *S. v. Melton, ib.,* 596; *S. v. Pierce,* 123 N. C., 749; *Wilson v. Lumber Co.,* 131 N. C., 164; *Cameron v. Power Co.,* 137 N. C., 102, 104, 105; *S. v. Dewey,* 139 N. C., 560; *Alley v. Howell,* 141 N. C., 116; *Slocumb v. Construction Co.,* 142 N. C., 352; *Jones v. High Point,* 153 N. C., 372; *S. v. Freeze,* 170 N. C., 711; *Hudson v. R. R.,* 176 N. C., 496; *Paul v. Burton,* 180 N. C., 47.

(721)

E. S. BOWERS ET AL. v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Tort — Contract — Damages — Complaint—Jurisdiction—Demand for Judgment.

1. A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and "so negligently and carelessly conducted in regard to the same that it was greatly damaged," states facts sufficient to constitute a tort.
2. Where the damages alleged amount to more than fifty dollars, the Superior Court has jurisdiction.
3. A mere demand of judgment for amount of damages greater than are alleged in the complaint will not avail to give the Superior Court jurisdiction.

APPEAL at Spring Term, 1890, of JACKSON, from *Connor, J.*

It is alleged in substance in the complaint that five boxes of *mica* were shipped to the plaintiffs from the city of Boston, and that the

defendant and others, common carriers, contracted with the plaintiffs to transport the same for certain compensation, etc.; and it is further alleged:

"4. That the defendant, in compliance with the said contract for hire, entered into in the said city of Boston, undertook to carry the said five boxes of mica safely from the town of Salisbury, North Carolina, to Sylva, in North Carolina, and collected the freight for transportation due for the entire route at said point of delivery.

"5. That the defendant did not safely carry and deliver said five boxes of mica pursuant to the agreement aforesaid, but it so negligently and carelessly conducted in regard to the same that the mica was greatly damaged, three boxes being broken open and scattered, to the great damage of the plaintiffs of one hundred and forty dollars.

"Wherefore, the plaintiffs pray judgment for the sum of $300 (722) and the costs of this action."

The defendant in its answer denied all the material allegations of the complaint. Thereupon, the court gave judgment as follows:

"It appearing from the pleadings in this cause that the court has no jurisdiction of the action, it is ordered and adjudged, on motion of defendant's counsel, that this action be dismissed at the cost of the plaintiffs."

The plaintiffs excepted and appealed.

George A. Jones (by brief) for plaintiffs.
F. H. Busbee and Charles Price for defendant.

MERRIMON, C. J., after stating the case: It is settled that under the present method of civil procedure when the breach of a contract involves a tort, the complaining party may waive the contract and sue for and recover damages for the tortious injury. In such case, if the damages alleged in good faith are fifty dollars or less, the court of a justice of the peace will have jurisdiction; if for that or a greater sum the Superior Court will have jurisdiction. *Bullinger v. Marshall,* 70 N. C., 520; *Ashe v. Gray,* 88 N. C., 190; *Noville v. Dew,* 94 N. C., 43; *Harvey v. Hambright,* 98 N. C., 446; *Edwards v. Cowper,* 99 N. C., 421; *Long v. Fields,* 104 N. C., 221.

In this case the plaintiffs might have sued for a simple breach of the contract, and if they had done so the Superior Court would not have original jurisdiction, because the damage alleged was but one hundred and forty dollars, a demand within the jurisdiction of the court of a justice of the peace. The mere demand for three hundred dollars could not give the Superior Court jurisdiction because, manifestly, such

demand would not be made in good faith, but simply to appar- (723)
ently give the court jurisdiction, and the court ought to dismiss the action.

We think, however, that it appears sufficiently from the face of the complaint that the plaintiffs allege, not simply a breach of contract, but a tort—a tortious injury—and damages occasioned thereby exceeding fifty dollars, so that the court had jurisdiction. A breach of the contract is alleged in general terms, but it is further alleged, particularly and specifically, that the defendant "so negligently and carelessly conducted in regard to the same that the said mica was greatly damaged, three boxes being broken open and scattered, to the great damage of the plaintiffs, one hundred and forty dollars." Obviously, these words were intended to allege more than a simple breach of the contract—a tort—tortious injury. Granting that more appropriate terms for such purpose might have been employed, still the Court can see the purpose informally expressed, and, as it can, the pleadings should be upheld and the jurisdiction sustained. As we have seen, the plaintiff might sue for the tort, and it sufficiently appears that he intends to and does so.

The defendant's counsel cited and relied upon *Winslow v. Weith,* 66 N. C., 432; *Froelich v. Express Co.,* 67 N. C., 1, and *Hannah v. R. R.,* 87 N. C., 351. In the first of these cases the Court expressly founds its opinion, of but a few lines, upon the ground that the cause of action is a breach of contract. The decision of the Court in the second case is put upon the like ground. In the third case, the action was disposed of upon a different ground, the late *Chief Justice* saying, *obiter,* of the alleged cause of action, that "if treated as an action for a *violated contract of carriage merely,* the claim asserted in the complaint would be solely within a justice's jurisdiction, an obstacle equally fatal to the recovery," citing *Froelich v. Express Co., supra.*

In cases like that under consideration, when the plaintiff intends to sue in tort, the distinctive tortious cause of action should be alleged in terms that clearly show the purpose. (724)

This is necessary, to the end the court may see that it, and not the court of a justice of the peace, has jurisdiction.

The court should have denied the motion to dismiss the action.

Reversed.

Cited: Purcell v. R. R., 108 N. C., 424; *Schulhofer v. R. R.,* 118 N. C., 1097; *Sams v. Price,* 119 N. C., 574; *Parker v. Express Co.,* 132 N. C., 130; *Williams v. R. R.,* 144 N. C., 505; *White v. Eley,* 145 N. C., 37; *Manning v. Fountain,* 147 N. C., 19; *Realty Co. v. Corpening, ib.,* 614; *Peanut Co. v. R. R.,* 155 N. C., 153; *Cheese v. Pipkin, ib.,* 401;

Fields v. Brown, 160 N. C., 300; *Mfg. Co. v. Mfg. Co.,* 161 N. C., 435; *Mitchem v. Pasour,* 173 N. C., 488; *Pendergraph v. Express Co.,* 178 N. C., 347.

T. M. HESTER v. JAMES MULLEN.

Slander—Statute of Limitations—New Cause of Action—Amendments of Pleadings.

1. An action for slander is barred in six months.

2. Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations: *Held,* (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred.

ACTION to recover damages for alleged slander, tried before *Brown, J.,* at Fall Term, 1890, of LINCOLN.

The statement of case on appeal is as follows:

"Upon the trial it was admitted by counsel that in the original complaint the plaintiff had complained and alleged a cause of action for words uttered by the defendant in April, 1888, to which the defendant answered and duly pleaded the statute of limitations. The summons is dated and was issued 20 January, 1889.

"At Spring Term, 1890, the plaintiff applied to the court for (725) general leave to amend the complaint, the defendant objecting. Leave to amend was granted.

"On 19 April, 1890, the plaintiff filed an amended complaint, setting up a cause of action for other words uttered by the defendant on another occasion, to wit, on 14 September, 1888. The defendant filed an answer, pleading statute of limitations."

The court held that upon the amended complaint, setting forth a new cause of action, the plea of the statute should be sustained, and intimated that the jury would be instructed upon the facts admitted and above set forth to find the issue as to the statute of limitations in favor of the defendant. Whereupon the plaintiff submitted to a nonsuit, and appealed.

No counsel for plaintiff.

W. A. Hoke for defendant.

DAVIS, J., after stating the facts: By section 157 of The Code, "an action for slander" must be brought within six months.

In the case before us the summons was issued 21 January, 1889.

The first complaint alleged a cause of action for words uttered in April, 1888, more than six months before the summons was issued, and was barred.

At Spring Term, 1890, leave was granted to the plaintiff to amend his complaint, the defendant objecting, and on 19 April, 1890, he filed an amended complaint setting up a cause of action for other words uttered by the defendant on 14 September, 1888, "within six months" of the issuing of the summons, but more than eighteen months before the filing of the amended complaint.

This cannot be done without the consent of parties, for while the power of the courts to allow amendments in furtherance of (726) justice is a very broad one, it has its limitations, and, after the action is commenced and the complaint is filed, as was said by the present *Chief Justice* in *Clendenin v. Turner,* 96 N. C., 421, "Only such amendments as to parties or the cause of action may be made as its nature and scope warranted. Amendments in this respect must be such, and only such, as are necessary to promote the completion of *the action begun.*" In the present case the action *begun,* as set out in the first complaint, was for words spoken in April, 1888; the amended complaint sets out a new and distinct cause of action for other words spoken in September, 1888, and as to the latter new and distinct cause of action, the amended complaint must be treated as the beginning of the action. *Ely v. Early,* 94 N. C., 1; *Clendenin v. Turner, supra; Robbins v. Harris,* 96 N. C., 557, and the cases cited in them.

No error.

Cited: Bray v. Creekmore, 109 N. C., 51; *Sams v. Price,* 121 N. C., 394; *Woodcock v. Bostic,* 128 N. C., 248; *Reynolds v. R. R.,* 136 N. C., 349; *Hall v. R. R.,* 149 N. C., 110; *Bennett v. R. R.,* 159 N. C., 347; *Reynolds v. Cotton Mills,* 177 N. C., 426.

GEORGE W. OSBORNE v. WILLIAM McCOY.

Damages—Warrants of Soundness—Deceit—Authority of Agent.

The plaintiff was employed by the defendant and another to sell some horses for him, among which was a mare which he swapped off. Afterwards, he paid, without authority of defendant, damages for the unsoundness of the

mare in compromise of a suit against him for a breach of warranty. He had no authority to warrant, nor did it appear that he did warrant, the mare to be sound: *Held*, that the plaintiff, in an action against the defendant for the money so paid in compromise of the suit for damages, was not entitled to recover.

APPEAL from a justice of the peace.

(730) *J. F. Morphew for plaintiff.*
Q. F. Neal and W. H. Bower for defendant.

DAVIS, J. This is not an action for deceit in falsely representing the mare as sound, when the defendant knew to the contrary, but an action commenced before a justice of the peace to recover money alleged to have been paid by the plaintiff as damages, "to a man in South Carolina," on account of a breach of warranty in the sale of an unsound horse, which he had sold, as agent for the defendant and Jonathan Osborne, with warranty.

We need not consider the question of power or authority of the plaintiff, as agent, to warrant the mare sold by him for the defendant. His own testimony, though not very clear, for it seems there were two trades, fails to show any warranty. He says that he told the "man" with whom he traded that the mare belonged to McCoy, and "was sound so far as (he) I knew." This was not even an *affirmation* of soundness, as was the case in *Horton v. Green,* 66 N. C., 596, in which it is said, citing *Baum v. Stevens,* 24 N. C., 411, and *Erwin v. Maxwell,* 7 N. C., 241, that such an affirmation of soundness does not, *per se,* amount to a warranty, but may be submitted to the jury, with attendant circumstances, to say whether the affirmation was *intended* as a warranty. The plaintiff sold the mare, not *affirming* her soundness, but only saying that she was *sound so far as he knew.* If knowingly false, it might have been cause for an action of deceit, but it was no warranty. The plaintiff, in 1889, near four years after the sale of 1885, though advised by
(731) a lawyer, to whom he paid a fee of $2.50, to compromise, had no authority from the defendant to pay the money sought to be recovered, for him, and he (the defendant) is under no legal obligation to reimburse the plaintiff for money so paid, not at his request or instance, but without authority from him, express or implied. *Meadows v. Smith,* 34 N. C., 18.

The plaintiff could not recover upon the evidence adduced by him, and there is

No error.

BRINKLEY BEAN v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Pleading — Practice—The Code—Legal and Equitable Defenses—Release—Issues—Fraud—Undue Advantage—Contributory Negligence —Fellow-Servant.

1. Under the present method of procedure, parties may allege their cause of action and their rights in and about the same, whether legal or equitable, in the same action.

2. Where the defendant, a railroad company, as a defense to an action for damages, set up a release, it is proper to set up in reply matters which, if true, will avoid it, whether legal or equitable.

3. Only issues arising naturally upon the pleadings should be submitted, but where they are subdivided, this is not a ground for new trial, unless it appear that they were thereby confusing, complicated or prejudicial.

4. Where the complaint does not allege fraud, in terms, but does set forth facts which, being denied by the defendant, raise issues as to unfairness, surprise and undue advantage, by means of which an instrument was obtained, the court will not let the defendant take advantage of it.

5. Contradictory issues under the different aspects of the pleadings are not objectionable under The Code system.

6. Where there was an allegation and evidence that the defendant, a railroad company, left a ledge of rock in such a position as that the jar of the passing train would probably cause it to fall on its track, and it did so fall, and plaintiff was thereby injured: *Held*, the issue of negligence was properly submitted to the jury.

7. The fact that it was the duty of a track-walker, a fellow-servant of plaintiff, to examine the condition of the track just before the passage of the train, cannot excuse the defendant of negligence.

8. This was not an ordinary hazard, and, in the absence of evidence to show that plaintiff knew of the dangerous condition of the ledge, the court rightly refused to instruct the jury that there was contributory negligence on his part.

ACTION tried at March Term, 1890, of BUNCOMBE, before (732) *Connor, J.*, by plaintiff to recover damages for injuries sustained by him while he was in the service of the defendant railroad company as a brakeman on the freight train, occasioned by its negligence, etc.

Among other things, it is alleged in the complaint:

"3. That at the point where the engine and cars were thrown from the track, as mentioned in the preceding paragraph, there was a large mass of stone, being the end of an adjacent mountain, standing up at

an angle of between forty-five and sixty degrees, extending into the river, the latter being at this point of the depth of about twenty feet. The defendant company, in making room for the road-bed, did not cut the full width of the track into the said mass of stone so as to give the said road-bed a firm foundation, but built a part of the track upon a substructure of wood and dirt that had a precarious footing on the sloping mass of stone aforesaid. This mass of stone on the opposite side of the track, and forming the upper portion of the cut at this point, was much loosened by the blasting that was done there when the track was located by the defendant, and being left without sufficient support at its foundation, pieces of it were liable at any time to be precipitated upon the track The stone that caused the engine
(733) to be thrown from the track, as hereinbefore mentioned, was in the large mass referred to, and after the location of the road-bed by the defendant had been left, one end of it and part of one side, wholly unsupported, and the upper end of it was so feebly held by the mass above it that the jar and concussion occasioned by the passing trains were likely at any moment to precipitate it upon the track, which was only a few feet from it.

"4. The unsafe condition of the road-bed and track at this point, their proximity to the river on one side and the mass of stone on the other, considering the depth of the river and its rapid flow, and the loose and unsubstantial character of the overhanging mass of stone, rendered the passage of an engine and cars on the road extremely hazardous, so much so that, in case of accident, escape from danger, by leaping to the right or the left, was impossible, of all this the defendant might and would then and theretofore have known by due care; and had it regarded its duty, it would have so located its road-bed and protected the track from the overhanging mass of stone as to have prevented obstructions from falling on the track, and otherwise have rendered the road safe and secure against damage to employees and others passing over the road. And yet the defendant, not regarding its duty, was so careless, negligent, and unskillful in this behalf that it failed to keep it free and clear of obstructions, by reason whereof the plaintiff, while in the employment of the defendant, and while engaged in the discharge of his duties as brakeman, and where he was himself in no fault, received the aforesaid injuries in the manner hereinbefore described."

The defendant denied the material allegations of the complaint, and alleged as affirmative defense:

1. That if injured at all, it was not by reason of the negligence of this defendant, but by plaintiff's negligence contributing to the
(734) said injury.

2. That if injured, it was not by reason of the negligence of defendant, as alleged in the complaint, but by reason of the negligence of a fellow-servant of the plaintiff in the service of the defendant.

For a third defense to this action, defendant says:

1. That after the injuries complained of, and before the commencement of this action, the plaintiff, on 18 December, 1885, executed and delivered to this defendant a release from all liability to him, plaintiff, on the part of defendant, by reason of the injuries received, as suffered by the plaintiff, as alleged in the complaint. That the said release was executed by this plaintiff, and delivered as aforesaid, for valuable considerations, and in full settlement of any claim plaintiff may have had against this defendant by reason of any negligence, as alleged in the complaint of plaintiff, on the part of this defendant, its officers or agents, and this said release this defendant pleads in bar of this action, and makes due protest of the same in this its answer.

The plaintiff replied to this answer as follows:

The plaintiff, replying to so much of the defendant's answer as set up an alleged release of claim to damages, says:

1. That he denies the same to be true.

2. That if he did sign the said alleged release he did it under the impression, belief and understanding that he was signing a receipt for wages then due him by the defendant company, and that at said time, to wit, the date of the alleged release, the defendant company was indebted to the plaintiff in the sum of about $50, due as wages earned in the employment of said company.

3. That said alleged release was obtained by the agent of the defendant company in a few days after the said injuries were received and while plaintiff was suffering great bodily pain therefrom, (735) mental anxiety by reason thereof, and was unable to comprehend the meaning or effects of the same.

4. That the plaintiff was, at the time the alleged release was procured, and is now, an ignorant, illiterate colored person, unable to read or write, and did not understand or comprehend the purport of said alleged release.

At the trial, on motion of the plaintiff, the following issues were submitted to the jury:

1. Did plaintiff sign and deliver the release mentioned in the answer of 18 December, 1885?

2. Did plaintiff sign said release under the impression, belief and understanding that it was a receipt for wages due him from the defendant company?

3. Was said release obtained by the defendant company while the plaintiff was suffering great bodily pain and mental anxiety from the injuries received by him?

4. Was the plaintiff, by reason of such bodily pain and mental anxiety, unable to comprehend the purport and effect of such release?

5. Was the plaintiff injured by the negligence of the defendant company, as alleged?

6. Did the plaintiff, by his negligence, contribute to the injury?

7. Was the plaintiff injured by the negligence of a fellow-servant, and if so, what one?

8. What damage has plaintiff sustained by reason of said injury?

The defendant excepted to the above issues, and tendered the following as the issues arising upon the pleadings:

1. Was the plaintiff injured by the defendant company as alleged in the complaint?

2. Did the plaintiff contribute to his injury by his negligence?

(736) 3. Was the plaintiff injured by the negligence of a fellow-servant, and if so, what one?

4. Did the plaintiff execute and deliver to the defendant company the paper-writing mentioned in the pleadings as a release of his claim for damages and in settlement of the same?

5. What damage, if any, is the plaintiff entitled to recover?

Defendant excepted to the ruling of the court refusing to submit the issues tendered by it.

The jury responded to the first issue "Yes," to the second "No," to the third "Yes," to the fourth "Yes," to the fifth "Yes," to the sixth "No," to the seventh "No," and to the eighth "$1,500," which responses duly appear in the record proper.

The following is so much of the evidence as has reference to the stone in the precipitous side of the mountain, the condition thereof, and the fall of parts of the same on the road:

"The stone had to be cut out to make the track at the place where the train ran off. A rock had fallen on track from the side of the mountain. I lived in 1885 at Hot Springs. I am acquainted with the road where the accident occurred. The railroad, after crossing the bridge, passes a curve. Where the accident happened the strata of rock had been cut off; pine stump in it; water running through it. It was a cold November morning. The bed of the road was cut out of the rock. The dip of the rock was such that, when loosened, either by the freezing of water or the jarring of the train, they would naturally be thrown upon the track. Some of them were of considerable size—as large as a millstone. The rock was the apparent cause of the wreck. Trains ran along there every day. I have seen the chief engineer, Major Wilson, there. They had Captain Payne there as roadmaster; he passed there every day. The condition was remarked by everybody as dangerous; it

remained there four years. After the accident the defendant (737) built a rock wall. They have begun to cut off the rocks. The rock is a granite flint; breaks off in blocks. Two men were killed."

"The place was dangerous-looking, apparently, to any one. A man on top of a freight car would be on a level with the rock. It would not appear dangerous to a man on top of a freight car."

"I live at Hot Springs. I remember the wreck in 1885. The road was cut out of the side of the mountain; the rocks projecting out of the mountain. I went there after the accident; could not see the engine. The defendant had a road-walker there. It was the duty of the track-walker to go before and after each train and see that the road was clear and not obstructed. He walked at the head of trains to see if there was any obstruction. I have seen him there. I do not know that there was any track-walker there that morning."

"I was in the employ of the Western North Carolina Railroad; painted Deepwater bridge. I noticed the condition of the railroad near there; I called Major Banner's attention to it. He was at the time assistant engineer."

The following is a copy of the release executed by the plaintiff in question:

STATE OF NORTH CAROLINA—Rowan County.

Know all men by these presents, that I, Pink Bean, a train-hand on the Western North Carolina Railroad, for and in consideration of thirty dollars, and other considerations made me thereto, the receipt whereof is hereby acknowledged, do hereby release the Western North Carolina Railroad Company from all claims whatsoever which I have or may have against them for injuries caused me while in their employ, and especially for damages for injuries received on 25 November, 1885, near Warm Springs. (738)

Witness my hand and seal, this 18 December, 1885.

PINK (his X mark) BEAN. [Seal.]

Witness: H. A. WYCHE.

The defendant's counsel requested the court to give the following instructions to the jury:

1. That negligence was a question for the court, and as there was no controversy between the plaintiff and defendant as to the facts shown by plaintiff, and relied on by him, pertaining to the fifth issue, it was for the court to say whether such undisputed facts constituted negligence; and in law they did not, and the jury must so find, responding to such issue in the negative.

2. That contributory negligence was a question for the court, and as there was no controversy between the plaintiff and defendant as to the existence of the facts and circumstances relied upon by the defendant, and testified to by the plaintiff and his witnesses, to establish contributory negligence on his part, the same did so establish, and the jury must find the sixth issue in the affirmative.

3. That, according to the testimony of one of plaintiff's witnesses, one Stone, the defendant has provided, at the point on its road where the plaintiff was injured, a track-walker, whose duty it was to precede and follow each train passing over that portion of the road for the purpose of keeping the same clear of obstacles, and his failure to notify the coming train, on which the plaintiff was engaged, of the obstacle on the track, or to remove the same, was negligence on his part, and being a fellow-servant with the plaintiff, the jury should find the seventh issue in the affirmative.

4. That there is no evidence of any undue influence, fraud or virtual mistake in the execution of the release mentioned in this case.

(739) 5. That the only question for the jury in this action, in passing upon the execution of the release, is as to whether he signed it.

6. A weak understanding on the part of the plaintiff is not sufficient to set aside a release of the kind mentioned here, but there must be connected with that understanding some fraud, or suprise, fraud practiced on plaintiff by the defendant, or surprise on his part.

7. If the parties have equal means of information, the rule of *caveat emptor* applies, and the injured party cannot have redress if he fail to avail himself of those sources of information, which he may readily reach unless prevented by the artifice or contrivance of the other party.

8. Before the release, mentioned in the pleadings, can be set aside the jury must find that the defendant practiced fraud upon the plaintiff in obtaining it from him, or obtained it, both parties being mistaken, or acting under a mistake, or exercised an undue influence over him in obtaining it from him.

9. There is no evidence of fraud, to go to the jury, practiced upon this plaintiff in obtaining from him the release.

10. There is no evidence of mutual mistake of the parties, or the mistake of one induced by the fraud of the other.

11. There is no evidence of undue influence exercised over the plaintiff by this defendant in obtaining from him the release.

12. There are no such allegations in the reply by this plaintiff as entitled him to have this release set aside, except the first one, wherein plaintiff alleges he did not sign and deliver it.

13. That, in the light of the allegations of the reply, the same are not material, except as to the signing and delivering the release, to which the first issue only is responsive.

The defendant excepted to the charge of the court, and assigned as errors in the same the court's failure to give, as a part of the same, the instructions asked for by the defendant. There was a finding by the jury as before specified, and as appears in the record proper. (740)

Upon these findings the defendant asked for judgment in its behalf, which the court refused, and gave judgment for the plaintiff, which is set out in the record proper.

The defendant excepted, and appealed to this Court.

Jones & Shuford (by brief) for plaintiff.
D. Schenck, F. H. Busbee and C. Price for defendant.

MERRIMON, C. J., after stating the case: The two first assignments of error have reference to the issues of fact—first, those which the court submitted to the jury; and secondly, those proposed by the defendant, and which the court refused to submit. The two may be considered and disposed of together. In this connection, it is important to observe the nature and purpose of the pleadings, and the same of the issues arising upon them, and how they arise.

The plaintiff alleges that he was the servant—a brakeman—on a train of cars of the defendant, and while he was employed about his duties as such, he sustained physical injuries, and damages as a consequence, occasioned by the default and neglect of the defendant in respects specified. The defendant denies the material allegations of the complaint, and, in its answer, alleges three grounds of affirmative defense—first, that of contributory negligence on the part of the plaintiff; secondly, negligence of a fellow-servant of the plaintiff; and thirdly, that the plaintiff, for a valuable consideration, released the defendant from liability to him for the injuries complained of, and damages as consequence thereof. The answer alleges "new matter constituting a defense by way of avoidance," or rather three distinct matters of defense by way of avoidance. The plaintiff, in his reply, first, simply denies that the matters so alleged are true. He further replies, as a matter of inducement, that the defendant owed him about the sum of $50. He then, in that connection, further replies and (741) alleges, specifically:

"3. That said alleged release was obtained by the agent of the defendant company a few days after the said injuries were received, and while plaintiff was suffering great bodily pain therefrom, mental anxiety by reason thereof, and was unable to comprehend the meaning or effects of the same.

"4. That plaintiff was, at the time the alleged release was procured, and is now, an ignorant, illiterate colored person, unable to read or write, and did not understand or comprehend the purport of said alleged release."

He thus replies and alleges, as to the release relied upon by the defendant, new matter, equitable in its nature, not inconsistent with the complaint, and demands judgment that he be relieved as to the same for the purposes of this action, and it be declared and adjudged inoperative and void. The defendant might allege such matters of defense, whether legal or equitable in their nature, and so the plaintiff might make reply. The Code, secs. 243, 244, 245, 248. The matter, equitable in its nature, alleged in the reply, is not so fully, specifically and formally alleged as it might and ought to be, but the Court can see the substance and purpose of it, and, therefore, the reply must be upheld as a pleading. All matters equitable in their nature should be alleged in the pleadings with such reasonable fullness and particularly as to the constituent facts as will enable the Court to see clearly the character of the equity alleged, the purpose of the pleading and the issues raised. Under the present method of civil procedure, the parties to an action may allege their causes of action, and their rights in and about them, in the same action, whether the same be legal or equitable, or both, and the Court must administer such rights in the action where the same are pertinent, and to administer them is necessary to a proper determination of it. The constituent facts of an alleged equity, whether
(742) the same be the chief cause of action, or be alleged as a pertinent incident in the course of the pleadings, in some aspects of the case, are sometimes voluminous and complicated. In such cases, the essential facts— not such as are immaterial and merely evidential— should be so alleged as to present the equity clearly and with a view to facilitate the trial of necessary issues of fact when raised. This is necessary in order to avoid a multitude of issues and to prevent confusion. In some cases—particularly in some equity cases—it would facilitate the trial and disposition of them if the court would "direct the jury to find a special verdict, in writing, upon all or any of the issues," or if it would "instruct them, if they find a general verdict, to find upon particular question of fact, to be stated in writing," and to make a "written finding thereon," as allowed by the statute (Code, sec. 409). *Porter v. R. R.*, 97 N. C., 66.

Now, in this case, the complaint and answer directly raised the issue of fact as to the alleged negligence of the defendant. The pleadings, and particularly the answer and the reply, raised—first, the issue of fact as to the contributory negligence of the plaintiff; secondly, that as to the negligence of a fellow-servant; thirdly, that as to the alleged

release of the plaintiff executed to the defendant; fourthly that raised by the allegation of the reply, that the release mentioned was obtained by the defendant from the plaintiff shortly after he sustained the injuries complained of, while he was suffering great bodily pain and mental anxiety occasioned thereby, was unable to comprehend the meaning and effect of the release, and that he was ignorant, illiterate, unable to read or write, and did not understand or comprehend the purport of the same.

The court, plainly, properly submitted the first four issues directly, and a fifth one as to damages. This the defendant's counsel concedes, but he insists that the second, third and fourth issues submitted were not raised by the pleadings—that they were immaterial, (743) confusing and inconsistent with the first issue submitted, and, therefore, absurd. We cannot treat these objections as well founded.

The reply to the answer does not expressly allege that the release in question was obtained from the plaintiff by the fraud of the defendant or its agents, but it does allege informally, in substance and effect, that it was obtained by the defendant under such circumstances of unfairness, undue advantage, inadequacy of consideration, suddenness, while the plaintiff was suffering great pain and mental anxiety, while he was ignorant and unable to comprehend the meaning and purpose of such an instrument—under such circumstances of mistake and surprise as that the court, in the exercise of its equitable jurisdiction, ought and will not allow the defendant to plead and use it to the disadvantage of the plaintiff in this action. The reply as to the release certainly alleges such pertinent matter, equitable in its nature in appropriate connection, as will induce the court to entertain and allow the same to be litigated and determined in the orderly course of action. The matter so alleged is fit and appropriate to be pleaded, and all issues, whether of law or fact, raised concerning the same must be tried and determined in the regular course of procedure.

The defendant did not, in any respect, demur to the reply to the answer. It was treated by the parties and by the court as if the allegations therein were denied, and thus serious issues of fact were raised to be tried by the jury. The plaintiff had the right to have these issues tried. Perhaps the court might have framed a single issue of fact as to the validity or invalidity of the release, but it submitted three issues in that respect, with the view and for the purpose of thus ascertaining the leading distinctive facts underlying the alleged equity. While the pleadings did not logically raise the three issues as submitted, the three, in effect, were so framed as to settle the material facts—the issue of fact to be passed upon by the jury. The issues submitted were plain; the jury could understand them; they were not confusing, nor (744)

did they, in any respect, because there were three, prejudice the defendant. It does not appear from the record, nor can we see that it did necessarily. Regularly and ordinarily, the issues of fact simply as raised by the pleadings should be submitted to the jury, but that they are subdivided intelligibly will not be ground for a *venire de novo* if the party complaining was not thereby prejudiced. The first exception cannot, therefore, be sustained.

The issues proposed by the defendant were substantially, in all material respects, embraced in the issues one, five, six, seven and eight submitted. That was sufficient.

The contradiction and absurdity in the pleading and issues, in respect to the release complained of, did not at all affect the substance of the pleading or the issues. Under the present method of procedure and pleading a party may allege that he did not execute a deed or other instrument, and further allege matter in avoidance of the same. It may be that, under the circumstances, the plaintiff did not remember or believe that he executed the release. But if he did, he might, nevertheless, further allege any matter in avoidance of it. Hence, the second exception cannot be sustained.

The facts going to prove the alleged negligence of the defendant, and bearing upon the fifth issue submitted, were not controverted. Accepting them as true, we cannot hesitate to hold that there was negligence as alleged. The mass of stone just above and near to the railroad track on which trains moved was in condition, as to situation, to slide or fall upon the track, was dangerous, was a standing menace, and was allowed to be so for several years, and the agents of the defendant knew the fact. The stone might, or ought to, have been removed when the road was constructed. The fact that the defendant kept a "track-walker" whose duty it was to examine and see, just after a train had passed the dangerous point, whether rock had fallen or was about
(745) to fall, cannot excuse the defendant. It was its serious duty to avert such danger, because it was obvious, could be seen and ought to have been removed. It is not sufficient to be simply cautionary when a manifest danger exists that may and ought to be removed. Hence, the defendant was not entitled to have the first special instruction it asked the court to give.

Nor was it entitled to have the second one asked and refused. There was no evidence to prove that the plaintiff knew of the dangerous condition of the stone that fell on the track and caused the disaster in which he suffered injury. Nor was this an ordinary hazard, certainly as to the plaintiff, of which he is presumed to take knowledge. He was a brakeman; he did service on trains that passed rapidly by the dangerous

point at intervals, and the evidence went to prove that at his place of duty he might not observe the danger, as he would be "on a level with the rock." The plaintiff was about his duty on the moving train; he was unconscious of the danger as the train approached it; he did not do anything to contribute to the injury he sustained or the negligence of the defendant that gave rise to it. In no aspect of the matter does it so appear.

Nor was the injury sustained by the plaintiff attributable at all, so far as appears, to the neglect of a fellow-servant. It is said the "track-man" was a fellow-servant and he failed to do his duty. It does not so appear. It appears it was the duty of the track-man to visit the dangerous place just before and just after trains passed the same. It does not appear that he did or did not. It may be that the weight of the freight train, and the jar occasioned by it, suddenly precipitated the fall of the stone. But, granting that the "track-man" failed to discharge his duty and to give notice, there was the greater neglect of the defendant, and the injury was occasioned by that neglect. The defendant was bound to remove so great a danger. If it had done so at the first, as it did at last, and after the disaster, the plaintiff (746) had not suffered the injury complained of.

We are of opinion that there was evidence of mistake, surprise and undue advantage taken of the plaintiff, under such circumstances as ought to avoid the release relied upon by the defendant, if the allegations of the reply were true, as the jury found them to be. The release was executed within a few days after the plaintiff sustained the injuries, at the instance of the defendant through its agent, while he was suffering great bodily pain and mental anxiety occasioned by such injuries, when he was unable to comprehend the meaning and effects of the release. He was ignorant, unable to write, and did not understand or comprehend the purport of such instrument. The defendant owed him wages, and he believed, when he executed the release, that he was giving a receipt for a part of the sum due him for wages. The jury so find by their verdict in response to the pertinent issues submitted to them, except in a single respect. The evidence tended to prove that the defendant's agent at Hot Springs, within a few days after the plaintiff sustained the injury, sent him on its road to Salisbury, a distance of one hundred and fifty miles or more, where, at the office of the defendant, its agent took the release in question, paying as consideration therefor $30. The evidence also tended to show that the damages sustained were greatly in excess of that sum. There was evidence tending to prove the substance of the allegations of the reply in respect to the release. It was in evidence for the defendant that its agent took the release. He

(747) testified that the release—its purpose—was explained to the plaintiff. It did not appear that the plaintiff had counsel of any friend to advise him other than the agent of the defendant.

Granting that there was no positive fraud on the part of the defendant or its agents (none was alleged), there was evidence to prove, and the jury found, under appropriate instructions from the court not objected to, that the plaintiff executed the release by mistake, occasioned by his ignorance, physical pain, mental anxiety and lack of capacity, under the circumstances, to understand or comprehend the nature and purpose of such release.

The Court of Equity will grant relief where only the party complaining makes mistake, when the facts and circumstances give rise to the presumption that there has been some undue influence, misapprehension, imposition, mental imbecility, surprise, or confidence abused. Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake on the part of one party, will not entitle that party to relief. But it is otherwise when there is a combination of such things to prejudice the party. In such case, in good faith and fair dealing, the adverse party ought to see and know, and must be presumed to know, that the complaining party was not fit or in such mental condition as to bind himself by contract. A Court of Equity will interfere when called upon to relieve a party against his mistake, made under a combination of such adverse circumstances as certainly destroy his capacity to know the nature of the contract or engagement to which he becomes a party. *Buffalow v. Buffalow,* 22 N. C., 241; *Futrill v. Futrill,* 58 N. C., 61; *Barnes v. Ward,* 45 N. C., 93; Story Eq. Jur., secs. 119, 120, 134, 251; Smith Man. Eq., 45.

As we have said, the plaintiff does not allege, in the reply, positive fraud of the defendant, nor mutual mistake, nor undue influence, nor simply weakness of understanding. He alleges such a combination of facts and circumstances, and produces evidence to prove the same, as show such mistake and surprise on his part as entitles him to have the release declared inoperative and void. So that the special instructions asked for, other than those particularly referred to above, have no material pertinency.

No error.

Cited: White v. R. R., 110 N. C., 462; *Smith v. R. R.,* 114 N. C., 766; *White v. Carroll,* 146 N. C., 234; *West v. R. R.,* 151 N. C., 233, 236; *Brazille v. Barytes Co.,* 157 N. C., 458.

(748)

J. W. RANDALL v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Live Stock, Injury to—Negligence—State, Interpretation of.

1. Where it is proven or admitted that cattle had been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing (under section 2326 of The Code), where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed.

2. Where the language of a statute is not ambiguous, the courts are not allowed to consider extraneous reasons, or to resort to the preamble of the act even, in order to give to its words any other than their technical meaning, if they have such signification, or their ordinary meaning, if they have no legal signification; and where the language of the law is clear, it is judicial legislation to look beyond its obvious meaning to ascertain the motives of the legislators in order to interpret it.

3. Where the language of the statute is doubtful, the argument of inconvenience may be considered, but where it is clear, and the legislative intent is manifest, the courts are not at liberty to be governed by considerations of inconvenience in interpreting its meaning.

PETITION to rehear, filed by defendant, and heard at the September Term, 1890, of the Supreme Court. (See 104 N. C., 410.)

No counsel for plaintiff.
C. M. Busbee and Charles Price for defendant.

AVERY, J. Counsel contended in this Court that there was error in the opinion delivered at the September Term, 1889, in giving too strict a construction to the statute (Code, sec. 2326), which provides that, "*when any cattle or other live stock* 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 (749) against said company: *Provided,* that no person shall be allowed the benefit of this section unless he shall bring this action within six months after his cause of action shall have accrued."

The plaintiff was driving oxen along the public highway, near the defendant's road, hitched to a cart when they were killed by the defendant's engine running on its track, the oxen having been so frightened by the approach of the headlight of the engine, as it suddenly turned a curve, that they jumped upon the track. Did the judge below err when he instructed the jury that the fact of killing the oxen by the en-

gine being admitted, there was a presumption of negligence on the part of the defendant? We think that he was not in error in so declaring the law. The word "cattle" is defined by Webster, when used in its more restricted sense, as meaning "quadrupeds of the bovine tribe," and, used as a generic term, as "including all domestic quadrupeds, as sheep, goats, horses, mules, asses, swine." It was admitted by counsel, on the argument, that the word "cattle" included oxen, and that a literal interpretation of the statute would give to a plaintiff, suing within six months after the killing of cattle by a train, the benefit of a presumption, whether it should appear that the animals were running at large or attached to a wagon. But it was insisted that it was the right and duty of this Court to go behind the plain letter of the law, and endeavor to find out the evil that was intended to be remedied by the statute, and, in that way, to ascertain and effectuate what we may conceive to have been the true purpose of the Legislature in passing the law. It is conceded that the leading object to be kept in view by courts in construing acts passed by the Legislature, is to determine what was the true intent of the General Assembly and to give effect to it. There are, however, certain familiar rules prescribed for the government of courts in interpreting their meaning, one of which is, that where the language
(750) of the statute is not ambiguous, and its literal import is not doubtful, the courts are not allowed to consider extraneous reasons, or to resort to the preamble of the act, even, in order to give to its words any other than their technical meaning, if they have such signification, or their ordinary meaning, if they have no legal signification. *Adams v. Turrentine,* 30 N. C., 147; *Blue v. McDuffie,* 44 N. C., 131.

The powers of the coördinate branches of the government being required by the Declaration of Rights (Const., Art. I, sec. 8) "to be forever separate and distinct," it is far more important here than it is in England, where Parliament is omnipotent, that the courts should observe and rigidly adhere to this established rule of construction, because it alone presents a barrier to the assumption by the highest judicial tribunals of the right to give to legislative acts, however clear and unmistakable their phraseology, what the courts think ought to have been, rather than what really was, the meaning of the lawmakers. The presumption is that the persons selected to represent the people in the Legislature understand the import of the language used by them, and their purposes, when clearly expressed, must be carried out to the letter, if we can give no better reason than that it will occasion what the courts consider hardship or inconvenience to some person or corporation to do so.

Sedgwick, in his work on Statutory and Constitutional Law, p. 310, quotes with approval the following forcible expression of the principle in the opinion of the Circuit Court of the United States in *Priestman v. U. S.*, 4 Dallas, 30: "By the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power, and on *pretense of judicial exposition* have, in fact, made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous than that which, distinguishing between the intent and the words of the Legislature, declares that a case (751) not within the meaning of a statute, according to the opinion of the judges, shall not be embraced within its operation, although it is clearly within the words, or *vice versa*. We should invariably deem it our duty to defer to the expression of the Legislature, *to the letter of the statute, when free from ambiguity and doubt,* without indulging in speculation, either upon the impropriety or hardship of laws." The author (Sedgwick), then adds: "Indeed, the idea that the judges, in administering the *written law,* can mould it and work it according to their notions, not of what the legislator said, not even of what he meant—in other words, according to their own ideas of policy, wisdom or experience—it is so obviously untenable that it is quite apparent it never could have taken rise, except at a time when the division lines between the great powers of the government were but feebly drawn and their importance very imperfectly understood. In the present condition of our political system, this practice *cannot be acted on with either propriety or safety.*"

In *Putnam v. Langley,* 11 Pickering, *Chief Justice Shaw* says: "The argument of inconvenience may have considerable weight upon a question of construction *where the language is doubtful;* it is not to be presumed upon doubtful language, that the Legislature intended to establish a rule of action that might be attended with inconvenience. But where the *language is clear,* and *where of course the intent is manifest, the court is not at liberty* to be *governed by consideration of inconvenience.*"

"Arguments from impolicy or inconvenience," says *Mr. Justice Story,* "ought to have little weight. The only sound principle is to declare *ita lex scripta* to follow and to obey; nor if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience." Story Conflict (752) Laws, 17; *Smith v. Rues,* 2 Som., 355; 1 Dillon Mun. Corp., sec. 311; Cooley's Const. Lim., 186, 187.

The principle that is so clearly expressed by the distinguished judges and authors already mentioned, has been repeatedly sanctioned by the adjudications of this Court. In *Blue v. McDuffie, supra,* the Court held

that where the words of a statute are vague and the meaning uncertain, the preamble or even the caption may be called in aid for the purpose of construction, but that neither could control the construction where the meaning was expressed with certainty. *Adams v. Turrentine, supra.* In *S. v. Eaves,* 106 N. C., 752, the principle was laid down that, where the language of the Legislature is clear, the courts will not look into the motive or purpose of the Legislature in the enactment of the law. *Justice Merrimon,* delivering the opinion in *Brown v. Brown,* 103 N. C., 213, says: "What is called the policy of the Legislature, in respect to particular enactments, is too uncertain a ground upon which to found the judgment of the Court in the interpretation of statutes, especially when they are clear, unequivocal and absolute in their terms and expressed purpose."

In the face of these full and unequivocal reiterations of this important rule of construction, by this as well as other courts of the country, counsel contend that we ought to look behind the language, which they admit is not vague or uncertain, and try to determine, from a consideration of matters entirely extraneous, what motives induced our legislators to enact the statute. The interpretation insisted upon would involve, in effect, the interpolation, after the words "other live stock," in the statute, of the words "while straying at large, but not while being driven, either attached to a vehicle or without the restraint of bridle or harness, or when being transported on trains"; and the argument offered to sustain the correctness of such a latitudinarian construction is, (753) that a literal construction may lead to inconvenience and absurdity, and that, in this case, it would be "absurd" to suppose that the Legislature intended to make the fact of killing in the presence of the owner or his servant *prima facie* evidence of negligence. The familiar instance given by Blackstone of the physician who bled a man who had fallen down in the street from a fit, in violation of a law that imposed a severe penalty for shedding blood in the streets, was referred to as authority. It is true, also, that the same principle was invoked in *S. v. Wray,* 72 N. C., 253 (which case this Court in *S. v. McBrayer,* 98 N. C., 619, declared went to the extreme limit); but, in both cases, the violator of the letter of law was justified only on the ground that a human being was thereby saved from death or peril, or relieved from great suffering. *Lord Coke* stated the principle to be, that "acts of Parliament are to be so construed as no man that is innocent and free from injury or wrong be, by a literal construction, *punished* or *endangered.*" Inst., 24 b. But we cannot see how a literal construction of a statute that merely shifts the burden of proof, where the question involved is the liability of a corporation to pay for cattle, can give rise to a great necessity, like the peril of human life, that will justify the disregard of the letter of the law.

The two suppositious cases that were submitted by counsel clearly come within the letter of the law. If the plaintiff's oxen had been killed while being transported in one of defendant's cars, or while he was driving them, without bridle or harness, across the track, it would not have been absurd to adhere to the letter of the law, and hold, that upon an issue as to negligence, the defendant would start out with the laboring oar. The Legislature had unquestionably the power to enact the law, as it did, in broad enough terms to cover both cases, and the exercise of a constitutional right by a coördinate branch of the government could not be adjudged by us to be absurd. Besides, the Supreme Court of the United States has declared that the courts would be going too (754) far in making, by construction, exceptions which the Legislature had not made. *McIver v. Reagon,* 2 Wheaton, 25. In a case somewhat like that of *S. v. Dalton,* 101 N. C., 680, *Chief Justice Shaw* said: "The Legislature has made no exceptions. If the law is more restricted in its present form than the Legislature intended, it must be regulated by legislative action." *Commissioners v. Kimball,* 24 Pick., 370. See also *Alexander v. Worthington,* 5 Md., 472; Dwarris, 597.

The rule adopted by the courts in England, and invoked by counsel here, was stated by *Parke, B.* (in *Jones v. Harrison,* 6 Ex., 332) to be, that the court should "take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument *to be collected from its terms* or would lead to some absurd or inconvenient consequence." Though, as we have seen, no such liberal rule has been adopted by this Court, or generally in this country, still, according to that authority, the meaning of the law must be gathered from its terms, giving to the words their ordinary sense, unless such construction would lead to absurdity or inconvenience.

In the face of such a current of authority prohibiting us from looking behind the plain language of the law and instituting search and inquiry to ascertain what was the purpose in the minds of the lawmakers when it was passed, we cannot be expected, because the late *Chief Justice, arguendo,* in *Doggett v. R. R.,* 81 N. C., 459, said, substantially, that the owner of cattle was placed at a disadvantage if they were killed by a train while straying at large, no witnesses being present, except the employees of the railroad company, and that was a sufficient reason for enacting the statute. If it had been declared, *obiter,* that such was the actual reason moving the lawmakers in passing it, the question there was whether the presumption was rebutted, and such sug- (755) gestion, by way of argument, would not constitute sufficient authority for violating an important principle and furnishing an entering wedge that might be used hereafter to justify the assumption by

this Court of the power to amend, modify or annul laws, because, in the opinion of the judges, the construction of the language, according to its usual import, would lead to absurd consequences or subject some person or corporation to hardship or inconvenience.

Counsel rested their case entirely upon the construction of the statute, and we deem it unnecessary to add anything to what was said in the opinion of the Court on the former hearing (104 N. C., 410) in response to the question whether there was evidence to go to the jury tending to show negligence, and especially in view of the fact that there was no disagreement among the members of the Court upon this question. The petition is

Dismissed.

CLARK, J., concurring: While the letter of the statute must be construed by the spirit, the spirit must be gathered from the act itself. *S. v. Eaves,* 106 N. C., 752, and cases there cited. Hence it would seem that the historical incidents cited in the argument do not apply, for in each of those cases the context plainly indicated the meaning of the phrases, which were ingeniously construed (or fictitiously supposed to have been construed) in an entirely different sense.

A human being is endowed with intelligence, and hence, when he is struck while on a railroad track, he may well be presumed to have been negligent, but no reason for such rule exists as to dumb brutes. *Snowden v. R. R.,* 95 N. C., 93; *Carlton v. R. R.,* 104 N. C., 365. The act of the Legislature, therefore, as to "livestock" has placed the pre-
(756) sumption of negligence upon the rational intelligence which guided and which might have restrained, perhaps, the instrument of destruction, and has not imputed negligence to the irrational victim who suffered. If the owner delays action for six months, the presumption ceases, for in the lapse of time the company may cease to have in its employ the witnesses who might have rebutted the presumption. The words of the act are so plain that it would be "judicial legislation" to place a construction upon them other than the import of the words, in their ordinary sense, would justify. Any amendment or restriction of the nature suggested by the defendant would properly come from the Legislature, and not from the Court.

When it appeared by the admission of the defendant that the oxen had been killed within six months before suit brought, by its engine running on its road, the statute raised the presumption of negligence. Had nothing else appeared, the plaintiff would have been entitled, of course, to a verdict. Had it been further shown that the oxen were hitched up and driven by their owner on defendant's track and were there killed, this would have been evidence of contributory negligence on the part of

the plaintiff, which, if unexplained, would relieve the defendant from liability. But because the act of the owner, or teamster, in driving his animals on the track may be contributory negligence, the courts are not authorized to hold that the statute throwing the presumption of negligence for the killing of livestock upon the railroad company shall not apply to cases in which it may be contended that the plaintiff was guilty of contributory negligence. Under the recent statute, it is the duty of the defendant to allege and prove the contributory negligence. Chapter 33, Laws 1887.

In the supposed case stated, of a man riding his horse upon the track, the man has not the right of way and knows he has not, hence the presumption of negligence is against him; but, as to the horse, while the conduct of the rider would be evidence of contributory negligence, it does not, therefore, justify a "judicial" amendment of (757) an unambiguous statute. The argument is, that the oxen, being yoked to the wagon, they were under the control of the driver, and hence, if they were killed in attempting in their terror and fright to escape, there was no presumption of negligence on the part of the company. Any one who has ever driven two yoke of oxen to a cart knows that when the engine with its glaring headlight suddenly emerged from the darkness round the curve in a few yards of them, and with the noise and rattle of a long train, bore apparently straight down upon them, the oxen had not sufficient intelligence to stand steady and let the alarming apparition harmlessly graze by them and pass on. According to their nature, they attempted flight, and in turning in the narrow pass, some of them got upon the track and were killed. No driver, however intelligent, could have controlled them. At that moment they were no more under his control than if they had not been yoked to the wagon at all. Unless, therefore, the driver was guilty of contributory negligence in driving his oxen along the public road, at that place at that time, there was nothing in the "situation" that could in justice (if the courts had the power) construe the statute as not applicable "because the oxen were under his control." The only person who could then have averted the catastrophe was he whose hand was, or should have been, upon the throttle valve of the engine. If after turning the curve it was too late even for him to prevent the killing, it was due to his own negligence. He knew that at that point the public road ran by the side of the railroad track, and that on the other side of the public road rose the steep shoulder of the mountain, so that a horse or oxen attempting flight would in turning come upon the track. The train was out of time. It could not be expected that all travel on the public road would be indefinitely suspended. The plaintiff did not drive his team upon the rail-

(758) road track, but was driving along the public road. Had the whistle been blown in proper time the plaintiff would have been warned not to enter upon that part of the road and risk his own life as well as that of his oxen. In the absence of such signal, he was justified in proceeding along the road. That the oxen were frightened, and in attempting flight got upon the track and were killed, is due to the recklessness of the engineer, upon the facts as the jury found them to be. There seems no hardship in the application of the statute in this case, even could the court consider that in construing the meaning of the unambiguous words used.

MERRIMON, C. J., dissenting: For the reasons stated by me in my dissenting opinion (104 N. C., 410), and others that I might state, I dissent from the order dismissing the petition in this case.

SHEPHERD, J., dissenting: It sometimes occurs in the administration of justice that a case is presented which, though in itself of but trifling moment, involves the enunciation of a principle of such great importance that the mind of the judge may well be impressed with the consciousness that, in passing upon the particular question in controversy, a precedent is being established so comprehensive in its character and of such general application as to materially influence the ruling of the Court in future cases in which interests of far greater magnitude may be concerned.

It is under this sense of responsibility that I feel constrained to express my dissent from the decision of the Court in the present case. No one, I trust, is more thoroughly convinced than the writer that the duty of the judge is *jus dicere non dare,* and no one more heartily concurs with the great authors and jurists mentioned in the opinion in condemning as "judicial legislation" that latitudinarianism in the
(759) construction of statutes which results in undue extension or restriction of their plain and unmistakable terms.

It is believed, however, that the repetition of these general expressions of disapproval of such a practice (in which it is to be hoped all judicial minds concur) can afford us no aid in determining whether a particular construction of certain words or phrases falls within their condemnation, since its correctness or incorrectness is the *very point* to be decided. They can, therefore, only legitimately serve as admonitions to the courts when exercising so grave and delicate a duty as interpreting the legislative will.

All will agree that where a statute is expressed in clear and precise terms and is susceptible of but *one meaning,* the courts are not at liberty

"to go elsewhere in search of conjectures in order to restrain or extinguish it" (Potter's Dwarris, 143); neither are they at liberty (quotes Sedgwick, 310) to depart from the letter of the statute *"when free from ambiguity and doubt."* But I have been unable to find any authority in support of the idea that this freedom from ambiguity and doubt is to be ascertained alone from the strict *letter* of a part of the statute; for if such were the case, the qualifying words of the rule, as above stated, and universally recognized and acted upon, would be meaningless, and the principle of construction would be simply that of *liberal* comprehension or exclusion. If the latter be the rule, it would amount to an abdication of one of the most important functions of the judiciary at the feet of the lexicographer, and the noble science of judicial interpretation as developed and illustrated by Vattel, Leiber, Domat, Sedgwick, Dwarris, Potter and other eminent writers would no longer find a place in our jurisprudence.

That such cannot be the proper rule is manifest from the injustice and absurdities that would follow, and these may be illustrated by reference to some of the examples to be found in the books. The surgeon "who opened the vein of a person that fell down in the (760) street with a fit" was held not to be within the law which enacted "that whoever drew blood in the streets should be punished with the utmost severity" (1 Black Com., 61), and this was not because he thereby saved a man's life, but because the law did not "extend" to him. So the law of Edward III, which forbade all ecclesiastical persons from purchasing *provisions at Rome,* was considered not to extend to the purchase of "grain or other victuals," because "the statute was made to repress the usurpations of the Papal See, and that the nominations to benefices by the pope were called *provisions."* 1 Black Com., *supra.*

As illustrative of the principle of literal exclusion or restriction, reference may be made to Mohammed, "the emperor of the Turks," at the taking of Negropont, where he promised a man to spare his head, but caused him to be cut in two through the middle of the body. So, when Tamerlane promised upon the surrender of a city that no blood should be shed, he considered that he had not violated the terms of the treaty by causing all of the garrison to be buried alive. Vattel Liv., ch. 11, 17.

It would seem hardly necessary to resort to such illustrations to demonstrate the utter impracticability and injustice of literal interpretation, and I have only done so because it seems to have had a controlling influence in the decision of this case.

So far from such a rule finding support in the books, it is universally condemned, and this disapproval is fittingly declared in *Eyston v. Studd,*

Plow., 467, "that a man ought not to rest on the letter only, *nam qui hæret in litera, hæret in cortice,* but he ought to rely upon the sense which is the kernel and fruit, whereas the letter is but the shell."

It is manifest, therefore, that we are blindly to follow the letter of the statute because by construction its general language *may* be made to include every subject of a class under all conditions and cir-
(761) cumstances, and it is also clear that the literal interpretation of the legislative will is an unsafe guide in determining whether the language is so free from ambiguity as to shut out all interpretation whatever. "The best rule of interpretation to be adopted by the courts is to ascertain the meaning of the Legislature from the words used in a statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if satisfied that the literal meaning would extend it to cases which the Legislature never designed to include." *Brewer v. Blonger,* 14 Peters, 178; Potter's Dwarris, 183. *"Scire leges non hoc est verba earum tenere sed vim ac potestatem,* and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. . . . When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and the remedy in view, and the intention is to be taken or presumed according to what is consonant to reason and good discretion." 1 Kent Com., 462; Potter's Dwarris, 209, note.

Disregarding, then, the idea that literal comprehension is the test of nonambiguity, I will now consider whether the language of section 2326 of The Code has such a "definite signification in common use, affixed to it by custom," that it necessarily includes within its meaning horses, mules and oxen when hitched to vehicles and under the guidance and control of an intelligent human will. Are the words so *very plain* in the connection in which they are used that all inquiry into the object, reason and spirit is inhibited, and that we are to abandon the well settled rules of construction and apply them with an utter disregard of the absurdities and incongruities to which their literal interpre-
(762) tation may lead? This, it seems to me, would be doing injustice to the Legislature, whose will we are all so anxious to interpret and execute. The language under consideration is to be found in chapter 9 of The Code. This chapter is entitled "Cattle and Other Livestock," and contains various provisions, such as to the branding of cattle, driving the same in certain seasons from other States into this State and from one part of the State to another; prohibiting distempered cattle from going at large, and other general regulations, no one of which in the slightest degree relating to such animals when hitched to vehicles or

otherwise in actual use. The general scope and meaning of the entire chapter excludes this idea, and the fact that we find the language under construction so associated reflects, it seems to me, a strong light upon the true sense in which it is employed. *Noscitur a sociis.*

Again, in all the works on railroads and negligence it will be found that the words "cattle and livestock" are exclusively used as applicable to animals straying on the roadbed and not under the direction and control of the owner. Take, for example, 3 Wood Railway Law, ch. 28, entitled "Injuries to Livestock," and there cannot be found, either in the text or in the multitude of cases cited in the notes, the least suggestion that the words, "livestock," or "cattle," cover such a case as ours. The idea of confounding straying stock with that which is hitched and under the control of an intelligent mind, has never before, I think, been intimated in the law of negligence; and in none of the States where statutes similar to ours have been passed can there be found a case where the law has ever been so construed. All of the law of negligence, statutory or otherwise, as to injuries to livestock seems to relate to stock when straying, and to recognize the important distinction to which I have adverted. It would be a strange anomaly in the law of negligence if, in a suit for the killing of a horse and its rider, the burden of proof should be in favor of the former and against the (763) latter. The same rule, under the construction contended for, would apply to the case of a live pig which is being carried to market on the shoulder of its owner. In a *single* action for the recovery of damages for injuries to both, occasioned by the *same accident,* we would have two different rules as to the *onus probandi,* with the advantage most decidedly on the side of the pig, thus constituting in the history of this species of the animal kingdom the single exception to its exclusion from all favorable consideration whatever, as indicated by its proverbial dependence upon its own peculiar exertions for a livelihood.

Another objection is, that under such a rule a person might purposely drive his horse on a railroad track and have him killed, and then insist that the presumption of negligence arose and that it devolved upon the railroad to rebut it.

Again, it cannot, I think, be reasonably insisted that animals in the actual use of the owner are generally spoken of as "cattle" or "livestock." "Words are only designed to express the thoughts; thus, the true signification of an expression in *common use* is the true idea which custom has affixed to that expression." Potter's Dwarris, 127.

When one is driving his horse, or a lady is riding her pony, is it customary to say that the man is driving one of his "cattle," or that the lady is riding one of her "livestock"? And is this the "expression"

which "custom has affixed," and which we commonly use in such instances? The mere statement of the question, it seems to me, furnishes its own answer.

These considerations induce me to believe that the words under examination do not apply to cases like the present. Certainly, their meaning is not so "explicit" as to shut out all inquiry into the reason and spirit of the law. As I have said, "the most universal and effectual way of discovering the true meaning of a law, when the words are
(764) dubious, is by considering the *reason* and *spirit of it,* or *the cause which moved the Legislature to enact it.*" 1 Black. Com., 61. Acting upon this well established principle, this Court has unequivocally declared the true spirit of the statute and the defects which it was intended to remedy. The late *Chief Justice,* in *Doggett v. R. R.,* 81 N. C., 459, in giving the history and reason of the statute, said, "where injury to stock *straying off* is done by trains running at night as well as by day, and *known only to defendant's employees,* it was almost an impossible requirement" that the plaintiff should prove the negligence as a part of his case. "The owner would not know how, when, or by whom the injury was done, while the servants of the road would possess full knowledge of the facts. *Hence,* the General Assembly enacted section 2326 of The Code, . . . 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." In *Durham v. R. R.,* 82 N. C., 354, the Court, further sustaining the same view, remarked: "The responsibility of railroad companies for injuries to stock *straying upon their tracks,* and the care and diligence required in the management of running trains, have frequently been before the Court, and were fully discussed in *Doggett v. R. R.,* 81 N. C., 459." It seems to me that this is clear and emphatic construction of the law, sustained as it is by reason and the current of authority, should not be disturbed. This construction gives full effect to all of the purposes which the Legislature had in view, and I am opposed, by what I consider a strained interpretation of the statute, to go beyond these purposes and introduce anomalies which were never even remotely contemplated by the lawmakers. To "cavil about the words in subversion of the plain intent of the parties is a malice against justice and the nurse of injustice." Plowd., 161. "Construction must be made in suppression of the mischief and in advancement of the remedy." Cook Lit., 381, 386.
(765) Says *Dillard, J.,* in *Burgwyn v. Whitfield,* 81 N. C., 265: "In construing a statute, it is laid down as a rule by which courts ought to be guided, to look at the words and construe them in the ordinary sense, if such construction would not lead to absurdity or manifest injustice, but if it would, then they ought to vary and modify

the words so used, so as to avoid that which it certainly could not have been the intention of the Legislature should be done." Broom's Leg. Maxims, 552.

The particular point under discussion in this case arises upon the instruction of the court (the defendant having asked a contrary instruction), that "it being admitted that defendant's engine 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 the statutory presumption." It will be noted that the *plaintiff's testimony* showed that the animals injured were *hitched to a wagon and being driven by the plaintiff, and there was no dispute whatever as to these facts.*

In view of the well established rules of construction, most pointedly illustrated by the foregoing facts, I am well satisfied that we were in error in holding that the foregoing instruction was correct. It is because of what I conceive to be an erroneous statement and application of these most important general rules that I have thought proper to state my views at such length.

I think that the petition to rehear should be granted.

Per Curiam. Petition dismissed.

Cited: S. v. Brown, 109 N. C., 807; *Harris v. Scarborough,* 110 N. C., 236; *Kelly v. Fleming,* 113 N. C., 139; *S. v. Patterson,* 134 N. C., 614; *Hanford v. R. R.,* 167 N. C., 279; *Borden v. R. R.,* 175 N. C., 178.

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(766)

J. M. McGEE AND WIFE v. DAVID FOX ET AL.

Case on Appeal, Time of Serving — The Code — Motion to Dismiss — Damages for Ponding Water—Offset and Counterclaim for Benefits—Nominal Damages—Judge's Charge—New Trial.

1. The Code, sec. 550, as amended by chapter 161, Laws of 1889, extends the time for serving case on appeal from five to ten days.

2. A motion to dismiss appeal for insufficient bond will not be entertained unless after written notice, as required by chapter 121, Acts 1887.

3. In an action for damages for ponding water back on plaintiffs' land, he asked for instructions to the jury that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby. The court so charged, but added that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage: *Held,* there was no error.

4. In such action a motion for a new trial for failure of the court to instruct the jury to return at least nominal damages because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court.

ACTION to recover alleged damages for ponding water back on plaintiffs' land by the erection of a milldam, tried before *Clark, J.,* at January Term, 1889, of ALEXANDER.

(767) There were no exceptions to evidence.

There was no written prayer for instructions, but plaintiffs' counsel in his address to the jury asked the court to charge, that if any part of plaintiffs' land had been benefited by the ponding-back of the water from defendants' dam, this benefit did not belong to defendants and they could not set this up as a counterclaim to offset the damage plaintiffs had sustained. The court charged that the defendants could not set up as a counterclaim any benefit, if any, which plaintiff may have received by such ponding-back, but the jury, upon all the evidence of plaintiffs and defendants, should ascertain if plaintiffs had sustained any damage, and if so, how much; if no damage had been sustained, then to so find. The issue as set out in the record was submitted, without objection. The jury rendered a verdict for the defendants.

Motion by plaintiffs for new trial, alleging as error the instructions above given and the failure to give instructions asked. Motion denied.

Motion for new trial, because some overflow having been admitted, the court should have instructed the jury to return at least nominal damages.

(768) The court, being of opinion that, under section 1862 of The Code, a verdict for nominal damages for one cent would only carry one cent cost, denied the motion.

There was judgment for defendants, and an appeal by plaintiffs.

D. M. Furches for plaintiffs.
R. Z. Linney for defendants.

DAVIS, J., after stating the facts: The appeal was taken Saturday, 2 February, the last day of the term. The plaintiffs' case on appeal was served Friday, 8 February, following. Counsel for appellees moved to dismiss the appeal, upon the grounds:

"1. That the case on appeal was not served upon appellees within the time provided by law, more than five days having elapsed from the termination of the court at which the cause was tried before any case was served.

"2. For that appellant's appeal bond is defective, in that the justification of the sureties is not for *double the amount* of the bond given."

As to the first ground, counsel was not advertent to chapter 161, Laws 1889, amending section 550 of The Code and extending the time from five days to ten. *Walker v. Scott,* 104 N. C., 481.

As to the second ground, no written notice to dismiss was given, as required by chapter 121, Laws 1887, and the motion cannot be entertained. *Jones v. Slaughter,* 96 N. C., 541.

There was no objection to the issue submitted, no exception to evidence and no written prayer for instructions, and that verbally asked for by plaintiffs' counsel in his address to the jury was substantially given.

The evidence was conflicting, and we can see no error in the charge of his Honor in relation thereto. (769)

The plaintiffs moved for a new trial, because, some overflow having been admitted, the court should have instructed the jury to return at least nominal damages. No such instruction was asked for. The evidence, as has been said, was conflicting, and the admission in the answer was accompanied with qualifications and denials, and it was in the discretion of his Honor to grant or refuse a new trial, the evidence upon both sides having been submitted to the jury upon an issue of fact presented in the exact language of the issue in *Hester v. Broach,* 84 N. C., 251, the plaintiffs' evidence tending to show damages, and that of the defendant none.

Counsel for appellant cite *Wright v. Stowe,* 49 N. C., 516, for the position that his Honor should have instructed the jury that the plaintiffs were entitled at least to nominal damage. In that case it is said, "If water be, in fact, ponded back upon the plaintiff's land, he will be entitled to recover at least nominal damages," and his Honor below erred in instructing the jury that the plaintiff in that case "would not be entitled to nominal damages." No such instruction was given by his Honor in present case, but all the evidence was submitted to the jury upon the proper issue, and they found that the plaintiffs had sustained no damage, and the judgment was in accordance with section 1862 of The Code.

No error.

(770)

STATE v. JAMES T. MOORE.

Special Verdict.

A special verdict which simply finds a certain state of facts, without a formal verdict of guilty or not guilty, in accordance with the opinion of the court given upon the facts found, is incomplete and will not support a judgment.

CRIMINAL ACTION, begun in the Municipal Court of McFarlan, in ANSON, and tried, upon appeal, before *Bynum, J.*, at September Term, 1890, of the Superior Court of that county.

The defendant is charged with a violation of an ordinance of the town of McFarlan. The defendant pleaded former acquittal. On the trial the jury rendered what purported to be a special verdict, which concluded as follows: "If, on these facts (the facts found), the defendant is guilty in law, we find him guilty; if, on these facts, he is not guilty in law, we find him not guilty." Thereupon the court made this entry on the record: "Upon this verdict of the jury the court finds the defendant not guilty and orders that he be discharged." The Solicitor for the State excepted and appealed to this Court.

Attorney-General for the State.
J. A. Lockhart for defendant.

MERRIMON, C. J., after stating the facts: The trial was incomplete and ineffectual, certainly for the purposes of this action. The jury rendered no verdict of guilty or not guilty; they simply found that certain facts stated by them were true. It was not the province of the court to find that the defendant was guilty or not guilty. It should have said that the facts found did, or did not, constitute the offense charged in the warrant, and the verdict of the jury should have been rendered by them in accordance with the opinion of the court.
(771) This is well settled, and it is strange, indeed, that courts so frequently, no doubt, by mere inadvertence, fail to observe the law in such respect. *S. v. Bray,* 89 N. C., 480; *S. v. Stewart,* 91 N. C., 568; *S. v. Morris,* 104 N. C., 837. There is

Error.

Cited: S. v. Monger, post, 771; *S. v. Nies, post,* 820; *S. v. Spray,* 113 N. C., 688; *S. v. Gillikin,* 114 N. C., 835.

STATE v. JOHN M. MONGER.

Special Verdict.

A special verdict which simply finds a certain state of facts, without a formal verdict of guilty or not guilty, in accordance with the opinion of the court given upon the facts found, is incomplete and will not support a judgment.

APPEAL from *Graves, J.*, at Fall Term, 1890, of MOORE.

Attorney-General for the State.
J. C. Black for defendant.

CLARK, J. The jury have rendered no verdict. They found certain facts to be true, and add: "If, upon the foregoing state of facts, his Honor be of opinion that the defendant is guilty, then the jury find him guilty; if not, then the jury find him not guilty." The record then states: "His Honor, upon the foregoing facts, being of the opinion that the defendant is guilty, adjudges that he pay a fine of $25 and costs." This was doubtless an inadvertence, but the effect is a judgment pronounced without a verdict to support it. *S. v. Moore, ante,* 770, and cases there cited. Regularly, the court, upon the facts found, should have instructed the jury that their verdict should be "guilty," or "not guilty," and, such verdict having been entered up, the court should thereupon have sentenced the prisoner, or have discharged him (772) as the case might be. From the former judgment the defendant might appeal, and from the latter the State. The Code, sec. 1237.

For the reasons given, we must declare that there is error. The transcript of the record on appeal was imperfect in not setting out that the court was held, etc. *S. v. Butts,* 91 N. C., 524. This, however, has been amended by a supplementary record having since been sent up.

Error.

Cited: S. v. Nies, post, 820; *S. v. Spray,* 113 N. C., 688.

STATE v. STEPHEN JACOBS.

Criminal Practice—Constitution—Presence of Prisoner—Right to Counsel—Escape—Waiver.

1. In the United States the principle has ever been universally recognized that persons charged with crime had the right to be present at their trial, to be informed of the accusation against them, to confront their accusers, and to have the aid of counsel. It is distinctly guaranteed in the Constitution of North Carolina, but, except in capital felonies, it may be waived.

2. But this right extends only to that tribunal which tries the facts, and where the accused is presumed, on account of his peculiar knowledge, to be able to conduct or assist in the conduct of his defense. It does not prevail in this Court, which has jurisdiction only to review alleged errors of law on the trial below.

3. Where a person who has been convicted of an offense appeals from the judgment, and escapes, the appellate court may in its discretion proceed with the hearing of the exceptions, dismiss the appeal, or direct the cause to be continued to await the recapture of the fugitive, and any judgment it may pronounce thereon will not be invalid because of the fact that the defendant was not actually or constructively in custody or not represented by counsel.

4. The rule enunciated in *S. v. McMillan*, 94 N. C., 945, has been altered by the provisions of chapters 191 and 192, Laws 1887.

(773) THE defendant was tried and convicted for murder at May Term, 1889, of ROBESON. From the judgment then pronounced upon him he appealed. When the cause was reached in its regular order at last term of this Court, it was argued for the State, but there was no counsel for the defendant. The Court considered the defendant's exceptions and affirmed the judgment of the Superior Court. Thereupon, the Governor issued the warrant for the execution of judgment.

The defendant, in fact, had escaped from custody and was at large when the cause was argued and determined in the Supreme Court, though that fact was not then known to the Attorney-General or the Court.

Shortly afterwards the defendant was recaptured, and the Governor reissued the warrant for his execution; and now, at this term of the Supreme Court, the defendant made a motion to vacate the orders and judgments made and rendered at least term, and grant him a rehearing upon the exceptions contained in the case on appeal.

The following certificate, upon which the motion of the defendant for a rehearing is made, was filed in this Court on 29 September, 1890:

"I, C. B. Townsend, clerk of the Superior Court of Robeson, N. C., do hereby certify that Stephen Jacobs, who was lately convicted of murder in this county and who appealed to the Supreme Court, and, pending the appeal, escaped from the jail of Robeson County about August, 1889, and was not recaptured till about August, 1890; that according to the best of his information he, the said Jacobs, was not in the custody of court during the February Term, 1890, of the Supreme Court, when his appeal was disposed of."

The facts stated in the foregoing affidavit were admitted to be true by the Attorney-General.

Attorney-General for the State. (774)
B. C. Beckwith for the defendant.

AVERY, J. The exceptions taken by the defendant Jacobs were reviewed at the last term of this Court in a well-considered opinion filed by *Justice Clark,* 106 N. C., 695. It now appears by certificate of the clerk of the Superior Court of Robeson County, and is admitted by the Attorney-General for the State, that, at the time when the appeal was heard here, the prisoner Jacobs had escaped from custody and was not recaptured till about August, 1890. Counsel now insist that this Court shall treat the decision made at the February Term as inconclusive upon the prisoner and hear another argument of his appeal, because he was neither actually nor constructively in custody when the exceptions were argued.

In appellate courts, where questions of law only can be reviewed, and in the absence of any statute specifically regulating the procedure, if there be satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below and has been regularly called for hearing, has escaped and is not in actual or constructive custody, it is clearly within the sound discretion of the Court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged offender. *Smith v. U. S.,* 94 U. S., 97; *Bonahan v. Nebraska,* 125 U. S., 692; *Leftwich's case,* 20 Gratt., 722; *Sherman v. Comrs.,* 14 Gratt., 677; *McGowan v. People,* 104 Ill., 100; *Wilson v. Comrs.,* 10 Bush., 522; *S. v. Sites,* 20 West Va., 16. In the exercise of this power, the courts of the different States have not adopted uniform rules of practice, even where there are no statutory or constitutional provisions regulating the mode of procedure. But while the general, if not universal, rule has been to refuse a motion of a defendant who had absconded and put himself in contempt of court, to dispose of his appeal or make any order affecting it *at his instance or for his benefit,* the (775)

courts of the different States have as a general rule where there was no express statutory requirement in reference to it, and where the prosecuting officer was the moving party, continued, dismissed or heard the appeal according to the circumstances of the case or the early precedents of the particular court. Anson, 31 Me., 592; *Comrs. v. Andrews,* 97 Mass., 544; *People v. Genet,* 59 N. Y., 81; *Warwick v. State,* 72 Ala., 486.

In *Smith v. U. S., supra, Waite, C. J.,* delivering the opinion, said: "It is clearly *within our discretion* to refuse to hear a criminal case in error, unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. . . . If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it, and order a new trial, he will appear, or not, as he may consider most for his interest." The reasoning of the learned *Chief Justice* has been adopted and his language quoted in many of the more recent decisions as to the right to refuse a request from the defendant that the Court pass upon his exceptions while he is absconding and in contempt. And even where the appellate courts review the facts, a defendant who escapes pending his appeal is deemed to have waived his right to be present on the final hearing upon his assignment of errors. *Comrs. v. Andrews, supra; Wilson v. Comrs., supra; People v. Genet, supra.*

The Court of Appeals of Virginia laid down the rule in *Sherman v. Comrs., supra,* that where a prisoner convicted of a felony has obtained a writ of error, which was directed to operate as a *supersedeas,* and then escaped from jail, the appellate court will discharge so much of the order as awards the *supersedeas,* and direct that the writ of error be dismissed on a day certain, unless the defendant shall have been meantime rearrested and placed in custody of the proper officer. The
(776) same rule was subsequently adopted in Illinois, West Virginia and Alabama. *McGowan v. People,* 104 Ill., 100; *S. v. Sites, supra; Warwick v. State, supra.*

The courts of Georgia, Indiana and Kentucky have concurred in holding that it is the proper practice to dismiss, on motion of the prosecution, unconditionally, an appeal by one charged with a felony, where it is made to appear satisfactorily that he has escaped custody pending the appeal and is still at large. *Madden v. State,* 70 Ga., 383; *Seargeant v. State,* 96 Ind., 63; *Wilson v. Comrs., supra.* In *Leftwich's case, supra,* the Court of Appeals of Virginia, having held that the judgment of the circuit court, by virtue of which the defendant had been sent to the penitentiary for three years, was erroneous, ordered that he be brought before the appellate court by *habeas corpus,* when it appeared that he

had escaped and was not in custody at the time of the hearing. The court refused to set aside the judgment sustaining the exceptions of the defendant.

In our case the judgment of the court below was affirmed here, and the Governor issued the death warrant by virtue of section 3, ch. 192, Laws 1887, fixing the time of execution on 26 September, but has respited the prisoner in order that the question presented by the motion before us might be considered. So that we are confronted with a question not directly raised in any of the cases already cited, though it was discussed, *arguendo,* in a few of them, and covered by the broad propositions stated in others.

In *S. v. McMillan,* 94 N. C., 945, it was declared to be the settled practice of this Court to refuse the motion of the Attorney-General to dismiss appeals where the defendant charged with a felony escaped after filing his exceptions below and was not in custody when the case was called for argument in this Court, and this rule was enforced in two other cases subsequently considered at the same term. *S. v. Pickett,* 94 N. C., 971; *S. v. Brocksville, ib.,* 972. The present (777) *Chief Justice* delivering the opinion in *S. v. McMillan,* said: "The Court will not do a vain and nugatory thing. The appellant may never be rearrested. . . . The decision would be empty and fruitless. The Court will not, ordinarily, hear and determine an appeal when it sees that its orders and judgments cannot be enforced by itself or through the Superior Court, as the law directs." The provisions of chapters 191 and 192, Laws 1887, enacted since that opinion was filed, meet the argument that it would prove fruitless to dismiss an appeal, which a defendant has voluntarily waived his right to prosecute, by giving the clerk or the Governor, or both conjointly, the power to order the original judgment, which has been stayed, not vacated, to be executed or enforced. Since the passage of the acts constituting the chapters mentioned, whether an appeal taken by a defendant in a criminal action be dismissed or affirmed in this Court, the stay of execution will be removed, and the law will require the sentence of the Court to be carried into effect in the manner indicated in the statute, either by warrant of the Governor or by virtue of execution issued directly to the sheriff of the county. This radical change in the manner of executing the criminal law obviates the objection growing out of the fact that it remains for the court below not only, under its process, to recapture, but likewise to resentence at a regular term. In *S. v. McMillan,* the Court says: "Besides, to dismiss the appeal might raise embarrassing questions in the Superior Court if the appellant should be rearrested. Would the dismissal reinstate the judgment of death vacated by the appeal, or operate to leave that judgment in force, as if no appeal had been taken? Could

such a result supervene in the absence of the prisoner, whether such absence be occasioned by his escape or otherwise?" The question propounded by the Court has been in part met by the express pro-
(778) vision of the statute, and it remains for us to construe the law so as to answer the interrogatory left open still by deciding whether a judgment of this Court, rendered after the prisoner's escape and before his recapture, would constitute a valid disposition of the appeal, so that the stay of execution below would be removed. The discussion of this point (incidentally and entirely *obiter)* by some of the courts has given rise to confusion, because of the failure to advert to the fact that counsel were not allowed in England until 1836 (by 6 and 7 William IV, ch. 114) to make a full defense for persons charged with any felony other than treason, while in the United States it was a universal principle of constitutional law that a man accused of a crime (whether a misdemeanor or a felony) was allowed a defense by counsel, both upon the law and the facts. Cooley Cons. Lim., 130 to 135, and notes; *Vise v. Hamilton,* 19 Ill., 78. The right "to have counsel for his defense" is distinctly guaranteed to the accused "in all criminal prosecutions" by an amendment to the original declaration of rights, incorporated in 1868. Constitution, Art. I, sec. 2. There is no sufficient reason, and no well-considered authority, for restricting the right and duty of counsel who have been employed by a person indicted for a felony, have entered his exceptions and appealed, and aided in settling the statement of case on appeal, so that they will not be allowed or expected, in the discharge of their duty to their clients, to appear in the appellate court at every stage of the procedure there whether the client be a fugitive or a prisoner. The relation of counsel and client is such that the former, having once engaged to represent the latter, cannot withdraw without leave of the court for cause shown. Cooley Const. Limitations, 335. But it is not essential in North Carolina, where the appellate court does not review the facts, that the client, though indicted for a capital felony, should be present in this Court, or should be in actual or constructive custody, so as to communicate with his counsel after the trial in the court
(779) below, including judgment, exceptions and appeal, is ended. *S. v. Overton,* 77 N. C., 486, *Justice Reade,* for the Court, says: "The Constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used. That is *his trial.* This, of course, implies that he shall have the right to be present. If he complains of any error in *his trial,* the record of the trial is transmitted to this Court. . . .

It has never been understood, nor has it been the practice, that the defendant shall be present in this Court, nor is he ever 'convicted' here." See also *S. v. Leak, 90* N. C., *656.*

This Court has repeatedly held that nothing should be done prejudicial to the rights of a person on his trial for a capital felony unless he is actually present; while, on trial for misdemeanors, it is sufficient if the defendant assents through counsel when any order is made or any step taken affecting his rights. *S. v. Weaver,* 35 N. C., 203; *S. v. Jenkins,* 84 N. C., 812; *S. v. Epps,* 76 N. C., 55; *S. v. Paylor,* 89 N. C., 539; *S. v. Sheets, ib.,* 543. But the distinction is clearly drawn in *S. v. Overton, supra,* between the trial below, at which the defendant has the right to be present and confronts his accusers, by virtue of the declaration of rights, in all criminal prosecutions (but may waive that right except in trials for capital felonies, and consent that his counsel shall represent him), and the hearing in appellate court, where it is not essential in any case that the accused should be actually present, or that counsel who represent him should know that he has not absconded. One on trial for a capital felony must confront his accusers in person at every stage of his progress, and the law does not permit him to waive his right or delegate to another the power to represent him in the examination of an issue involving his life, or certainly not by (780) implication. But now that it is settled that even one convicted of a capital felony may be represented by counsel (and not in person) when this Court hears arguments upon his exceptions, and that this Court may affirm the judgment of the court below and direct the clerk to notify the Governor so that a death warrant may issue in the absence both of client and counsel, it is difficult to discover any principle of constitutional, common or statute law that gives a defendant who is in hiding and in contempt the right to insist upon setting aside and annulling a judgment of this Court because he was "in the woods" instead of in the prison, and could not, therefore, communicate by letter or telegram with counsel, engaged to represent him and protect his interests in this Court. It would have been absurd, if the appeals of Jacobs and Oxendine in this case had been heard together, decided in one opinion and disposed of by one decree affirming judgment as to both, to have afterwards held that any principle of law would compel the Court to execute the judgment as to Oxendine, who remained in jail, and grant a new hearing as to the defendant Jacobs because he was in the swamps of Robeson County and could not advise his learned counsel by letter what steps he ought to take in the management of his appeal here.

In *S. v. Leak, supra,* the Court passed upon a motion of counsel for a defendant charged with a misdemeanor (fornication and adultery) to withdraw his appeal, and the motion was allowed. The question whether

the appellate court should grant a motion made by counsel and not supported by affidavit or direct authority from one charged with a capital felony, to dismiss the appeal of the latter, did not arise in that case and has never been decided by this Court.

(781) It seems, as already stated, that the Court of Appeals of Virginia not only directed, when notified of the escape of an appellant, that his appeal should stand dismissed unless it should be made to appear that he was in custody before a certain day, but discharged immediately the order that the writ of error should act as a *supersedeas*. *Shearman v. Comrs., supra.* We infer that *supersedeas* is used in the sense of stay of execution, and that the effect of discharging the *supersedeas* would be the same as dismissal of an appeal in this Court since the passage of the act of 1887. Abbott Law Dict. *(Supersedeas),* 523; *Williams v. Bruffy,* 102 U. S., 249; *Smith v. Telegraph Co.,* 83 Ky., 271; *Hovey v. McDonald,* 109 U. S., 159. The Texas Court of Appeals declared constitutional an act which provided that, in case a defendant should escape from prison pending his appeal, the jurisdiction of the appellate court should no longer attach, and the appeal should be dismissed; and in discussing the subject that, in the absence of any statutory provision, an escape should be considered an abandonment of an appeal. *Brown v. State,* 5 Texas, 129; *Lloyd v. State,* 19 Texas, 155. The case of *People v. Bedenger,* 55 Cal., 290, involved only a construction of an express provision of the Constitution and a statute of the State of California, and the citation of 4 Blackstone, 355, which is a summary of the law in force in England prior to 1836, was not applicable in this country, because the provisions of the organic law in nearly all of the States secure the right of representation by counsel in all cases and at all stages of the prosecution.

If we concede that the right of the accused to be present, or in communication with his counsel, extends beyond the time when the *nisi prius* court is actually engaged in the trial of the indictment preferred against him, it gives rise to many embarrassing questions. If the defendant has the right to confront his accusers or to be in such a position that he can direct or assist his counsel, after verdict and judgment below, while his appeal is pending, there is even greater reason for his presence, at least by counsel, acting under his advice

(782) when many preliminary steps are taken by witnesses, prosecuting officers and grand juries. Yet this Court has denied the right of the accused to have a dying declaration excluded on the ground that he could not confront his accuser, and has admitted testimony as to an examination of a defendant's tracks, in his absence, in the face of a similar objection. *S. v. Tilghman,* 33 N. C., 513; *S. v. Morris,* 84 N. C., 759. This Court has condemned, in very severe terms, too,

any attempt to compel grand juries to conduct their investigations in the presence of the public or the accused, even though the question before them may be whether the life of a citizen shall be placed in jeopardy by the finding of an indictment charging him with a capital felony. *S. v. Branch,* 68 N. C., 186. If this Court had never considered any of these questions, it would be much more important to extend the right of the accused so that he could confront those who, by acts or declarations, make or prepare testimony to be used on the trial below, than to secure to him the privilege of advising counsel, learned in the law, as to questions about which the client is usually profoundly ignorant. But this Court, in the case of *S. v. Kelly,* 97 N. C., 404, has held that where a defendant charged with a felony of lower grade (less than capital) is present when his trial begins in the court below, and, being under bond for his appearance, is in constructive custody, but voluntarily absents himself or flees during the progress of the trial, he thereby impliedly waived his right to be present at all subsequent stages up to and including the rendition of the verdict. Surely, then, if an alleged criminal can, by implication, surrender his acknowledged constitutional right to meet his accusers in the forum where the facts are investigated, and where he is supposed, on account of his peculiar knowledge, to be able to aid his counsel, it will not infringe upon any important principle or subject him to peril from which he should be protected, to con- (783) cede that a higher court, having only cognizance of questions of law that may be as thoroughly discussed in his absence as in his presence, may proceed to hear and determine issues arising out of his appeal, and enter its judgment, whether the defendant be charged with a misdemeanor, a capital felony, or one of lower grade, and whether he be, at the time of the hearing, under bond or recognizance for his appearance, in prison, or in the woods.

The motion of the counsel for the defendant is not allowed.

Motion refused.

Cited: S. v. Austin, 108 N. C., 786; *S. v. Anderson,* 111 N. C., 689; *S. v. Mitchell,* 119 N. C., 786; *S. v. Cody, ib.,* 908; *S. v. Howard,* 129 N. C., 662, 676; *S. v. Dixon,* 131 N. C., 813; *S. v. Keebler,* 145 N. C., 560; *S. v. Moses,* 149 N. C., 581; *S. v. DeVane,* 166 N. C., 281.

STATE v. ALEX. OXENDINE.

Homicide—Trial—Severance—Evidence—Judge's Charge.

1. It is well settled that the question of severance is submitted to the discretion of the trial judge, and the exercise of that discretion, except in case of gross abuse, is not reviewable by the appellate courts.

2. Upon the joint trial of three persons for murder, the State offered evidence of the declarations of one of the prisoners to show his guilt, but they were not made in the presence or knowledge of the others: *Held*, that it was the duty of the judge, in his charge to the jury, especially when he had been so requested, to particularly direct the attention of the jury to this aspect of the evidence, and to instruct them specifically as to its nature and the extent of its competency, and to caution them against giving it any weight when determining the guilt or innocence of the prisoners who were not bound by it, and that a general charge that the jury should not consider any admission or declaration of one prisoner against the others, unless they were present when made, was not a sufficient compliance with the law.

(784) INDICTMENT for murder, tried at May Term, 1889, of ROBESON, before *Gilmer, J.*

Only Stephen Jacobs and appellant were on trial.

There was a verdict of "guilty," and from the judgment pronounced thereon the prisoners appealed. Jacobs' appeal was disposed of at last term *(S. v. Jacobs,* 106 N. C., 695).

Attorney-General for the State.
W. F. French for the defendant.

SHEPHERD, J. The prisoner was jointly indicted with Stephen Jacobs, Purdie Jacobs and Make Mitchell for the murder of one Mrs. Arps, and, upon the arraignment, he and the said Mitchell moved for a severance. The motion was granted as to Mitchell but refused as to the prisoner, who, after requesting that he might be tried with Mitchell, was put upon his trial with Jacobs.

It is well settled that the question of severance is addressed to the wise discretion of the trial judge *(S. v. Gooch,* 94 N. C., 1006; *S. v. Smith,* 24 N. C., 402; 1 Whart. Cr. Law, 433), and that the exercise of this discretion, except in cases of gross abuse cannot be reviewed by the appellate court. The duty of passing upon such motions is one of very grave responsibility, and its discharge is often very perplexing to the judge, the difficulty in many instances being enhanced because it cannot, before trial is entered upon, be satisfactorily ascertained whether the defenses are so

antagonistic that the parties cannot be fairly tried together. When, however, a severance is declined and the trial develops conflicting defenses, involving the admission of testimony against one party which is inadmissible against the other, and it becomes the duty of the judge by clear and distinct instructions in his charge to guard against the prejudicial effect of such testimony by stating it carefully and specifically to the jury, explaining to them the peculiar and exclusive applicability to the party against whom it is competent and earnestly (785) admonishing them against its influence in determining the guilt of the other. *S. v. Powell,* 106 N. C., 635.

It is believed by some that even the most painstaking efforts of the judge will often fail to efface from the minds of the jury the impressions made by hearsay or other incompetent testimony, and the task is rendered all the more discouraging by the repetition of such testimony in the arguments of counsel, directed, as they are, in the interest of their respective clients. It is said that it requires the highest exercise of the intellectual faculties to free the mind from erroneous opinions founded upon improper testimony, and that so great is the infirmity of man that often the most severely trained intellects are incapable of accomplishing so gratifying a result.

It is but natural, therefore, that the same law which, for purposes of convenience or other policy, makes it possible in some cases, that such exceptional testimony may be heard, should also devolve upon its judges the imperative duty of exerting themselves to remove its prejudicial effects. This is demanded by every principle of humanity as well as of justice.

Was this duty performed in the present case? There was testimony tending to show that the deceased was killed while in her house by shots fired by some person or persons from the outside, and that Jacobs, Mitchell, and the prisoner were the guilty parties.

In the course of the trial the State introduced one Hinson, who was permitted, over the objection of the prisoner, to testify to certain incriminating "admissions or declarations" made by Jacobs, "in the absence and out of the hearing" of the prisoner. The said witness testified that Jacobs told him (we give the substance of the testimony only) that it was not he (Jacobs) who killed Mrs. Arps, but that it was the prisoner, and that he (Jacobs) "shot with small shot" only. The (786) court stated that when it charged the jury, it would instruct them that the testimony was "no evidence," as against the prisoner, and in the notes of the testimony it is stated that the court "did so charge."

Another witness for the State (whose name is not given) testified, over the objection of the prisoner, that Mitchell told him that the prisoner had a gun and fired into the house of Mrs. Arps, the prisoner not being

present at such conversation. Mitchell had been introduced and examined by the prisoner, and testified that he and the prisoner had been forced to go with Jacobs, and that they took no part in the shooting, and did not aid or abet the same. The prisoner contended that the testimony of said witness for the State could only be "used to attack the character of Mitchell," and his Honor said that such was the law, and that he would so instruct the jury. In the notes of the testimony it is stated that the judge did so charge as to the alleged admissions or confessions, . . . telling the jury that, if made out of the presence of either of the defendants, there was no evidence against the absent defendant, and would be only considered as against the person making them. While this, it seems, would not have been sufficient explanation of the purpose and effect of the testimony as to Mitchell's declaration (Mitchell not being upon trial), yet, conceding this to be so, and assuming, as we would have been warranted in doing in the absence of anything to the contrary that the explanatory instructions as to the testimony of Hinson were also sufficient, still, when we come to the charge itself, we find a seeming conflict between what is there set forth and the statements made in the notes of the testimony as above recited.

As the instructions referred to in these statements embody only general legal principles, and as the statements do not expressly show that these important principles were applied to the specific testimony (787) of each of the said witnesses, the apparent conflict may be reconciled by construing the language of the statements to mean that the court did no more than state the general propositions of law in the manner as set forth in the charge. This view is not unreasonable, because it is a mere matter of inference from the statements that the instructions were specifically applied to the testimony, whereas the charge *expressly* shows that this very important duty was not performed as required by the law.

This is manifest from a perusal of the charge, in which it is said that "his Honor did not read *any* of the evidence, or state *any* of the evidence to the jury." How could the judge have pointed out the testimony mentioned, and instructed the jury in reference to it, unless he had read or stated such testimony? We are not required, however, to resort to such an inference, because it will be seen by reference to the charge that it is there explicitly stated that his Honor did not, as a matter of fact, expressly charge the jury upon these points, that is, he did not state the testimony of each of the said witnesses, and specifically instruct the jury as to its character and the restricted purposes for which it was admitted.

The only charge which appears to have been given in reference to the testimony mentioned, was a statement of the general proposition that the

"confession" of one defendant in the absence of another was not evidence against the latter, and that it should only be considered as against the defendant who made the confession.

This, we think, falls very far short of the great particularity required under the peculiar circumstances of cases like the present. Contrary to the general principles of evidence, hearsay testimony of the most serious character is admitted in the trial of a case involving the life of human being. If, as we have said, the law tolerates such a practice as it must do upon joint trials, great care should be required of the judge in particularly stating such testimony to the jury and specifically (788) instructing them as to the restricted purposes of its admission. If we are correct in the interpretation of the case as presented by the record, the hearsay testimony was admitted, counsel presumably were allowed to discuss it, and nothing but the general proposition we have recited was charged in reference to its highly prejudicial tendency as affecting the prisoner.

Taking the charge to be as we have construed it, another objection appears by reason of the failure of the court to give any particular instructions as to the declarations of Mitchell. As Mitchell was not on trial, his declarations were not substantive testimony as to any one, but they seem to have been admitted for the purpose of affecting his credit.

The declarations were not confessions of any person, and, as the charge of the court relates only to "confessions," it appears that this very serious hearsay testimony (to the effect that a person not on trial had told the witness that the prisoner had fired the gun, etc.), was left to the jury without qualification of restriction. *S. v. Powell, supra,* and the cases there cited. For the foregoing reasons we think that the prisoner is entitled to a new trial.

This trial occurred in May, 1889, but owing to the loss of the judge's notes (which, it seems, is not to be attributed to him), the case upon appeal was not settled until a few days ago. The notes have never been found, and we infer from his Honor's statement that his recollection of some of the disputed points in the settlement of the case was not altogether clear. This leads us to believe that in his desire to be entirely fair under the embarrassing circumstances, he has, in stating the case, resolved all doubts in favor of the prisoner. This we have remarked in justice to the intelligent and conscientious judge who tried the case below.

New trial.

Cited: S. v. Finley, 118 N. C., 1164; *S. v. Moore,* 120 N. C., 571; *Harrison v. Garrett,* 132 N. C., 174; *S. v. Carrawan,* 142 N. C., 576; *S. v. Holder,* 153 N. C., 607; *S. v. Millican,* 158 N. C., 620; *S. v. Southerland,* 178 N. C., 677.

(789)

STATE v. W. M. EARNHARDT.

Arrest—Constitution—Municipal Ordinance.

1. A municipal ordinance which forbids the use of "abusive or indecent language, cursing, swearing, or any loud or boisterous talking, or other disorderly conduct," within the corporate limits, is valid.
2. A fine or penalty imposed by a municipal ordinance is treated as a debt, and, under Article I, section 16, of the Constitution, a person from whom it is attempted to be collected is exempt from arrest, but he may be indicted and punished for the criminal offense of violation of the ordinance for which it is imposed, under the statute (Code, sec. 3820).
3. When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined twenty-five dollars upon conviction thereof": *Held*, that so much of the ordinance as provided for the arrest was in violation of the Constitution, but the other provisions were valid.

INDICTMENT for violation of an ordinance of the town of Lenoir, instituted by warrant of the mayor, and tried on appeal, at Fall Term, 1890, of CALDWELL, before *Merrimon, J.*

The ordinance provided that any person or persons who shall, within the limits of the town of Lenoir, be guilty of using any abusive or indecent language, cursing, swearing, or any loud or boisterous talking, hollowing, or of any other disorderly conduct, shall be *arrested* and fined not less than twenty-five dollars upon *conviction* thereof.

It was admitted that the testimony showed that the defendant had violated the ordinance. But the defendant insisted that the ordinance upon its face was unconstitutional and could not be enforced. The jury returned a verdict of guilty. The court pronounced judgment. The only error assigned is the refusal of the judge to hold that the ordinance was void.

(790) *Attorney-General for the State.*
No counsel contra.

AVERY, J., after stating the facts: We think that an ordinance which forbids the use of "abusive or indecent language, cursing, swearing or any loud or boisterous talking, hollowing or any other disorderly conduct" within the corporate limits of a town, and imposes a fine of twenty-five dollars for a violation of it, may be enacted by its proper authorities under the powers granted to them in the general law, especially

section 3802 of The Code, and that such an ordinance is reasonable. *S. v. Cainan,* 94 N. C., 883; *S. v. McNinch,* 87 N. C., 567; *S. v. Merritt,* 83 N. C., 677.

But the ordinance provides that offenders shall be *arrested* and fined, and, though no counsel appeared for the defendant in this Court, we suppose that counsel may have contended in the court below that the municipality was not authorized to pass an ordinance that provided, in terms, for the arrest of those who should violate it. A fine imposed by a by-law is treated, for the purpose of determining the jurisdiction, as a debt arising *ex contractu,* and a suit brought for the collection of it is cognizable in the court of a justice of the peace where the penalty demanded does not exceed two hundred dollars. *Froelich v. Express Co.,* 67 N. C., 1. The Constitution (Art. I, sec. 16) prohibits imprisonment for debt except in cases of fraud, and the town could not provide for an arrest merely for the purpose of collecting the fine imposed. The Legislature, by enacting section 3820 of The Code, made the violation of any ordinance a misdemeanor, and the right to arrest for such violation is given by that general law, not by the ordinance. The penalty may be recovered in a civil action, subject to the rules of practice applicable in the same jurisdiction in other similar suits.

But while the provision for arrest by virtue of the ordinance (791) itself was void, it does not necessarily follow that the whole of the ordinance is thereby vitiated and rendered null. If a part of a by-law is void, every other part that is connected and essential, in order to constitute a complete prohibition of the act forbidden, is also void. 1 Dillon Mun. Cor., sec. 421. But where a by-law consists of several distinct and independent parts one or more may be valid, the rest void. Dillon Mun. Cor., sec. 160.

Where the city was authorized, by the express terms of its charter, to pass an ordinance imposing a fine and imprisonment, but not costs, it was held by the Supreme Court of Minnesota that an ordinance providing for the payment of costs, in addition to fine and imprisonment, was void only as to the payment of costs. *S. v. Cantieny,* 34 Minn., 7. In our case, while the defendant cannot be arrested by virtue of the ordinance, but only for the offense created by the statute, there is a full and distinct prohibition and penalty provided in the by-law after striking out the words "arrested and." Those words are not so connected with other parts of the ordinance as to leave it incomplete, but, on the contrary, its enforcement by fine, without those words, accomplishes the object of the municipality, and reaches and corrects the very evil that it was intended originally to remedy. In *S. v. Hunter,* 106 N. C., 796,

there was no penalty provided for a violation of the ordinance, but the officer of the town was required to take the offender, without a hearing, to the station house, and hence, it was declared void.

No error.

Cited: S. v. Stevens, 114 N. C., 879; *Board of Education v. Henderson,* 126 N. C., 691; *S. v. Medlin,* 170 N. C., 685.

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(792)

STATE v. O. WITTER.

Liquor Selling—Statute, Repeal of.

Chapter 183, Private Laws 1889, amending the charter of the town of Marion, did not, either by the provisions contained in the body of the act, or by the repealing clause thereof, repeal that portion of the act of 1879, ch. 232, prohibiting the sale of liquors within two miles of the courthouse in McDowell County.

CRIMINAL ACTION tried at Fall Term, 1890, of MCDOWELL, before *Merrimon, J.*

The indictment charges that the defendant sold to a person named one pint of spirituous liquor "within less than two miles of McDowell courthouse," etc. He pleaded "not guilty." On the trial, the jury rendered a special verdict, from which it appeared that the defendant, as charged, sold spirituous liquor within half a mile of said courthouse, and within the corporate limits of the town of Marion, and that at the time of such sale he "had a (retail) liquor license regularly issued to him by the sheriff of the county by order of the board of county commissioners, and had paid all the tax required by law, both to the State and county and to the town of Marion."

Under appropriate instructions, a verdict of "guilty" was entered. The court gave judgment against the defendant, and he, having excepted, appealed.

Attorney-General for the State.
J. F. Morphew for defendant.

MERRIMON, C. J., after stating the facts: The statute (acts 1879, ch. 232) prohibits the sale of spirituous and other liquors specified within two miles of the "courthouse in McDowell County." If this

statutory provision has not been repealed or modified by the other (793) statute presently to be mentioned, the county commissioners of McDowell County had no authority to order the sheriff of that county to grant a license to sell spirituous liquors, in any quantity, within the territorial limit mentioned, to the defendant, and the license that he purported to have would, in that case, be void and of no effect. The statute (acts 1889, ch. 216, sec. 32) regulating the sale of spirituous and other liquors, prescribes how a license to sell such liquors shall be granted, "except in territory where the sale of liquors is prohibited by law." As to this, no license can be granted.

It is contended, however, that the subsequent statute (Pr. Laws 1889, ch. 183), amendatory of the charter of the town of Marion, in the county of McDowell, repealed so much of the statutory provision first above cited as applies to territory within and embraced by the corporate limits of that town, and these limits embrace a considerable part of the territory within which the sale of liquors is so prohibited. The amendatory statute last above cited, among other things, confers upon the authorities of the town of Marion "power annually to levy taxes for town purposes on real and personal property," and likewise to tax trades, businesses, etc., and "on every barroom," and "on every person dealing in spirituous, malt or vinous liquors," and also "on every wholesale dealer in spirituous, malt or vinous liquors." The repealing clause of the statute provides that "All laws and parts of laws inconsistent with the provisions of this charter, within the corporate limits herein provided for, are hereby repealed, and this act shall be in force from and after its ratification."

It is to be observed that the statute, of which this repealing clause is a part, is organic in its nature, and amendatory of a like preëxisting statute on the same subject. Its purpose is to incorporate a town—to confer upon it a corporate entity, certain defined powers and privileges, to be exercised when and as may be allowed by its (794) charter, consistently with, and in subordination to, the existing public laws of the State, and such as may from time to time be enacted. Its purpose is particular, in no sense general, nor is it intended by it to improve, modify or repeal existing public laws, whether local or general. It does not provide in terms, nor by reasonable implication intend, that barrooms *shall* be allowed, or that spirituous or other liquors shall be sold within the town, nor does it so provide or imply that such barrooms *may* be allowed or such liquors sold therein, at all events in the discretion of the town authorities and the county commissioners; it simply intends to confer organic charter authority, in such respects to be exercised if and when the pertinent public laws of the State shall so allow. The repealing clause above recited has pertinency to, and must be con-

strued in, connection with the nature and purpose of the statute of which it is a part, and hence it has reference to, and implies, "all laws and clauses of laws" conferring power, authority and privileges upon, or denying the same to, the town, as such, whose charter the statute amends. The Legislature, in this statute, might have modified or repealed the other statute prohibiting the sale of spirituous and other liquors within 2 miles of the "courthouse of McDowell County," but it should have done so by express provision or in such way as to certainly manifest such purpose. Such purpose has not been clearly manifested, nor is it at all probable that the Legislature intended to modify the statute so as to exclude from its operation the territory within the town of Marion and leave a narrow belt of territory immediately around it within which such sales could not be made. It was much more probable that there was no purpose in granting a mere amendatory charter to interfere with a local public law forbidding the sale of such spirituous liquors. It is altogether probable that, if there had been such
(795) purpose, it would have been expressed unmistakably. *S. v. Chambers,* 93 N. C., 600; *S. v. Wallace,* 94 N. C., 827.

The license relied on by the defendant was, therefore, void and did not authorize him to make the sale of the spirituous liquors charged in the indictment.

No error.

Cited: S. v. Snow, 117 N. C., 776; *S. v. Knotts,* 131 N. C., 707; *S. v. Parker,* 139 N. C., 587.

STATE v. STANHOPE HOOVER.

Indictment—Enticing Servant—The Code, secs. 3119 and 3120.

Where a tenant contracts that, in addition to payment of the stipulated rent, he will work for the landlord whenever he can leave his own crop and is needed by the landlord, this does not constitute the relation of master and servant, and a person employing the tenant is not guilty of enticing a servant, under The Code, sec. 3120.

CRIMINAL ACTION, tried before *Meares, J.,* at August Term, 1890, of MECKLENBURG. Appeal by defendant.

Attorney-General for the State.
E. T. Cansler (by brief) for defendant.

CLARK, J. The contract, as testified to by the prosecutor, was as follows: "Jackson was to cultivate certain of the prosecutor's land, amounting to about 8 or 9 acres, for the year 1890, and pay him as rental the sum of $33 or one 400-pound bale of cotton, with the understanding that Jackson was to work for the prosecutor whenever he needed Jackson, and he (Jackson) could leave his own crop, at 50 cents a day."

We think the relation of master and servant did not exist, for (796) the reason that Jackson was not in the employment of the prosecutor. The relation between them was that of landlord and tenant. One of the terms or stipulations of the renting was, that in addition to the rent paid, Jackson, whenever at leisure, if called upon by the landlord, should work for him at 50 cents a day.

It has been held that where A employs B to labor for him for one year, at $20 per month, and gives him the use of a dwelling during the term, B's occupancy of the dwelling is that of a servant and not as a tenant, and if he quits A's service or is discharged, A may enter and forcibly eject him. Wood's Master and Servant, sec. 153, and cases there cited. The reason is, that the contract is that of hiring, and the use of the house is a part of the hire or an incident of the contract. *E converse,* here the contract is that of renting, and the promise by the tenant to do labor when at leisure, if it is wanted by the landlord, is a mere incident of the contract of renting. The court below erred, therefore, in instructing the jury that "the contract, as sworn to by the prosecutor, gave him the right to demand the services of Jackson every day if he chose to, and the man who took him away was guilty of violating the statute."

Per Curiam. Error.

Cited: S. v. Etheridge, 169 N. C., 263.

STATE v. DRURY HART.

Agency—Selling Liquor.

1. Under the provisions of the Revenue Act of 1887 (ch. 135, sec. 31), a person could lawfully sell spirituous liquors—the product of his own farm—in quantities less than a quart, at any place where the sales of liquors were not prohibited, without paying the tax or procuring the license otherwise required by said act. The act of 1887 has, however, been changed by chapter 216, Laws 1889.

2. One who, in good faith, sells liquors for another who has the right to do so without license, is entitled to the same defenses as his principal.

(797) APPEAL from *Bynum, J.*, at Spring Term, 1890, of ASHE.

The defendant is indicted for selling spirituous liquors "by the quart, not at the place of manufacture of the said liquor, and without having a license to sell by the measure, aforesaid," etc., in violation of the statute (Laws 1887, ch. 135, sec. 31). He pleaded not guilty. On the trial the evidence went to prove that the defendant sold a quart of whiskey to a person named, as agent of and for the manufacturer thereof, and that the whiskey so sold was the product of the manufacturer's own farm—that it was sold at a place about 15 miles from the place of manufacture. The defendant insisted that the evidence, taken as true, did not prove the offense charged in the indictment, or that he was guilty of any offense. But the court told the jury that, if they believed the evidence, the defendant was guilty. There was a verdict of guilty, and judgment against the defendant, from which he appealed.

Attorney-General for the State.
J. F. Morphew for defendant.

MERRIMON, C. J., after stating the facts: The statute (Laws 1887, ch. 135, sec. 31) prescribes that spirituous and other liquors shall not be sold without a license so to do, and the payment of certain tax therefor. It provides, among other things, that "Nothing in this section contained shall prevent any person from selling wine of his own manufacture at the place of manufacture, or any person from selling spirits or wine, the product of his own farm, in quantities not less than one quart." We are of opinion that the clear purpose of this clause of the statute was to allow any person to sell spirituous liquors by a measure not less than a quart without license granted by authority so to do if the spirituous liquors so sold were the products of his own farm and the sale
(798) made at a place where such sales are not prohibited. The object was to afford the farmer the largest opportunity to get the most he could for the manufactured product of his own farm. This view of the clause in question was recognized as correct in *S. v. Kennerly,* 98 N. C., 657, and *S. v. Whissenhunt, ib.,* 682. The statute cited is now modified and changed by the subsequent statute (Acts 1889, ch. 216, sec. 32), so that the sale at a place other than the place of manufacture is forbidden.

The defendant sold the liquor as the agent of the manufacturer, it being the product of the latter's farm. There was no reason why he should not do so in good faith, and at a place other than the place of

manufacture. There is nothing in the statute that requires the farmer himself in person to sell spirituous liquors, the product of his own farm, and that he may not do so by an agent. The agent, however, must be such in good faith.

There was no formal exception or assignment of error, but the defendant in effect demurred to the evidence. The court overruled the demurrer, and the exception was implied. The defendant is entitled to a New trial.

STATE v. FRANK GOODSON.

Homicide—Evidence.

The deceased, a woman, was found dead just outside her house, which was about one-half mile from the town of Marion and one-fourth of a mile from a public road, about 11 o'clock a. m. on 30 April. The body bore evidence of a most brutal murder and an attempt to burn. The prisoner, who was a laborer on a railroad near by, had been seen frequently, previous to the murder, going in the direction of deceased's house, and, on the afternoon of the day preceding the finding of the body, was seen talking with a person who resided near deceased, after which he went in the direction of her house. Shortly after, he was seen in the town, drinking. He spoke of going to see his "old gal," and of having sexual intercourse with some woman. He was further heard to say: "I expect to kill some d——d woman, and have got money enough to carry me whereever I want to go." A witness said he saw a person he believed to be the prisoner, on the same afternoon, going as if from the house of deceased, across a field, not in any pathway, and he was walking briskly—"almost in a trot"—and, once or twice, without stopping, looked back toward the deceased's house. After his arrest, the prisoner's clothing was examined, and splotches, which had the appearance of blood, were found upon it; but the tracks near the place of the homicide, did not correspond with prisoner's foot. The prisoner made no attempt to fly: *Held*, that while these facts established a strong suspicion against the prisoner, they were not sufficient to warrant his conviction of murder, and the jury should have been so instructed.

INDICTMENT for murder, tried at Fall Term, 1890, of Mc- (799) DOWELL, before *Merrimon, J.*

There was a verdict of "guilty," and judgment of death, from which prisoner appealed.

The facts are stated in the opinion.

Attorney-General for the State.
J. F. Morphew for defendant.

MERRIMON, C. J. The evidence produced on the trial was abundant to prove—indeed, it was not denied—that some person murdered the deceased, but the prisoner insisted that there was no evidence to go to the jury to prove that he was the guilty party, as charged in the indictment. The court held otherwise, and the prisoner excepted, thus presenting a single question for our consideration.

It is well settled that the evidence produced for such purpose should be sufficient, in some reasonable aspects of it, to prove the prisoner's guilt, else the court should instruct the jury that there was no evidence to warrant a verdict of guilty, and they should render a verdict (800) of acquittal. *S. v. Brackville,* 106 N. C., 701, and the cases there cited.

We have examined with much care and scrutiny the evidence sent up as part of the case stated on appeal, and are of opinion that it was not sufficient to prove the prisoner's guilt or to go to the jury for that purpose. Accepting the evidence as true and sufficient to prove the facts to which it related, and giving these facts, severally and collectively, and in their bearing each upon the other, due weight, in any view of them they simply raise a strong suspicion of his guilt. The evidence pointing to the prisoner is circumstantial. The facts may be true; they may be taken, in any combination of them of which in their nature they are capable, and they fail to prove his guilt; they are inconclusive as to the material fact of guilt. The evidence thus taken may be true, and yet the prisoner may be innocent.

It appears from the material parts of the evidence pointing to the prisoner that he was a laborer on the railroad, about 2 miles distant from the house of the deceased, which was situate in a field, about a quarter of a mile from the public road, and half a mile from town; that he passed not far distant from her house in going to and from the town of Marion; that he had been seen repeatedly in the neighborhood of her house—more than once going in the direction of it. About 2 or 3 o'clock of the evening on which the homicide was probably perpetrated he talked with a witness at her house, about a quarter of a mile distant from that of deceased, and when he left, saying that he was going to town, about half a mile distant, he went across the field in the direction of where deceased lived; he went to town and returned, the witness last mentioned seeing him about 5 o'clock the same evening passing along the public road. Another witness said he saw him—was not positive that he was the same person—passing as if going from the house of the deceased across the field—not in the pathway—walking briskly, nearly in a trot; looked back towards the house; went a short dis- (801) tance and looked back again, and then passed on out of sight of

the witness. On the same day, in the forenoon, he was heard to say that he was going up to town to see his "old gal." He expressed his desire to have sexual connection with the woman—did not say what woman; was seen about an hour by sun of the same day in the evening; wanted liquor—had some—gave the witness some; said, "I've got $108, and I expect to kill some d—d woman, and I've got money enough to carry me wherever I want to go." He went on down the railroad from this witness; was about 3 miles from the town. A witness, while the prisoner was in jail, asked him to take off his vest; he at first refused, but did so; some "splotches" were found on his vest and some on his pants; the expert thought the "splotches" were blood, but might be mistaken; did not make best test. Prisoner hesitated, while in jail, to take off one of his shoes; he did so, however; it did not correspond with or fit the tracks seen and measured.

This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. The mind is not simply left in a state of hesitancy and anxious doubt—it refuses to reach a conclusion. But there is an absence of facts which lessens the force of the view just mentioned that must be taken into consideration here. So far as appears, no one ever saw the prisoner at the house of the deceased, or saw him with her, or heard him speak of her, or knew of his having relations of intimacy, or otherwise, with her. There is no evidence that he at any time manifested anxiety, nor did he flee; nor was there evidence of ill-will or threat on his part towards the deceased, nor of motive to harm her. He had opportunity to do the murder, but there is a total absence of motive to do it, unless (802) it might be very remotely and vaguely inferred. That he had motive, so far as appears, is altogether conjectural. The inference that he sought to, or did, ravish her, and, in that connection, for any cause, took her life, is remote, conjectural and unsatisfactory. There was large opportunity for some other person to have done the crime. Many persons lived near to her. She lived half a mile from the county town, not far from where many persons—men—were working, grading a railroad. She was a laundress, and probably knew and had business with such men, many of them, no doubt, more or less dissolute and immoral. There was evidence to show that she was a lewd woman; that she never had been married; that she was white and had two bastard children of mixed blood.

Such evidence—such a state of facts, leading to no satisfactory conclusion as to the principal fact, but leaving the question of the prisoner's

guilt or innocence in grave doubt—is not sufficient, in any just view of the same, to warrant a verdict of guilty, and the court should have so instructed the jury. The prisoner is entitled to a

New trial.

Cited: S. v. Green, 111 N. C., 651; *S. v. Tillman,* 146 N. C., 615; *S. v. West,* 152 N. C., 833; *S. v. Matthews,* 162 N. C., 550.

STATE v. H. G. WHITAKER.

Officer—Trespass—Process.

An officer cannot break open the door of a house and enter therein, without the consent of the owner, for the purpose of executing civil process, except when acting under a requisition in claim and delivery where the property has been concealed, in which case special provision has been made by statute (The Code, sec. 329).

(803) INDICTMENT for forcible trespass, tried before *McCorkle, J.,* at November Term, 1890, of SURRY.

After evidence offered by the State, showing the facts relied upon to sustain the charge, the defendant introduced himself and one Simmons, a constable, each of whom testified that a warrant of attachment had been issued by a justice of the peace at the instance of the defendant as agent for Royster & Strudwick. The warrant was produced and appeared regular on its face, commanding the constable to levy upon the property of defendant, who is the husband of the prosecutrix. They further testified that when the warrant was delivered to the constable, he, not knowing where the parties lived, summoned the defendant to go with him; that they went together to the house of the prosecutrix, about an hour by sun in the evening; that she met them at the door and stood upon the steps, drawing the door to behind her, and forbade their entrance into the house; that the constable read the warrant to her and demanded entrance; that she refused entrance, and that Simmons, the constable, asked her if the corn was in the house; she said it was, but that she and her children made it; that her husband, before leaving the State, had sold the tobacco covered by Royster & Strudwick's mortgage, and had carried off the money with him. She said that she could prove by one Wall, living by, that she and her children had made the corn. The officer then went after Wall and brought him up, when he told the officer that the husband had made the corn. The officer again attempted

to enter the door, when the prosecutrix cut at him with a knife. The officer then directed the defendant and another person who was standing by to take the prosecutrix off the steps, which they did, with no unnecessary force. The officer then opened the door, partially, when it was violently shut against his hand by two other women standing behind it. The officer pushed it open and went in and found 15 bushels of corn, which he levied on. The defendant introduced a mortgage to Royster & Strudwick, covering the crop of corn, of which the 15 (804) bushels was a part.

The solicitor for the State asked his Honor to direct the jury that, upon the evidence, they should find the defendant guilty, as a warrant of attachment did not justify the officer and his *posse* (the defendant) in forcibly entering a dwelling-house. The court reserved its opinion, directing the jury to return a verdict of guilty, subject to the opinion reserved. Afterwards, the court, being of opinion that, under the above facts, the defendant was guilty, pronounced judgment upon the verdict, and the defendant appealed.

Attorney-General for the State.
No counsel contra.

SHEPHERD, J. In the absence of some statutory provision to the contrary, this case is governed by *S. v. Armfield,* 9 N. C., 246. It was there decided that an officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. This decision is referred to with approval in *Sutton v. Allison,* 47 N. C., 339.

While such authority is given an officer in case of "claim and delivery" where property is concealed, we can find nothing in The Code which warrants such conduct in cases of attachment and execution.

No error.

(805)

STATE v. W. H. ALLEN.

Carrying Concealed Weapons—Witness.

1. Unless, in the discretion of the court, at the close of the State's evidence, the State is restricted to one of the transactions shown by it and tending to prove the offense charged, the solicitor, on cross-examination of defendant's witnesses, can bring out any other transaction within the statute of limitations tending to prove the charge. This rule is not varied when the defendant is a witness in his own behalf.

2. The defendant waives his constitutional privilege not to answer questions tending to criminate when he voluntarily testifies in his own behalf.

3. The offense is deemed and held to have been committed, if at all, in the county charged, unless the defendant pleads in abatement, under oath, and the cause is thereupon removed to another county. The Code, sec. 1194.

CRIMINAL ACTION for carrying a concealed weapon, brought to the Superior Court of PITT by appeal from a justice, and tried at June Term, 1890, before *Boykin, J.*

In the warrant the defendant was charged with having committed the offense on 2 May, 1890, in Greenville Township, Pitt County.

The State introduced evidence tending to prove the commission of the offense at the time and place charged.

The defendant was introduced as a witness in his own behalf. On cross-examination the solicitor asked him if he had not, at any time within two years next preceding the date of the warrant, carried concealed about his person a pistol while off his own premises. To this defendant objected. The court permitted the question and directed defendant to answer, whereupon he replied he had, and excepted.

(806) The court instructed the jury, if they believed the defendant's own testimony, to find him guilty.

Verdict, "guilty," and judgment. Defendant appealed, assigning as error that he was required to answer the question objected to.

Attorney-General for the State.
J. E. Moore for defendant.

CLARK, J., after stating the facts: Time and place in a charge for an offense like this need not to be proved as laid. It is sufficient if the time proven was at any time within two years prior to issuing the warrant, and it is enough if the offense is shown to have been committed within the county. Indeed, the offense, if proven, "shall be deemed and taken" as having been committed in the county laid in the charge, unless the defendant, by plea in abatement, under oath, shall allege the transaction took place in another county, whereupon the case may be removed thither for trial. The Code, sec. 1194.

It was competent for the State to introduce testimony as to various transactions, each one constituting, if the evidence is believed, the offense. At the close of the evidence on both sides, or even at the close of the evidence for the State, the court, in its discretion, may require the solicitor to elect upon which transaction the State will ask for a verdict. *S. v. Parish,* 104 N. C., 679, in which *Avery, J.,* in a well considered and careful opinion, reviews the authorities.

When the State is not required, at the close of its evidence, to elect one of the transactions put in evidence by its witnesses, it is competent for the solicitor, upon cross-examination of defendant's witnesses, to show any other transaction within the statute of limitations which would constitute the offense charged. The rule that the cross-examination is limited to the matters brought on the direct examination has never prevailed in this country, either in civil or criminal actions, (807) though it is otherwise in England.

The rule that it is competent to bring out such evidence upon cross-examination of defendant's witnesses is not varied by the fact that the defendant uses himself as a witness in his own behalf. He cannot be compelled to testify, and no inference to his detriment can be drawn from his failure to go upon the stand. The Code, sec. 1353. When he voluntarily does so, he waives his constitutional privilege of not being required to give evidence on the issue tending to criminate himself, and, to impeach him and shake his evidence, he can be asked questions as to other and distinct offenses, like any other witness. *Smith, C. J.*, in *S. v. Thomas,* 98 N. C., 599. With stronger reason, the defendant, like any other witness introduced by him, may be required to give evidence tending to prove the very offense charged in the indictment or warrant. He has no more privilege than any other witness, and in telling "the whole truth" he is called upon to give evidence which may be against the defendant, as well as for him. It is his own fault here that he offered a witness who knew more about his transgressions of law on this charge than he afterwards found it to his interest for the jury to have information of.

Per Curiam. No error.

Cited: S. v. Barber, 113 N. C., 714; *S. v. Williams,* 117 N. C., 755; *S. v. Mitchell,* 119 N. C., 787; *S. v. Howard,* 129 N. C., 656; *In re Briggs,* 135 N. C., 146; *S. v. Leeper,* 146 N. C., 660; *Smith v. R. R.,* 147 N. C., 607; *S. v. Simonds,* 154 N. C., 198.

(808)

STATE v. JOE PENLEY AND JAMES LANCE.

Courts—Jurisdiction—Statutes—Verdict.

1. It appearing from the record that a trial for a misdemeanor—the defendants being on bail—was commenced on Saturday of the first week of the Criminal Court of Buncombe County, but the jury did not return a verdict until the following morning; and it further appearing that the court con-

tinued in session the second week, it will be presumed that such condition of the docket existed as authorized the prolongation of the term, under the statute creating the court (Laws 1889, ch. 493, sec. 15).

2. When such term is continued until the second week, its jurisdiction is not limited to those cases where the defendants are charged with crimes punishable capitally or by imprisonment in the penitentiary, or are in jail awaiting trial, but it may then try any cause within its jurisdiction.

3. A verdict rendered on Sunday is not invalid.

INDICTMENT for assault and battery with a deadly weapon, tried before *Moore, J.*, at July Term, 1890, of the Criminal Court of BUNCOMBE.

The case on appeal is as follows:

The trial was concluded and the case given to the jury at about 6 o'clock on Saturday evening of the first week of said court.

As the jury was about to retire to consider their verdict, the court asked the solicitor and the counsel for the defendants if they would consent for the clerk to take the verdict, to which they agreed.

The jury returned to the clerk a verdict of guilty as to both defendants at 7 o'clock on the following Sunday morning, in the absence of the defendants and their counsel.

The defendants were on bail at the time of their trial and until after the rendition of the verdict, having given bail before a justice of the peace for their appearance at court.

(809) On the opening of the court on Monday morning of the second week of the court, the defendants' counsel moved the court to set aside the verdict, for the following reasons:

1. Because the verdict was rendered after the expiration of the term of court.

2. Because the verdict was rendered on Sunday.

The motion was overruled by the court. Defendants excepted, and there was judgment and appeal.

Attorney-General for the State.
No counsel contra.

DAVIS, J., after stating the facts: Chapter 493, Laws 1889, establishing "The Criminal Court of Buncombe County," provides, in section 15, that there shall be four terms of said Criminal Court in each year, specifying the time and place of holding said court, which shall continue its sessions for the term of one week if the business thereof shall require: "*Provided,* if there be remaining undisposed of at the end of the week cases where defendants are charged with crimes punishable with im-

prisonment in the penitentiary, or capitally, or if defendants be in jail waiting trial, its sessions may be continued until such cases are disposed of, either by trial or continuance of the court."

1. It was the duty of the judge to continue the court beyond the first week if for any of the causes stated in the statute it was required. The term did not necessarily end with the first week. The judge was holding court on Monday of the second week, and the presumption is that he was doing so rightfully, as he might do, as authorized by the statute.

If it be said that the defendant was not charged with a crime punishable with imprisonment in the penitentiary, or capitally, or that he was not in jail awaiting trial, and *only* such cases could be disposed of during the second week, we think the statute is susceptible fairly of a broader construction, and if it becomes necessary to hold the (810) court two weeks, any causes within its jurisdiction may be disposed of during the second as well as the first week. The judge was both a *de jure* and a *de facto* officer, holding court during the second week for the transaction of such business as came within his jurisdiction, and the presumption is in favor of the regularity and validity of his acts in a court actually being held during the second week. *S. v. Speaks,* 95 N. C., 689.

2. The question presented by the second assignment of error has been settled by this Court adversely to the appellants. *S. v. Ricketts,* 74 N. C., 187; *S. v. McGimsey,* 80 N. C., 377; *White v. Morris, ante,* 92.

No error.

Cited: Taylor v. Erwin, 119 N. C., 276; *Rodman v. Robinson,* 134 N. C., 507.

STATE v. JAMES HAWN AND HARRIET POPE.

Evidence—Witness—Character.

1. The answer of a witness to a question in reference to a collateral matter, put to him with a purpose to attack his credibility, is conclusive.

2. Nor can the character of a witness be attacked by evidence that there was a general report that he was guilty of a particular offense.

INDICTMENT for fornication and adultery, tried at Fall Term, 1889, of CATAWBA, before *Shipp, J.*

The only exception taken at the time was as to the ruling of the court on a question as to the admissibility of evidence.

(811) The State introduced one Yoder as a witness, who testified to facts tending to prove the guilt of the defendants.

On the cross-examination of said witness he was asked if he had written a letter making a false charge against a young man, with a view to prevent him from obtaining a position as a school-teacher. The witness said he had not written such a letter.

Afterwards, the defendants introduced one Dr. Clapp, who testified that the general character of said witness (Yoder) was not good. After cross-examination by the solicitor, the defendant proposed to ask the witness if there was not a general report that the witness Yoder had written a letter against a young man (being the letter alluded to on cross-examination of Yoder). The solicitor objected; objection sustained, and the evidence excluded. Defendants excepted. There was a verdict of guilty. Judgment, and appeal by defendants.

Attorney-General for the State.
No counsel for defendants.

SHEPHERD, J. The question put to the witness was collateral, and his answer conclusive. *S. v. Patterson,* 74 N. C., 157. Even if the answer had not been conclusive, it could not have been contradicted by general report.

There is nothing whatever in the appeal.

No error.

Cited: S. v. Castle, 133 N. C., 776.

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(812)

STATE v. GEORGE MCAFEE

Assault—Arrest—Officer.

1. Where the defendant struck his wife a blow with a stick, in a public road, so near to an officer (a justice of the peace) that he could hear the sound made by the blow and the cries of the woman, though, on account of the darkness, he could not actually see the assault, it was such a breach of the peace in the presence of the officer as authorized him to arrest the assailant without warrant.

2. When the officer, who was known by the defendant to be such, attempted to make the arrest, the latter drew back the stick in a striking position and ordered the officer to stand back, in consequence of which he desisted and got out of the way: *Held,* that this constituted an assault upon the officer.

STATE *v.* MCAFEE

INDICTMENT for assault and battery, tried at February Term, 1890, of the Criminal Court of MECKLENBURG, before *Meares, J.*

The State introduced one Severs, a justice of the peace, who testified that, about 8 o'clock at night, on a Saturday in July, 1890, he was informed by one Watts that the defendant was beating his wife and about to kill her, and that he and his son went out to the road and heard persons talking in a loud tone down the road. They were coming up the road in the direction of witness' house. It was dark, and witness could not see the persons who were talking loud, but when they approached to within 40 feet of him he heard a blow given as with a stick, and a woman's voice cried out very loud, as if in distress. In a few minutes thereafter, the defendant and his wife came along the road, and the defendant had a stick in his hand and was cursing and talking violently, and his wife was crying in a loud voice. Witness went up to the defendant and told him to consider himself under arrest, and immediately the defendant drew back his stick and told witness to stand back—that he had done nothing to be arrested for, and would not be arrested. The defendant held the stick uplifted and in a (813) position as if he intended to strike the witness, and witness, believing he was about to strike, got out of defendant's way, and defendant and his wife then walked on down the road. The stick was the limb of a sycamore tree, 4 or 5 feet long and 1 or 2 inches in diameter. Witness did not see the defendant strike his wife. When he told defendant to consider himself under arrest, he was about to take hold of him in order to arrest him, but before he could do so the defendant lifted the stick and assumed a striking position and ordered him to stand back. Defendant is well acquainted with witness and knew that witness was a justice of the peace. Witness had not issued any warrant and did not profess to have any warrant in his possession at the time of the attempted arrest.

William Severs, a son of the above-named witness, was introduced, and corroborated the statement of his father.

The defendant introduced one Watts, who testified that he was walking along the road, in company with defendant and his wife and sister, and when they were near a bridge, about one-quarter of a mile from Severs' house, he saw the defendant push his wife two or three times, and slap her, but did not see him strike her with a stick; that he went up to Severs' house (who is a magistrate) and told him that defendant was beating his wife.

The defendant testified in his own behalf that while going along the road on the night in question he pushed his wife two or three times, merely in play, and she fell into a ditch and then began to cry. He denied that he struck her with a stick, and stated that he did not strike

her at all. When he got in front of Severs' house, Severs was standing in the middle of the road and told him to consider himself under arrest, and he replied that he had done nothing to be arrested about. He walked around Severs and passed by him, and Severs never (814) moved from his position. He neither raised his stick nor threatened to strike Severs. He had had one or two drinks that evening.

Maria McAfee, wife of defendant, testified that defendant did not strike her with a stick that night. She said he did not hurt her and that she cried because her feelings were hurt. She did not think he was angry with her, but that he had been drinking. She went home and stayed with her husband that night.

The defendant's counsel asked the court to instruct the jury:

1. That there was no evidence that the prisoner assaulted Severs, the prosecutor.

2. That no person without a warrant could make an arrest unless he was present at a riot, rout, affray, or other breach of the peace, and he could only make the arrest then when it was necessary to prevent or suppress the same.

3. That there was no evidence that there was any riot, rout, affray, or any breach of the peace committed by the defendant.

4. That there was no evidence that, if a breach of the peace was committed by George McAfee (defendant), it was done in the presence of the prosecutor.

The court refused the first, third, and fourth instructions, but gave, in substance, to the defendant the full benefit of the second prayer for instructions. On the question which was raised as to what constitutes a presence in law, the court told the jury that an officer of the law had no power to arrest a person on a charge of assault and battery, or other breach of the peace, without a warrant, unless the same was committed in the presence of an officer; and, although it was night-time and the officer could not see the persons committing a breach of the peace, yet if it was done so near that what was said and done by the parties could be distinctly heard by him, this would be considered by the law as a breach of the peace committed in the presence of the officer. If (815) Severs, the justice of the peace, heard defendant strike his wife with a stick, and heard her cry out, at a distance of only 40 feet (as the State alleges) from where he was standing, the law would consider the deed as done in his presence, although it was night-time and he could not see the parties. The court also told the jury that a husband had no right to whip his wife with a stick larger than a man's thumb, if the chastisement was inflicted from pure malice; that the State's witness had testified that the stick used on this occasion was 4 or 5 feet

long and from 1 to 2 inches in diameter; that while it was indictable for a husband to chastise his wife with a whip or stick out of pure malice, a husband has, nevertheless, a right to chastise his wife for the purpose of correction; that the question of malice must be determined by the jury, who must take into consideration all the facts and circumstances testified to by witnesses in this case. If the jury believe the testimony of Severs, the justice of the peace, to be true, he had the right to arrest the defendant, and it was his duty to have done so; but if they believe the witnesses for the defendant, then the defendant is not guilty. There was a verdict of guilty, and the defendant submitted a motion for a new trial, upon the following alleged errors:

(1) That the court refused to give the instructions prayed for, and in charging (2) that it was a question of malice whether a man was guilty of chastising his wife; (3) that the presence, under the testimony, was a sufficient presence to justify the prosecutor in making the arrest without a warrant; (4) there was no evidence that, if the defendant McAfee struck his wife, it was done with malice.

The motion for a new trial was overruled, and the defendant appealed from the judgment rendered.

(816)

Attorney-General for the State.

Heriot Clarkson and C. H. Duls (by brief) for defendant.

AVERY, J. A justice of the peace, a constable, or a sheriff is, unquestionably, authorized to arrest without warrant one who commits a felony or breach of the peace in his presence. *S. v. Hunter,* 106 N. C., 798; *S. v. Freeman,* 86 N. C., 683; 3 Wharton Cr. Law, sec. 2927. But in *S. v. Hunter,* where the right of a policeman to arrest under the provisions of the charter without warrant for a violation of a city ordinance was declared the same as in cases of breaches of the peace, the Court say that "they (policemen) must determine, at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated," and that the question of good faith on the part of an officer comes to his aid only where he is resisted in making a lawful arrest. The rule is different when arrests are made by officers for felonies, however, because reasonable ground to believe a felony has been committed or a dangerous wound inflicted, is sufficient to justify an officer in arresting.

If the assault with the stick described was committed in the presence of the officer, Severs, and he was known to the defendant to be a justice of the peace, it was not unlawful to arrest without informing the offender of the nature of the charge, as well as without warrant. 3 Whart. Cr. L., sec. 2829. We concur with the judge below in the

view expressed in his charge, that if the defendant struck his wife with the stick described by the witness, at a point so near to the officer that he could distinctly hear what was said, and the sound made by the blow, it would be considered in law a breach of the peace in his presence, though he could not at the time actually see the former, because (817) it was too dark. *S. v. Hunter,* 8 L. R. A., 530, and notes.

The principal evil intended to be avoided by restricting the right of arrest to breaches of the peace committed in the officer's presence was depriving a person of his liberty, except upon warrant issued on sworn information or upon the actual personal knowledge of the officer that the offense was committed. The reason of the law is as fully met, therefore, if the officer heard enough to satisfy him that the law was violated, as if he had acquired the information through his sense of sight. He incurred the risk of subjecting himself to indictment for assault if the defendant did not in fact strike his wife with the stick, and, under the instruction given by the court, the jury must have found that the defendant did commit the assault upon his wife with the same stick afterwards drawn over the prosecutor. The stick that was raised over the head of the prosecutor was a piece of the limb of a sycamore tree, from 4 to 5 feet in length and from 1 to 2 inches thick. There was evidence tending to show, and sufficient, it seems, to satisfy the jury, that the defendant struck his wife with that stick. His Honor, in his charge, left the question of striking with the stick to the jury, and made the guilt of the defendant dependent upon it, and the defendant had no reason to complain of such instruction. *S. v. Huntley,* 91 N. C., 617. If the defendant raised the stick, described, in striking posture over the prosecutor's head, and caused the prosecutor to step aside to avoid an apprehended blow, it was an assault. *S. v. Shipman,* 81 N. C., 513. There was evidence tending to show that the defendant committed an assault—first, upon his wife, in presence of the prosecutor, and, secondly, that he committed an assault upon the prosecutor, who was attempting to arrest him, and was known to the defendant to be a peace officer. The jury passed upon the disputed facts.

No error.

Cited: Kelly v. Traction, 132 N. C., 372; *S. v. Rogers,* 166 N. C., 389.

(818)

STATE v. FRENCH DUNCAN.

Appeal, Without Security.

To entitle a convicted person to an appeal without giving an undertaking to secure costs, under section 1235 of The Code, it is essential that the required affidavit should state (1) that the defendant is wholly unable to give the security; (2) that he is advised by counsel that he has reasonable ground for appeal, and (3) that the application is made in good faith. These essential averments cannot be waived.

THIS was a charge of violating an ordinance of the town of Hendersonville, tried on appeal from the municipal court, at the Fall Term, 1890, of HENDERSON, before *Merrimon, J.*

The defendant appealed without giving bond. The Attorney-General moved to dismiss the appeal because the affidavit and certificate of counsel are not made in compliance with the statute.

The affidavit, certificate and order of the judge are as follows:

"The defendant, desiring to appeal from the judgment in the above cause, being sworn, makes affidavit that he is unable by reason of his poverty to give the security required by law for said appeal, and that he is advised by counsel learned in the law that there is error in the matter of law in the decision of the Superior Court in said action."

"I, Thomas J. Rickman, a practicing attorney in said Superior Court, do hereby certify that I have examined the case of above affiant, and am of the opinion that the decision of the Superior Court in said action is contrary to law."

(819)

"In the above and foregoing cause, it being made to appear to the court by affidavit and certificate of counsel that the defendant is unable by reason of his poverty to make the deposit or give the security required by law for said appeal, it is, therefore, ordered that the said defendant be allowed to appeal from said judgment to the Supreme Court as in other cases of appeal, without giving security therefor."

Attorney-General for the State.
No counsel contra.

AVERY, J., after stating the facts: The affidavit required by the statute (The Code, sec. 1235) must embody the statement: "First, that the defendant is wholly unable to give security for the costs; secondly, that he is advised by counsel that he has reasonable cause for the appeal prayed for; third, that the application is made in good faith." *S. v. Moore,* 93 N. C., 500; *S. v. Jones,* 93 N. C., 617. It is not a matter of

discretion with the court, but it is the right of the State to have an appeal dismissed where there is a failure to comply with either of the three essential requirements of the law. *S. v. Payne,* 93 N. C., 613. The solicitor is not authorized to waive compliance with it. *S. v. Moore, supra.*

The affidavit is fatally defective, and the motion of the Attorney-General to dismiss must be granted.

Appeal dismissed.

Cited: S. v. Gatewood, 125 N. C., 695; *S. v. Smith,* 152 N. C., 843.

(820)

STATE v. E. H. NIES.

Special Verdict—Appeal.

When the jury return a certain state of facts, and a verdict thereon, "guilty, or not guilty, as the court may be of opinion as to the law," and the court assumes to pass judgment without directing a verdict to be entered up in accordance with its opinion on the law, there is error. A verdict must be absolute and unconditional.

APPEAL from *Moore, J.,* at July Term, 1890, of BUNCOMBE Criminal Court.

The jury returned as their finding a certain state of facts unnecessary to be stated, and added: "If upon this state of facts the court should be of opinion that the defendant is guilty, then they find him guilty; but if upon this state of facts the court is of opinion that he is not guilty, then the jury find him not guilty."

The court, being of opinion that the defendant is not guilty, adjudged that he be discharged.

Appeal by the State.

Attorney-General and J. B. Batchelor for the State.
No counsel contra.

CLARK, J. A verdict, like a judgment, cannot be conditional. Upon the findings of fact, as returned by the jury, the court should have instructed them to render a verdict of guilty, or not guilty, according to the view he entertained of the law applicable to such state of facts. This

was not done, and we have in the record a judgment without a verdict to support it. This has been repeatedly held to be error, and was so held again in *S. v. Moore, ante,* 770, and *S. v. Monger, ante,* 771.

Per Curiam. Error.

Cited: S. v. Leeper, 146 N. C., 674.

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(821)

STATE v. RILEY PARKS.

Appeal.

It appearing that the case upon appeal, and the exceptions thereto, were delivered to the judge, who died before it could be settled; that the papers have been lost, and that the defendant has been guilty of no laches, a new trial is awarded.

IT appears from a return to a writ of *certiorari,* directing the transcript of the proceedings in this case to be certified to this Court, that the defendant was indicted for the crime of arson, and tried and found guilty before *Shipp, J.,* at Spring Term, 1890, of RANDOLPH, and from the judgment rendered upon said conviction he duly appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: The statement of the case on appeal was duly prepared and served upon the solicitor, who filed exceptions, and all the papers in the case, including the original bill of indictment and appeal bond, were handed to the judge to settle the case on appeal. Soon thereafter *Judge Shipp* died, and the case on appeal was never settled, and the papers were not returned, and have not, upon inquiry, been found among his papers. It is conceded by the State that the appeal was taken and that the papers in the case have been lost and cannot be found.

The defendant has lost the benefit of his appeal, as is made manifest by the return to the writ of *certiorari,* without any default or neglect on his part, but in consequence of the deplored death of *Judge Shipp,* and, as has been often held by this Court, he is, under the circumstances, entitled to a new trial. *Clemmons v. Archbell, ante,* 653, and the cases there cited.

New trial.

Cited: Ritter v. Grimm, 114 N. C., 374; *Brendle v. Reese,* 115 N. C., 552; *Heath v. Lancaster,* 116 N. C., 70; *Taylor v. Simmons, ib.,* 71; *Parker v. Coggins, ib.,* 72; *S. v. Huggins,* 126 N. S., 1056.

(822)

STATE v. M. D. BRADY ET AL.

Indictment—Conspiracy—Bill of Particulars—Judge's Charge.

1. In an indictment for a conspiracy to cheat and defraud, the means to be used need not be charged.

2. When there is a general verdict upon an indictment containing two or more counts, if either count is valid it will support the verdict. *S. v. Toole,* 106 N. C., 736.

3. When an indictment, otherwise valid, does not convey sufficient information to enable the defendant to prepare his trial, he can apply for a bill of particulars. The rule governing applications for a bill of particulars stated.

4. A prosecutor in a criminal action is not disqualified for that reason as a juror.

5. Though a challenge for the defendant is erroneously disallowed, yet if it appear that no juror objectionable to such defendant sat on the jury, it is no ground of exception, and it makes no difference whether a juror objectionable to such defendant is stood aside by reason of his having other challenges unexhausted, or is rejected on the challenge of a codefendant.

6. The acts of the different parties alleged to be conspirators can be given in evidence to prove the conspiracy. *S. v. Anderson,* 92 N. C., 732, approved.

7. Whether or not a witness is an expert is a question of fact for the court, and its finding is not reviewable. *S. v. Cole,* 94 N. C., 958, approved.

8. The testimony of a witness as to a collateral matter cannot be contradicted in order merely to impeach him by showing its untruth.

9. When evidence is offered that the defendants "salted" a gold mine, with a view of proving the conspiracy to cheat and defraud, it is not requisite to show, first, that the defendants knew how to "salt" a mine.

10. On an indictment for a conspiracy to cheat and defraud, the court refused to charge that if the defendants honestly believed the representations to be true, or if the representations were merely matter of opinion, or if defendant got cheated by his fear that some one else would get ahead of him, the defendants would not be guilty: *Held,* no error, for the conspiracy, and not the execution of it, is the issue on which the guilt or innocence of the defendants depended.

11. The declaration of a party, after the consummation of a conspiracy, is evidence only against the defendant who makes it.

12. The Code, sec. 413, only requires the judge to "explain the law arising upon the evidence." The misconception as to this founded upon *S. v. Boyle*, 104 N. C., 800, corrected.

13. Declarations and acts of a party charged with conspiracy are competent against the other defendants who entered into the conspiracy, when made prior to its completion.

14. It is not material, in an indictment for conspiracy, that the unlawful purpose should be accomplished.

INDICTMENT for conspiracy to cheat and defraud, tried before (823) *Graves, J.*, and a jury, at August Term, 1890, of MOORE.

The indictment was as follows:

"The jurors for the State, upon their oath, present: That N. P. Brady, D. M. Brady, R. D. Williams, and J. W. H. Cockerman, late of the county of Moore, on 10 December, 1887, at and in the county of Moore, with the intent to defraud, unlawfully, wickedly and deceitfully, did conspire together to cheat and defraud William K. Jackson of his goods and chattels, bonds and tenements, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present: That the said N. P. Brady, D. M. Brady, R. D. Williams, and J. W. H. Cockerman, late of the county of Moore, at and in the said county, on 10 December, 1887, with intent to defraud, unlawfully, wickedly and deceitfully, did conspire together to cheat and defraud William K. Jackson of his goods and chattels, lands and tenements, and that the said defendants, in pursuance of said conspiracy, did falsely and fraudulently pretend to said W. K. Jackson that two certain tracts of land in Chatham County contained gold mines, well knowing that neither of the said tracts of land contained a gold mine; and that, in pursuance of said conspiracy, the said D. M. Brady did (824) then and there, in Moore County, unlawfully, knowingly and designedly obtain from the said W. K. Jackson $800 in money and the said Jackson's note for $700, being then and there the property of the said Jackson, and the said N. P. Brady did then and there, in said county of Moore, unlawfully, knowingly and designedly obtain from the said W. K. Jackson a certain tract of land on Deep River, in Moore County, of the value of $3,000, being then and there the property of the said Jackson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendants moved to quash the bill, and also in arrest of judgment, which being refused, they excepted. There were sundry exceptions to the evidence, to the charge and for refusal to charge, all of which sufficiently appear in the opinion. Two of the defendants were acquitted. D. M. Brady and J. W. H. Cockerman were convicted and sentenced, and appealed.

Attorney-General and J. C. Black and W. J. Adams for the State.
Douglas & Shaw for defendants.

CLARK, J. The defendants moved to quash the indictment as to each count, on the ground (1) that it charged no indictable offense; (2) that it did not allege the means by which the cheating and defrauding were to be effected.

This motion being denied, it was renewed on the same grounds in arrest of judgment, and again denied. A general verdict of guilty as to appellants was returned.

There were two counts in the indictment, and if either was good it would support the verdict. *S. v. Morrison,* 24 N. C., 9; *S. v. Toole,* 106 N. C., 736, and cases there cited. Upon reason and precedent, however, we think both counts are sufficiently alleged. The first count is (825) almost *in totidem verbis* with that in *Sysderff v. Queen,* 11 Ad. & Ellis, 245, which was held sufficient by the Court of Exchequer Chamber, affirming the ruling of the Queen's Bench. The opinion was delivered by *Wild, C. J.* (afterwards *Lord Truro*), and cites with approval *Queen v. Gompertz,* 9 Ad. & El., 823, opinion by *Lord Denman; King v. Gill,* 2 B. & Ald., 204, opinion by *Lord Tenterden;* and *King v. Eccles,* 3 Doug., 337. In the last three cases the indictment charged the conspiracy to cheat and defraud "by divers means," but this was no specification of the means, and even those words did not appear in the indictment in *Sysderff's case.* In *King v. Eccles, Buller, J.,* says that the means need not be charged, for they are "matters of evidence to prove the charge, and not the crime itself," and that it is quite sufficient to charge the defendants with illegal conspiracy, which, of itself, is an indictable offense; and in *King v. Gill,* also just cited, the Court points out that the conspiracy would be indictable even when the parties had not settled upon what means they would employ to effectuate their purpose, and hence the means need not be charged. To the same effect are later cases. *Latham v. The Queen,* 9 Cox Cr. Cases, 516 (1864), and others. The same rule has been upheld in *Commonwealth v. McKisson,* 8 Ser. & Rawle (Pa.), 419, and in other cases in this country. 3 Greenleaf Ev., sec. 95. There have been decisions to the contrary holding that the means must be charged, but the leading authorities to that

effect are to be found in the United States and New York courts, in which jurisdictions the law on this subject has been modified by statute.

As the conspiracy or illegal combination is the indictable offense, though no act may be done in pursuance thereof, and, indeed, without agreeing upon the means to be used, it is difficult to discover any reason why the means should be charged. "If two or more persons conspire to do a wrong, this conspiring is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy." (826) 1 Bish. Cr. Law, sec. 432. And in *S. v. Younger,* 12 N. C., 357, it is said: "Every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy, and indictable." "If unexecuted, the means cannot be stated; if executed, the means employed are but evidence of the offense, or an aggravation of it, . . . for the crime of conspiracy consists of the *conspiracy,* and not of the execution of it." Wright's Crim. Conspiracy, 189, 191. What has been said as to the first count applies equally to the second. Indeed, the second count is an almost exact copy of the indictment, which, upon a motion in arrest of judgment, was held good in *S. v. Younger, supra,* the opinion being delivered by *Taylor, C. J.*

While the courts are not disposed to encourage slovenly or careless pleading in either civil or criminal actions, the whole tendency of legislation is against exacting overrefinement and nicety of technical allegation. The office of the indictment is to give the defendant notice of what charge he has to meet. In *Goersen v. Commonwealth,* 99 Pa. St., 398 (which was an indictment for murder), it is tersely said: "The nature and cause of a criminal prosecution is sufficiently averred by charging the crime alleged to have been committed. This must be done. The mode or manner refers to the instrument with which it was committed, or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment. Whenever one, before trial, needs more specific information than is contained in the indictment, to enable him to make just defense, it may be obtained on proper application to the court." There is nothing in the case to suggest that the defendants were not fully aware of the specific offense with which they were charged, but as application for a bill of particulars is not unusual practice in indictments for this crime, and may be resorted to in a trial for all offenses, though not very common hitherto in this State, it may be useful to cite the rules governing such appli- (827) cations, which are, that the defendant or his counsel should first apply to the officer prosecuting for the State; if refused, he should then, before the cause is called for trial, apply to the court, who, in its sound discretion, will direct a bill of particulars to be furnished. This practice is much favored, because no demurrer or motion to quash lies as to

a bill of particulars, but if an insufficient bill is furnished, the court will order a fuller statement of particulars to be made. Such applications should always be made in time to avoid any delay being caused in the trial. If too long delayed, the court would refuse the application. The same practice obtains in civil cases. The Code, sec. 259, provides: "The court may, in all cases, order a bill of particulars of the claim of either party to be furnished."

Second Exception.—The defendant Brady challenged as a juror one who was prosecuting witness in another criminal action in that court, in which action the *capias* had been served, but the defendant had not pleaded. The challenge was overruled, and the defendant then peremptorily challenged the juror. After having exhausted his peremptory challenges, the same defendant afterwards challenged one Ray, offered as a juror, which challenge was disallowed. As a codefendant, who had not exhausted his challenges, thereupon peremptorily challenged Ray, it is clear that Brady had no ground of objection. Besides, a prosecuting witness in a criminal action is not disqualified as a juror. He is not a "party to an action" within the purview of the statute. The State and the defendant are the only parties to a criminal action by indictment. Indeed, the disqualification attaches only to a party to a *suit* pending and at an issue, and it is doubted if it apply at all to a defendant, even in a criminal action. *Hodges v. Lassiter,* 96 N. C., 351.

(828) Third Exception.—During the trial, certain witnesses testified to evidence tending strongly to show that the mine sold to the prosecutor had been "salted," that is, that gold obtained elsewhere had been scattered in the alleged mine by the defendants, so that the prosecutor was misled and bought the land, believing that gold was indigenous. The defendants objected, because these "means" were not charged in the indictment. If they had been so charged, the indictment might have been for the substantive offense, and not for the conspiracy; still the testimony of such acts, jointly done by defendants, was competent as evidence of a previous unlawful combination and conspiracy to "cheat and defraud" the prosecutor. *S. v. Anderson,* 92 N. C., 732.

Fourth Exception.—The exception that the court found, after examination, a witness (who testified that he had been a miner over twenty years) to be an expert, "although defendants' counsel propounded to him numerous technical questions, all of which he failed to answer," cannot be sustained. Whether or not a witness is an expert is to be determined by the judge, and, like other findings on questions of fact, his conclusion is final and not reviewable. The value of the testimony of the witness, when admitted, is for the jury. *S. v. Cole,* 94 N. C., 958, and numerous cases there cited.

Fifth Exception.—One Cagle testified that he had found on the land of one Stewart a nugget of gold, and had sold it for $8, and had never notified Stewart of finding it, nor accounted to him for it. Stewart, who had already testified, was subsequently recalled to the stand, and defendant proposed "to ask him concerning the nugget for the purpose of impeaching Cagle." We do not see how the evidence, if admitted, could have had that effect, but, as its bearing could only be to contradict Cagle as to a collateral matter, and was not asked to show temper or bias, it was properly ruled out.

Sixth Exception.—The State asked an expert, in the proper (829) hypothetical form, as to the quantity of gold which would be necessary to "salt" a mine, and also how the earth might be "salted" with gold. The defendants objected that there was no evidence that the defendants knew anything about the various modes of "salting" earth, or even knew what "salting" meant. There had been evidence tending to show, if believed, that the defendants *had* "salted" the mine, and, from the verdict, it seems, the jury did believe it. The object of the State was to show that the defendants had, in fact, "salted" the mine. It was not necessary to show, first, that the defendants knew how to do it.

The defendants asked the court to instruct the jury, first, that there was no sufficient evidence to go to the jury of a combination between any two or more of the defendants, and that, therefore, the jury should acquit. The second and third prayers for instruction were based on the same ground, and all three, upon the testimony, were properly refused. The fourth prayer for instruction was that, though the representations might be false, if the defendants honestly entertained the opinion they were true, they would not be guilty. The fifth prayer was, that if the representations in regard to the amount of gold or the value of the minerals on said land were merely expressions of opinion in regard thereto, defendants were not guilty. The sixth prayer was, that if the prosecutor was influenced in closing the trade when he did by the fear that Stewart or some one else would get ahead of him, the defendants would not be guilty unless the jury was satisfied beyond a reasonable doubt that such fear was caused by the false representations of the defendants. These prayers seem based upon the misconception that the defendants were on trial for the substantive offense of obtaining the property of the prosecutor by false pretenses, and the court properly refused them in the words asked. The court pointed out the distinction, and further told the jury that even should they find there was false representations, and that the defendants salted the mine, they would not be guilty of this indictment unless the jury found there was a combination and conspiracy to cheat and defraud. (830)

The seventh prayer was, that there was no evidence tending to show that the transactions in proof in regard to D. M. Brady was intended or could, in fact, cheat or defraud the prosecutor, and should be discarded. This was properly refused.

The last prayer for instruction was, that no admission or declaration of any of the defendants made after the alleged consummation of the conspiracy is competent evidence either to establish the conspiracy or its consummation. The court properly charged that such evidence would only be competent against the defendant making such admission or declaration.

The defendants assign as error in the charge as given:

1. That "the court did not eliminate the material 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." This exception seems to be copied from that in *S. v. Boyle,* 104 N. C., 800, and there seems to be a misapprehension generally existing that in granting a new trial in that case the Court sustained the exception of the defendant broadly as made by him and as a formula applicable in all cases. This it did not do, *Merrimon, C. J.,* in *S. v. Pritchett,* 106 N. C., 667. What the Court did was to hold that the statute, Code, sec. 413, required the judge "to state in a plain and correct manner the evidence given in the case and explain the law arising thereon." This the Court held was not done in *Boyle's case,* and that the defendant had just ground to complain, because "his counsel in apt time had requested the court to call 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," which
(831) the judge "declined to do." In the present case the judge complied, as we think, with the plain requirements of the law, and the charge is a clear and intelligent presentation of the law arising on the evidence.

2. For failure to give the special instructions asked. They have already been disposed of.

3. Because the court charged the jury: "Mere expressions of opinion by the defendants, or any of them, as to the quantity of gold on the land would not make the defendants expressing such opinion guilty; the acts and declarations of the defendants are evidence for the jury to consider in determining whether, in fact, the defendants did from the conspiracy with which they are charged, and here I may repeat to you that the acts and declarations of any one of the defendants, although evidence against the party making it is not evidence against any of the others, unless you find there was a common purpose, then the acts and declarations of each one of the parties who had the common purpose are competent evidence

for the jury to consider as against each one of the defendants who had such common purpose to unlawfully cheat and defraud W. K. Jackson. It is not material, in an indictment for a conspiracy, that the unlawful purpose should be accomplished." We find no error in this, especially when construed in connection with the context of the whole charge.

Per Curiam. No error.

Cited: S. v. Gates, post, 835; *Boon v. Murphy,* 108 N. C., 193; *S. v. Cutshall,* 109 N. C., 771; *S. v. Dunn, ib.,* 840; *S. v. Bryant,* 111 N. C., 695; *S. v. Behrman,* 114 N. C., 807; *S. v. Shade,* 115 N. C., 759; *Blue v. R. R.,* 117 N. C., 649; *Townsend v. Williams, ib.,* 337; *S. v. Pickett,* 118 N. C., 1233; *S. v. Robbins,* 123 N. C., 738; *S. v. Howard,* 129 N. C., 657, 660; *S. v. Van Pelt,* 136 N. C., 645, 669; *Turner v. McKee,* 137 N. C., 254; *S. v. Dewey,* 139 N. C., 558; *Simmons v. Davenport,* 140 N. C., 411; *S. v. Sultan,* 142 N. C., 574; *S. v. Long,* 143 N. C., 676; *S. v. Whedbee,* 152 N. C., 784; *S. v. Stephens,* 170 N. C., 748; *S. v. Horner,* 174 N. C., 792; *Bristol v. R. R.,* 175 N. C., 510; *S. v. Stancill,* 178 N. C., 685; *S. v. Caylor, ib.,* 809.

(832)

STATE v. W. G. GATES.

Costs—Prosecutor—Perjury—Jurisdiction—Indictment.

1. Perjury cannot be committed when the court has no jurisdiction of the matter about which the alleged false oath was made.

2. The court has no power to tax a prosecutor with costs when the indictment has been ignored by the grand jury.

3. The form of indictment for perjury, under the recent act (chapter 83, Laws 1889), approved.

INDICTMENT for perjury, tried before *Womack, J.,* at June Term, 1890, of DURHAM.

The bill charged that the defendant "committed perjury upon the trial of a motion in the cause in an action in Durham Superior Court, . . . in which said motion it was sought to tax the costs in said action against A. M. Leathers, as prosecutor," etc. It was shown that the bill of indictment upon which Leathers was sought to be charged, as prosecutor, had been ignored by the grand jury.

There was a verdict of "guilty," and from the judgment pronounced thereon he appealed.

Attorney-General for the State.
W. W. Fuller for the defendant.

CLARK, J. In order to constitute perjury, the false swearing must be in a matter material to the issue. When, therefore, the court has no jurisdiction of the subject-matter in the investigation of which the false swearing is alleged to have taken place, there could be no issue, in contemplation of law, and the false swearing is not perjury. In the present case the perjury is alleged to have been committed in the trial of a motion to mark and tax one Leathers with the costs in a criminal action, in which the grand jury had ignored the bill. The au-
(833) thority of the court to tax prosecutors with costs is given in The Code, sec. 737, and no power is conferred by that section to tax a prosecutor with costs when the bill is ignored. *S. v. Horton,* 89 N. C., 581; *S. v. Cockerham,* 23 N. C., 381. Nor is this changed in the present instance by the recent amendment made to section 737 by chapter 34, Laws 1889, which extends the power to tax costs against a prosecutor to cases in which the defendant is discharged from arrest for want of probable cause, for there is no evidence or allegation that the defendant in the ignored bill was under arrest or discharged therefrom.

It was pointed out in *S. v. Peters, post,* 876, that if the court had jurisdiction of the subject-matter and of the person in the proceeding in which the false swearing is alleged to have occurred, it is immaterial whether the court (there a magistrate) correctly or wrongly took final jurisdiction or bound over to court, convicted or discharged the defendant for the jurisdiction was to be determined by the facts charged by the State in such proceedings, and not by what occurred during the trial. The test, according to the authorities, seems to be that if upon the state of facts alleged by the State or (in a civil action) by the plaintiff the court has jurisdiction, there is an issue if they are denied by the defendant, and any false swearing upon a matter material to such issue is perjury, although on the trial it might turn out that upon the truth of the facts as found there was not any case against the defendant, or none of which the court had jurisdiction. Here the contention of the State was that one Leathers had instituted a criminal action frivolously and maliciously and that the grand jury had ignored the bill. Taking these facts to be all true, the court had no jurisdiction of the motion and it was, therefore, immaterial in law whether the defendant swore falsely or not. *Studdard v. Linville,* 10 N. C., 474; *S. v. Alexander,* 11 N. C., 182; *Buell v. State,* 45 Ark., 336; *Collins v. State,* 78 Ala., 433; *Reg. v. Fair-*
lie, 9 Cox Crim. Cases, 209; Whart. Cr. Law, sec. 2232a (7 Ed.);
(834) Desty Cr. Law, 75i.

The court erred, therefore, in refusing the prayer for instruction asked by defendant "that if the jury believed the evidence the defendant is not guilty, because the affidavit did not and could not affect the determination of the motion to tax A. M. Leathers with the costs of the action in *S. v. Gates,* pending at October Term, 1890, of this Court because the bill of indictment was ignored by the grand jury, and in such case the judge has no power to mark a prosecutor and tax him with the costs."

This renders it unnecessary to consider the other exceptions noted in the record. We will observe, however, in regard to the objections taken to the form of the indictment, which is drawn in pursuance of chapter 83, Laws 1889, that the unconstitutionality of that act was passed upon in *S. v. Peters, post,* 876, and we reaffirm the ruling of that case. The office of an indictment is to inform the defendant with sufficient certainty of the charge against him to enable him to prepare his defense. This the form of indictment prescribed by the act does. It points out that the charge is perjury, the name of the court and of the action in which it was alleged to have been committed, and the words sworn to by the defendant therein which are alleged to have been false. The defendant certainly could derive no just benefit from the insertion in the charge of the *minutiae* of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to the charge he was to meet, as to present a network of technicalities which hindered the trial of the cause upon its merits and very often caused a miscarriage of justice. Hence, the Legislature here, as elsewhere, in its wisdom has swept these details all away, or, rather, they are all contained in the simple allegation, "did commit perjury." This, (835) together with the name of the case and the court, and the words alleged to have been falsely sworn, are deemed by the law-making power amply sufficient to enable the defendant to prepare for his trial. If, in any case, further information is essential to the defendant, his remedy is not by objection to the bill, but by application for a "bill of particulars." *S. v. Brady, ante,* 822.

Error.

Cited: S. v. Flowers, 109 N. C., 843; *S. v. Thompson,* 113 N. C., 639; *S. v. Hawkins,* 115 N. C., 715; *S. v. Hester,* 122 N. C., 1050; *S. v. Mitchell,* 132 N. C., 1036; *S. v. Van Pelt,* 136 N. C., 669; *S. p. Long,* 143 N. C., 676; *S. v. Harris,* 145 N. C., 458; *S. v. Cline,* 146 N. C., 642.

STATE v. J. E. HOWELL.

Injury to Buildings—Trespass—Landlord and Tenant—Intent—Possession.

The prosecutor, claiming under a deed from an admitted former owner, placed a tenant in possession of the premises, who, before surrendering to his landlord, went out, and, taking a lease from another claimant, went back as his tenant, but did not continue to occupy the house; thereupon, the prosecutor fastened up the house, leaving some personal property in it, and went away. The defendant, in prosecutor's absence, and with knowledge of the circumstances, broke open the building and otherwise injured and defaced it, and refused to leave when ordered. He was indicted for willful injury to the building. The Code, sec. 1062: *Held*, (1) that the tenant could not divest the possession of his landlord by his attempted attornment to the defendant, and that the prosecutor had the legal possession when defendant entered; (2) that the defendant's action was unlawful and willful, and he could not justify it by proof that he entered in good faith and under claim.

INDICTMENT for willful injury, to a house, etc., tried before *Bynum, J.*, at the Fall Term, 1890, of MONTGOMERY.

(838) The defendant's counsel asked the court to instruct the jury that if defendant went and took possession under a *bona fide* claim of right, and that he believed he had a right to enter and take possession under his deed from Andrews, he could not be convicted.

The court refused this instruction, and instructed the jury that if they found the facts to be that Andrews had conveyed a fee simple in the land to Graham, and put him in possession, and Graham had rented it to Rhine, and, during the time Rhine was in possession as tenant of Graham, the defendant J. E. Howell went into the house and Rhine went out and immediately went in again as a servant of Howell, this did not transfer the possession to Howell from Graham, and that the possession of Rhine could still be the possession of Graham, and that if Rhine stayed there until 20 December, paying rent to Graham, and then left, and immediately Graham went and fastened up the house, put his tools and fodder in it, and had wheat sowed in the field, and that if the defendant came there and burst open the door, and split off part of the facing, and took up the sleepers in one of the rooms, and put his mules in, he would be guilty; that a question of a *bona fide* belief that defendant was the owner and had a right to enter was not the question in this particular case; that the burden was on the State to satisfy the jury beyond a reasonable doubt of these facts, for they should acquit the defendant; that if they found the facts to be as testified to by the

defendant—that he went there, found no one, and opened the (839) door without any injury to the door or house—he would not be guilty. Verdict of guilty. Judgment.

The defendant appealed.

Attorney-General for the State.
No counsel for the defendant.

MERRIMON, J. The tenant of the prosecutor in possession of the house could not, by simply going out of the same and purporting to take a lease thereof from the defendant and going back into the house professedly under such lease, thus rid himself of the relation as tenant to the prosecutor and put the latter out of possession and give the defendant the possession to the prejudice of the landlord, the prosecutor. He could put an end to his relation and possession as tenant ordinarily, and in this and like cases, only by a surrender of the possession to the landlord himself. *Springs v. Schenck,* 99 N. C., 551, and cases there cited. Hence, the defendant got no benefit or advantage by the supposed lease he undertook to make to the tenant of the prosecutor—it was a mere fruitless shift.

The possession of the house was in the prosecutor at the time the defendant took possession, as alleged, and defaced and injured the same. He was not there in person, but he had been lately theretofore, had stored fodder and other things in it, and had closed and fastened it by suitable fastenings. The defendant took possession of it without his permission and against his will—the evidence tended to prove that he broke the door open, defacing parts of it to some extent. If it be granted that the defendant had the better title to the house, he (840) had no right to take violent, injurious possession of it while the prosecutor was so in possession thereof. His action was unlawful, and, if done *willfully,* was a violation of the statute (The Code, sec. 1062), which makes it a misdemeanor to *unlawfully* and *willfully* "deface, damage or injure any house," etc. So that, although the defendant may have believed in good faith that he had the right to enter and take possession of the house, but did so unlawfully and willfully, he would be guilty. A party, no doubt, may ordinarily destroy, deface or injure his own property when it is in his possession and under his complete control—when he may make such disposition of it as he may see fit—but it is otherwise when it is in the possession of, and claimed by, others. The purpose of the statute is to prevent the unlawful and willful injury to houses and other property specified in it, no matter to whom the same may belong. A party commits no trespass—does not unlawfully destroy, deface or injure his own property, ordinarily—when he has the same in

his possession and complete control, and the statute does not apply to such case. But it does apply when the injury involves a trespass and is willful. It is willful when the party does the injury charged deliberately, of purpose and without regard to whether it is done rightfully or wrongfully. The manner, the occasion, the circumstances attending the doing of the injury, make evidence going to prove that the intent was willful or otherwise. *S. v. Hovis,* 76 N. C., 117; *S. v. Watson,* 86 N. C., 626; *S. v. Piper,* 89 N. C., 551; *S. v. Marsh,* 91 N. C., 632; *S. v. Whitener,* 93 N. C., 590; *Mosseller v. Deaver,* 106 N. C., 494.

The defendant was not entitled to have the special instruction, asked for, given to the jury. The general exception to the "charge as given" was no exception. There is

No error.

Cited: S. v. McRackan, 118 N. C., 1242; *S. v. Fender,* 125 N. C., 651; *S. v. Jones,* 129 N. C., 509; *S. v. Morgan,* 136 N. C., 631; *S. v. Taylor,* 172 N. C., 893.

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(841)

STATE v. JOHN F. FERGUSON.

Seduction—Evidence.

1. The paramount and essential ingredient of the crime of seduction, under chapter 248, Laws 1885, is the fact of sexual intercourse *induced by a promise of marriage*, and no conviction can be sustained upon the testimony of the woman unless she is supported upon this essential point.

2. The supporting testimony required by the statute is something more than corroborative evidence—it must be such independent facts and circumstances as will tend to establish her credibility.

3. The woman must be shown to be not only "innocent" (as that term has been interpreted in the statutes relating to the slander of women), but *"virtuous."*

4. Upon the trial of an indictment for seduction, for the purpose of attacking the character of the prosecutrix the defendant offered to prove, by parol, the contents of a note she had written appointing an assignation with another party: *Held,* that such evidence was competent, the paper not being of the class which must be produced before its contents could be proved.

INDICTMENT for seduction under promise of marriage, tried before *Meares, J.,* at August Term, 1889, of MECKLENBURG Criminal Court.

There was a verdict of "guilty" and an appeal by the defendant, and it is necessary to an intelligent understanding of the questions presented by his appeal to state at some length the testimony and charge of the judge below.

Rosa Hargett, the prosecutrix, testified as follows: "The defendant first came to our house, with Jim Trull, in May. I became engaged to him in July, at Bradley's, and I saw him in September and October. Some time during the first days in October he came to our house one night. My father went off to a meeting that night, and my mother went to bed in the other room. He proposed that we should get married next day two weeks. When he proposed that, I said I would have to go in and ask my mother. I went in, waked her up and asked (842) her, and she consented. When I awoke my mother I called her, and we talked in a tone loud enough for defendant to hear us. The door was open. We had sexual intercourse that night after I came back, at his solicitation. . . . It was the first and only time I ever had sexual intercourse with any man. . . . The child was born 18 June, 1889. The defendant promised to come to see me the next Thursday night week, but he did not come. My father went to town the next day and bought the dry-goods to prepare for my marriage."

Mrs. Hargett, the mother of the prosecutrix, testified: "On the night spoken of by Rosa she came to my room and waked me up and said the defendant had asked her to marry him, and she wanted my consent. After some hesitation, I gave my consent, and Rosa went back into the room where the defendant was. She told me the next day that they were to go to Charlotte in about two weeks and get married. When my husband returned I told him what had occurred and that he must go to town the next day and get dresses, etc., which he did."

Dr. Strong, for the State, testified: "I examined Rosa Hargett on 26 April and found her pregnant. She denied it at first, but afterwards acknowledged it and said defendant had seduced her under promise of marriage, in October. The time of the birth of the child fell short of the regular time, but was not below minimum limit."

J. W. Kirkpatrick, the magistrate, testified that when the warrant was sworn out before him, Mr. and Mrs. Hargett said they thought it was 25 October when the seduction took place, but Rosa said it was earlier than that.

On the preliminary hearing, the defendant admitted that he had intercourse with the prosecutrix, but denied that it was under promise of marriage. This witness and two others testified that the characters of Mr. and Mrs. Hargett and Rosa were good, and the State rested.

The defendant testified in his own behalf, in substance, that he went to Mr. Hargett's one night to engage a buggy. He (Mr. (843)

Hargett) had gone off, and defendant waited for his return. Mrs. Hargett went to bed, and defendant and Rosa were in the next room. He had sexual intercourse with her that night; did not promise her then, or at any other time, to marry her. After sitting some time, told her (Rosa) to go and ask her mother if he could get the buggy; she returned and said that her mother said he could get it; did not hear what was said in the other room; told the magistrate that he had had intercourse with her once, but denied the promise of marriage; never went to see her but once before the night spoken of.

One Garrison, a witness for defendant, testified that, in December, 1889, he and the prosecutrix went out among some cedars to have sexual intercourse, "but was scared off by Martin Wolfe, and he did not have intercourse with her."

James T. Trull, Joe Trull, Columbus Pressley, and M. A. Price, witnesses for defendant, each testified that, prior to October, 1888, he had sexual intercourse with the prosecutrix.

The defendant's counsel proposed to prove by one C. Pressley, of these witnesses, that prior to October, 1888, the prosecutrix had written a note to him, making an assignation with him. The witness stated "that he did not know where the note was, that he had not seen it since he left Pineville, more than a year ago, and that he had not looked for it."

The solicitor for the State objected to the witness stating the contents of the note. The objection was sustained, and defendant excepted.

Martin Wolfe testified, corroborating the witness Garrison.

Six witnesses for the defendant testified that his character was good, and there was the testimony of a number of witnesses as to the good character of witnesses for defendant.

(844) Four witnesses testified that the character of the prosecutrix had been bad for eighteen months, and another testified that "she was considered a fast girl, but he never heard anything against her chastity."

The defendant closed, and the State introduced one Jennings, who testified that the characters of Mr. and Mrs. Hargett and Rosa were good.

The father of the prosecutrix was then introduced by the State, and testified that Joe Trull and Jim Trull had both told him that they never had had intercourse with Rosa, and that defendant was at his house in October, . . . and when he returned that night Mrs. Hargett told him that Rosa and Ferguson would be married in two weeks, and that he must go to town and get dresses, which he did next day.

The defendant asked, in writing, the following instructions:

1. That the testimony of the prosecutrix, Rosa Hargett, must be supported by other testimony as to the fact that there was a promise of marriage, and that the defendant procured the carnal intercourse by reason of promise of marriage.

2. That there is no evidence in this case supporting the testimony of Rosa Hargett as to the promise of marriage, and the jury must, therefore, acquit the defendant.

3. That upon all the evidence the jury should acquit the defendant.

His Honor refused to give these instructions, and defendant excepted.

His Honor then instructed the jury as follows:

"In other criminal cases a jury may convict the defendant upon the mere naked testimony, unsupported, uncorroborated, of one witness, provided the jury are satisfied, beyond a reasonable doubt, of the guilt of the defendant by the testimony of the witness; the case at bar, however, forms an exception to this rule. The act of Assembly creating this offense provides that the defendant shall not be convicted (845) upon "the unsupported testimony" of the woman. It follows, therefore, that if the jury in this case should believe the testimony of the prosecutrix to be true, they are prohibited from convicting the defendant unless there is testimony in the case of a supporting nature. The crime of seduction, under this statute, is made of three ingredients: 1. There must be the act of sexual intercourse. 2. This act must be committed under a promise of marriage. 3. The woman must be in the character of an innocent woman—one who has never had illicit sexual intercourse with a man. You are instructed, in order to convict the defendant, you must be convinced beyond a reasonable doubt (1) that there was an act of sexual intercourse between the defendant and prosecutrix; (2) that the act was committed under a promise of marriage; (3) that the prosecutrix was an innocent woman—one who had never had illicit sexual intercourse with a man.

"The opposing counsel in this case do not agree in construing the statute. Bear in mind that there must be supporting testimony in order to bring the case within the provisions of the statute. The court instructs you that if the prosecutrix is supported by the testimony of other witnesses as to the truth of the existence of either one of the three material allegations made by the State, then such supporting testimony would bring the case within the provisions of the statute.

"Is there any supporting evidence in this case as to the act of sexual intercourse? Is there any as to the promise to marry? Is there any as to the innocent character of the woman? (Here his Honor repeated

the testimony.) It is not necessary that there should be supporting testimony as to each and all three of the issues involved to bring this case within the provisions of the statute.

(846) "The statute does not go so far as that. If there be supporting testimony going to establish the truth of either one of the three allegations made by the State, and which it devolves upon the State to establish, then the case is brought within the intent of the statute. Whether there be any supporting testimony in the case, and the extent of it, and the weight to be attached to it, are questions entirely within the province of the jury."

The jury returned a verdict of "guilty," and there was judgment, from which the defendant appealed, and assigned as errors:

1. In excluding the evidence of the witness Pressley as to the contents of the note.

2. In refusing to give the charges requested.

3. To that part of his Honor's charge defining the offense.

Attorney-General for the State.

C. W. Tillett and P. D. Walker for defendant.

DAVIS, J., after stating the facts: 1. The first exception is to the exclusion of the evidence of the contents of the note.

There are numerous exceptions to the general rule which requires the production of a written instrument as the best and usually only evidence of its contents. Does the note in question fall within any of the exceptions? The note contained no agreement required to be in writing, its contents were purely collateral to the issue, and, as was said by the present *Chief Justice,* in the case of *S. v. Credle,* 91 N. C., 648: "It was not intended to be preserved, but to serve a temporary purpose and disappear. . . . It was a loose, casual paper, and what it contained might be proved like any other fact or event. The rule that a written instrument cannot be contradicted, modified or added to by parol proof, has no application to it.

(847) "It was competent to speak of it and what it contained, without producing it or showing that it was destroyed or lost." We do not think the note in question comes within the general rule excluding parol evidence of the contents of written instruments, and the evidence should have been admitted. *S. v. Credle, supra; S. v. Wilkerson,* 98 N. C., 696; 1 Greenleaf Ev., sec. 89, and cases cited.

2. The second exception is to the refusal to give the charges requested.

We think the defendant was entitled to the first instruction asked, and if not embraced in substance in the charge of his Honor, as it clearly was not, it was error to refuse it, and as the exceptions to the

refusal to give the instructions asked, and to the charge as given, are kindred in character and rest substantially upon the same grounds, we propose to consider them together.

The act (Laws 1885, ch. 248) under which the defendant is indicted declares: "That any man who shall seduce an innocent and virtuous woman under promise of marriage shall be guilty of a crime, etc.: *Provided, however,* that the unsupported testimony of the woman shall not be sufficient to convict."

His Honor not only refused to give the first instruction asked, but, after defining the crime of criminal seduction under the statute, as "made up of three ingredients—(1) there must be the act of sexual intercourse; (2) the act must be committed under promise of marriage; (3) the woman must be in the character of an innocent woman—one who has never had illicit sexual intercourse with a man"—and telling the jury "that there must be supporting testimony in order to bring the case within the provisions of the statute," he tells them, in substance, that if the prosecutrix is supported by the testimony of other witnesses as to the truth of the existence of any one of these ingredients, the cause is brought within the provisions of the act, and he then asks, "Is there any supporting evidence in this case as to the act of sexual intercourse?" and of the two other material ingredients, and instructs (848) them, if there is, the case is brought within the statute.

We think his Honor's definition of the crime created by the statute is misleading. It is true, there can be no crime without sexual intercourse, but there may be sexual intercourse without crime, under the statute.

Sexual intercourse is not made criminal by this statute, nor is seduction made a crime, but it is the *seduction* of an *innocent* and *virtuous woman,* under the *promise of marriage,* and the concurrent presence of a man and woman may be said to be an essential ingredient, whether in the act of sexual intercourse or seduction, without which neither could be committed, but neither one, more than the other, nor is seduction itself a crime under the statute, but the *gravamen* of the offense is the *seduction of an innocent and virtuous woman, under the promise of marriage;* without the *promise* there can be no crime under the statute, whatever may be the character of the woman. Besides, the woman must be virtuous, that is, pure and chaste, as well as innocent.

The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage. In section 1113 of The Code the word "innocent" is used, which *Justice Ruffin* defines in *S. v. McDaniel,* 84 N. C., 805, as meaning "a pure woman—one whose character, to use the language of the preamble of the statute, is unsullied."

In *S. v. Davis,* 92 N. C., 764, "an innocent woman," within the meaning of that section, is defined to be "one who had never had actual illicit intercourse with a man," and mere lasciviousness, and the permission of liberties by men, are not contemplated by the statute; and this definition of the words, "an innocent woman," has been followed in *S. v. Horton,* 100 N. C., 447, in construing the word "innocent" in the statute now under review. But the woman must not only be
(849) "innocent," but "virtuous." What force, if any, does the word "virtuous" impart to the act?

In *S. v. Grigg,* 104 N. C., 882, it is said, citing *S. v. Aldridge,* 86 N. C., 680, that a woman who at some time in her life has made a "slip in her virtue" is entitled to the protection of section 1113 of The Code, if she is "chaste and virtuous" when the slanderous words are uttered.

There is a manifest reason why the words, "an innocent woman," in section 1113 of The Code, and "innocent and unprotected woman," in section 3763, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of those sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip *has* been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their characters.

But the act of 1885, recognizing the frailty of man, as well as woman, superadds to the word "innocent" the word "virtuous," and before it will condemn and punish the man, who may be seducible as well as seductive, requires that it shall be made to appear that the woman was herself "innocent and virtuous," and that the seduction was compassed by winning her confidence and love under the false and alluring means of a promise of marriage; but if she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a *promise* of marriage, she is *in pari delicto,* and there is no crime under the statute. She must not only be innocent, but *virtuous*—that is, chaste and pure; and if such a woman yields under the promise of marriage to the "studied, sly, ensnaring art . . . dissem-
bling smooth" of the seducer and is betrayed, she deserves sym-
(850) pathy and pity; and he not only deserves the "curse" of all who love honor and virtue, but the severest penalties of the law.

The woman, however, must be "virtuous" as well as "innocent," and this implies something more in her conduct than mere innocence of illicit sexual intercourse. If she willingly submitted to his embraces, the mere promise of marriage would not make it seduction. 33 Mich., 117. And her evidence must be supported. No such proviso is to be

found in sections 1113 and 3763. For illustration, there is no evidence that Potipher's wife ever had illicit sexual intercourse with any one, and yet the idea of a "virtuous woman" would hardly be suggested by her name.

In the case before us, was the evidence of the prosecutrix supported as required by the statute, and was his Honor correct in telling the jury that it was sufficient if she was supported in any one of the three facts—of sexual intercourse, promise of marriage, and innocence of the woman, in the sense defined by him? The question of sexual intercourse was not in issue—that was an admitted fact—and if his Honor was correct, it was needless for him to have told the jury that it was entirely within their discretion to say whether there was any supporting testimony, and the weight to be attached to it. He might as well have told them that there was supporting testimony, as the defendant admitted the sexual intercourse, and that was sufficient under the statute.

But we think his Honor erred in his charge. The crime does not consist in the sexual intercourse, nor in the seduction, nor in the innocence and virtue of the woman, but in committing the act under promise of marriage, without which no crime is created by the statute, and which alone makes the seduction criminal, and in this it is not sufficient that the prosecutrix shall be corroborated, but she must be supported by independent facts or circumstances, and this seems to be the view of the Court in *S. v. Horton,* 100 N. C., 445, in which the late (851) *Chief Justice* speaks of the "corroborative evidence" and of the "additional supporting evidence under the statutory requirement"—the supporting evidence in that case being the admission by the defendant to the father that he had promised to marry the prosecutrix.

The supporting evidence need not be an additional witness, or equivalent to the testimony of an additional witness, but, as is said in regard to indictments for perjury, which cannot be sustained upon the simple, unsupported testimony of a single witness, however credible, there must be some independent evidence or circumstance in corroboration. 1 Greenleaf Ev., secs. 257 and 258. And it must be independent of, and other than, that of the prosecutrix. *People v. Kenyon,* 5 Parker Crim. Rep., 288.

The questions presented by the appeal are discussed at length in Bishop on Statutory Crimes, secs. 638 to 652; in *People v. Clark,* 33 Mich., 112, and in *Armstrong v. People,* 70 N. Y., 38.

In many of the States there is a statutory provision similar to ours, varying in phraseology—that of New York, for instance, using the words, "unmarried female of previous chaste character," but most of them requiring that the prosecutrix shall be supported in her evidence in order to convict.

In the last case cited it is said: "The immediate persuasions which led to compliance may not be proved by the evidence of third persons directly to the fact. They are to be inferred from the facts that the man had the opportunities, more or less frequent and continued, of making the advancements and the proposition; and that the relations of the parties were such as that there was likely to be that confidence on the part of the woman in the asservations of devotion on the part
(852) of the man, and that affection towards him personally which would overcome the reluctance on her part, so long instilled as to have become natural, to surrender her chastity." As to the *promise* of marriage, the requirement of the statute is satisfied by proof of circumstances which usually attend an engagement of marriage.

The defendant either committed the crime of seduction "under promise of marriage," or there was no crime. The only independent supporting evidence of the promise of marriage was the conversation with her mother when she went to get her consent, if the defendant heard it, and that was a question for the jury, and the second and third instructions asked were properly refused. There is no other evidence or circumstance, except that emanating from her, that is not consistent with the conclusion that she submitted to the embraces of the defendant voluntarily and without seductive arts or promises on the part of the defendant, as that she surrendered her chastity because of any promise of marriage, and persuasion or solicitation because of the promise.

In fact, there is a singular absence of facts or circumstances which usually attend engagements or promises to marry. Her father and mother were witnesses for her, and it does not appear that either of them ever had any conversation with the defendant about so important a family matter; it does not appear that he was in the habit of visiting her before the alleged act of seduction, or that he ever visited her after, or that there was any complaint of his failure to do so, or to comply with his alleged promise, till many months after, when the doctor examined her and found her pregnant, which she at first denied, but afterwards said that she had been seduced by the defendant under promise of marriage. It appears from the testimony of the doctor that the birth of the child was short of the regular time, but within the minimum limit of gestation, and so far from furnishing independent evi-
(853) dence to support that of the prosecutrix, it tends to throw suspicion upon it.

The prosecutrix says that the illicit intercourse was at the defendant's solicitation, but she does not say, and it only appears inferentially, if at all, that she yielded to his solicitations because of a promise of marriage, and, upon her own testimony, there seems to have been very little seductive art employed.

There were a number of witnesses who testified to illicit intercourse with the prosecutrix, but it was for the jury to say what weight their evidence was entitled to, and they seem to have given none. While we do not and cannot approve or commend the example of an eminent personage who is said "to have sworn to a lie like a gentleman" to protect the reputation of a woman in high social position, we cannot condemn that sentiment which disinclines honest and virtuous jurors to yield ready credence to the testimony of men who expose their own immoral conduct in testifying willingly to their wicked intercourse with a frail woman whose virtue has been assailed. We think, for the reasons stated, there was

Error.

Cited: S. v. Crowell, 116 N. C., 1058; *S. v. Hayes,* 138 N. C., 662; *S. v. Whitley,* 141 N. C., 825, 826; *S. v. Ring,* 142 N. C., 600; *S. v. Raynor,* 145 N. C., 474; *S. v. Neville,* 157 N. C., 597; *Christmon v. Tel. Co.,* 159 N. C., 199; *S. v. Cooke,* 176 N. C., 738.

STATE v. HENRY PERDUE ET AL.

Indictment—Joinder of Counts—Arrest of Judgment.

An indictment contained two counts—the first (under section 1, ch. 51, Laws 1889) against P. for obstructing an officer in the discharge of his duty, and the second (under section 2 of said act) against three other persons for refusing to aid the officer. There was a verdict of "not guilty" upon the first count, but "guilty" on the second. The defendants moved in arrest of judgment because of misjoinder in the counts: *Held,* that if the objection had been made in apt time it might have been good, unless the State had entered a *nol. pros.* as to one count, but it came too late after verdict.

INDICTMENT under chapter 51, Laws 1889, tried before *By-* (854) *num, J.,* at September Term, 1890, of DAVIDSON.

The indictment contains two counts—the first charging the defendants Henry Perdue and Lizzie Perdue with willfully and unlawfully resisting, delaying and obstructing a public officer in discharging a duty of his office, in violation of section 1, chapter 51, Laws 1889; and the second charging the defendants Isham Floyd, Jim Floyd, Jule Grubb, Bob Cecil and Albert Myers with willfully neglecting and refusing to

aid such officer in arresting the persons (three in number) named in the warrant of arrest, having been lawfully commanded to aid such officer, in violation of the second section of the act.

The defendants pleaded "not guilty," and, upon the trial, there was a verdict of "not guilty" as to Henry Perdue and Lizzie Perdue, the only defendants named in the first count, and a verdict of "guilty" as to Jule Grubb, Bob Cecil and Albert Myers, the only defendants on trial in the second count.

The defendants Grubb, Cecil and Myers "moved the court to arrest the judgment, on the ground that there was a defect in the bill (indictment), in this, to wit, that two distinct offenses were charged in the bill (indictment), and that there was a misjoinder of counts and offenses, not triable in the same bill (indictment), and against distinct and different parties in the two counts." *Per contra,* the solicitor maintained—first, the counts could be joined, the whole offense being at the same time and being one transaction, and the act contemplating a joinder; and, second, that if there was a misjoinder, it was cured by the verdict acquitting the defendants in the first count—the bill (indictment) being sufficient to proceed to judgment as to the defend-
(855) ants in the second count. The court allowed the motion in arrest of judgment, and rendered judgment discharging the defendants, from which the State appealed.

Attorney-General and R. H. Battle for the State.
No counsel for defendants.

DAVIS, J., after stating the facts: The first section of chapter 51, Laws 1889, under which the defendants Henry and Lizzie Perdue, are indicted, makes it a misdemeanor for any person to willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge the duties of his office, and the second section, under which the other defendants are indicted, enacts that, "Any person who, after having been lawfully commanded to aid an officer in arresting any person or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officers, shall be guilty of a misdemeanor."

The defendants named in the first count, and who were acquitted, were charged with a violation of the first section of the act, and the defendants named in the second count, and against whom there was a verdict of guilty, were charged with a violation of the second section of the act.

In *S. v. Hall,* 97 N. C., 474, it is said: "Different parties cannot be charged with different and distinct offenses in the same indictment."

In that case, two distinct offenses were charged against two distinct boards of officers, sustaining distinct relations to the city of Wilmington, and the objection was taken by demurrer. In the present case, the offenses charged are of the same grade, are kindred in their nature, relate to the same transaction, and are subject to the same punishment. Two of the defendants, as to whom there was a verdict of not guilty, are indicted in one count for resisting an officer in the discharge of his duty, under the first section of the act, and the others, as to whom there was a verdict of guilty, are indicted for refusing to aid the (856) officer under the second section of the act.

There is no objection as to the sufficiency of each count, as to the persons respectively embraced therein, to charge the offenses set out, but it is insisted that they cannot be tried in the same indictment. If this objection had been taken in apt time, it might have been available to the defendants unless the solicitor should elect to enter a *nol. pros.* as to one or the other of the counts, or quash the indictment and proceed upon separate indictments, which he might have done; but, we think, the objection after verdict is too late, and that "sufficient matter appears to enable the court to proceed to judgment." Code, sec. 1183; *S. v. McNeill,* 93 N. C., 552, and cases there cited. *S. v. Harris,* 106 N. C., 682, and cases cited.

The verdict of not guilty, as to the defendants in the first count, was equivalent to a *nol. pros.* as to them, and there being a verdict of guilty as to the other defendants, upon the distinct count in the indictment, properly charging an offense against them, upon which the court can proceed to judgment, there is no ground for arrest of judgment. *S. v. Reel,* 80 N. C., 442.

Error.

STATE v. ANDREW BERRIER AND GRANT BERRIER.

Evidence—Witness.

A witness having stated, upon cross-examination, that the relations between her and the defendant were unfriendly, it was not error to refuse to permit the further inquiry, whether there was not a bitter feud between her family and that of the defendant, to be made.

APPEAL from *Bynum, J.,* at September Term, 1890, of DAVIDSON. (857)

Attorney-General and R. H. Battle for the State.
No counsel for defendant.

CLARK, J. A witness for the State was asked, on cross-examination, as to her feelings towards the defendants. She answered that they were not friendly. She was then asked if there was not a bitter feud between her family and the family of defendants. On objection by the State, the question was excluded, and defendants excepted. The last question was relevant and admissible only to lay the foundation on which to base the further question, whether witness was not unfriendly to the defendants. As she had already answered that inquiry direct, the latter question could serve no purpose, and was properly excluded.

No error.

STATE v. W. A. RITCHIE.

Escape—Indictment.

1. An escape is defined to be when one is arrested gains his liberty before he is delivered in due course of law.

2. An indictment lies, at common law, independent of the statute (The Code, sec. 1022), against an officer who permits the escape of one arrested upon a bastardy warrant.

INDICTMENT for escape, tried at Spring Term, 1890, of STANLY, before *Shipp, J.*

The bill of indictment charged that the defendant had arrested one J. L. Ritchie under and by virtue of a certain warrant for bas-
(858) tardy. The defendant made a motion to quash the bill, upon the grounds that it did not charge a "crime or misdemeanor, or that the defendant was acting by virtue of any *capias* issuing on a bill of indictment, in formation or other criminal proceeding; that bastardy is not a crime or misdemeanor."

Motion allowed, and the court gave judgment quashing the bill and discharging the defendant. Appeal by the State.

Attorney-General and R. H. Battle for the State.
No counsel contra.

CLARK, J. An escape is defined—"when one who is arrested gains his liberty before he is delivered in due course of law." 1 Russ. Crimes, 467. And by another eminent authority, tersely, as "the departure of a prisoner from custody." 2 Whart. Cr. L., sec. 2606.

These definitions are cited and approved by *Smith, C. J.*, in *S. v. Johnson,* 94 N. C., 924.

The indictment charges, in proper and sufficient terms, that the prisoner was arrested by the defendant by authority of a warrant for bastardy, and that the defendant subsequently unlawfully and negligently permitted the prisoner to escape. The warrant for bastardy was legal and sufficient authority to arrest such prisoner. Code, sec. 32; *S. v. Palin,* 63 N. C., 471; *S. v. Green,* 71 N. C., 172. The indictment was, therefore, valid at common law, as may be seen from above citations. This renders it unnecessary to consider whether the indictment was not also sufficient under the statute (Code, sec. 1022). The motion to quash was improvidently allowed.

Error.

Cited: S. v. Edwards, 110 N. C., 512.

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(859)

STATE v. W. M. BAGWELL ET AL.

Unlawful Opening and Publishing Letter—Indictment.

It is necessary to charge, in an indictment for a violation of section 2, ch. 41, Laws 1889, and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority.

INDICTMENT charging the defendants with reading, publishing and making known the contents of a letter without authority, in violation of section 2, chapter 41, Laws 1889, tried before *Bynum, J.,* at the August Term, 1890, of IREDELL.

The indictment charges that the defendants, on or about 10 July, 1890, did "unlawfully, willfully, and without proper authority, take into their possession a certain letter written by Emma L. Rankin to S. C. Rankin on or about 20 June, 1890, which said letter was duly received by the said S. C. Rankin, through the United States mail, at the post-office in Mooresville, N. C., on or about 24 June, 1890," and that the said defendants "did, on or about 12 July, 1890, unlawfully, willfully, and without authority, read, publish and make known the contents, etc., of the said letter, against the form of the statute," etc.

Before the jury was impaneled the defendants moved "to quash the bill of indictment, upon the plea that the bill fails to charge an offense under the statute, and particularly for that it fails to describe the letter

in question to have been 'a sealed letter,' and fails to charge the alleged reading and publishing to have been done with knowledge that said letter had been opened without proper authority."

After hearing the argument of counsel, his Honor quashed the indictment, and the State appealed.

(860) *Attorney-General and R. H. Battle for the State.*
W. M. Robbins for defendants.

DAVIS, J., after stating the facts: The following is the act under which the defendants are indicted: "Any person who willfully, and without authority, opens and reads, or causes to be opened and read, a sealed letter or telegram, or publishes the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor," etc. Laws 1889, ch. 41, sec. 2.

This indictment is for an offense created by statute, and it not only fails to follow the language of the statute, descriptive of the offense, but, by the most liberal construction, it cannot be made to charge that the defendants opened or read a *"sealed letter or telegram,"* or that they "published the whole or any portion of *such letter or telegram knowing* it to have been opened and read without authority," and these are necessary words descriptive of the offense, without which the indictment fails to charge any offense under the statute. *S. v. Deal,* 92 N. C., 802; *S. v. Hall,* 93 N. C., 571; *S. v. Aldridge,* 86 N. C., 680; *S. v. Watkins,* 101 N. C., 702, and cases there cited.

It is insisted for the State that the letter was "received through the United States mail," and the material charge here was the unlawful publishing and making known its contents without authority.

We do not see how this can aid the indictment. The statute does not make it an offense to open, read and make public a letter received through the United States mail, but it must be a *"sealed* letter," and opened or read without authority, or published *"knowing* it to have been opened or read without authority." This is not charged, and the indictment was properly quashed.

Affirmed.

(861)

STATE v. LLOYD ARNOLD.

Homicide—Indictment.

1. The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under chapter 58, Acts 1887. *S. v. Kirkman*, 104 N. C., 911, and *S. v. Harris*, 106 N. C., 682, cited and approved.

2. Forms of indictment for murder and manslaughter approved.

INDICTMENT for murder, tried before *Whitaker, J.*, at Spring Term, 1890, of WASHINGTON.

The indictment was in the following words:

"The jurors for the State, upon their oaths, present that Lloyd Arnold, late of the county of Washington, on 9 June, 1889, at and in said county, with force and arms, in and upon one Sarah Arnold, then and there, in the peace of God and the State being, unlawfully and feloniously did make an assault, and the said Lloyd Arnold, then and there, the said Sarah Arnold, unlawfully, feloniously and of his malice aforethought, did kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the State."

The defendant was convicted of manslaughter, and moved in arrest of judgment, on the ground that "the indictment failed to allege that the killing and murder was done 'willfully,' as required by chapter 58, Laws 1887." The motion was overruled, and defendant excepted. Sentence having been pronounced on the verdict, the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

CLARK, J. The books of Forms and Precedents usually insert (862) the word "willfully," and sometimes the word "unlawfully," before the words "feloniously and with malice aforethought" in indictments for murder. While there are numerous decisions that the words "feloniously," "with malice aforethought" and "murder" are essential to the validity of such indictments, and that their place cannot be supplied by the use of any other, it is not so as to the words "willfully" and "unlawfully." 1 Hale P. C., 466; *Heydon's case*, 4 Co., 41a; 2 Bish. Cr. Pr., 546. Indeed, it has been expressly held that the latter words are not necessary, the reason assigned being that, unlike the other words above quoted, "willfully" and "unlawfully" are not "sacramental words." *S. v. Harris*, 27 La. Ann., 572. The real reason, however, probably, as

suggested by Mr. Bishop (2 Crim. Prac., 543, 547), is not that there is any magic quality in one set of words and not in others, nor because they have no synonyms (as has been sometimes held), but because by the statute 1 Edward VI (enacted 1547) benefit of clergy was taken away from those convicted of murder committed "feloniously and of malice aforethought" (omitting the additional word "willfully," which had been used in the prior statute of 23 Henry VIII), and since, and by virtue of that act, murder has been a capital felony. Being an act increasing the punishment, the courts have always restricted the capital felony to those homicides which were charged, in the exact language of the statute, as committed "feloniously and of malice aforethought." "Willfully" is mere surplusage.

Aside from this, the words "willfully and unlawfully" are tautological, for murder, which is done "feloniously and with malice aforethought," must necessarily be committed "willfully and unlawfully," and is "willful murder of malice prepense," under The Code, sec. 1057. The defendant, upon this bill of indictment, well knew he was charged with the "willful" slaying of the deceased, and has been put to no disadvantage.

(863) Chapter 58, Laws 1887, does not *require,* as defendant's motion premises, any set words to be used. The act is a substantial copy of 24 and 25 Victoria, ch. 100, and its object is correctly set out in the caption, "An act to simplify indictments." It creates no new offense. It declares an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. To so construe the act would make essential, likewise the words "with force and arms," which have not been requisite in indictments for any offense whatever for three centuries and a half, having been abolished by 37 Henry VIII. *S. v. Harris,* 106 N. C., 682. It would also probably make essential the usual concluding words of an indictment which have been held immaterial in *S. v. Kirkman,* 104 N. C., 911, and other similar matters which are customary and formal parts of an indictment, but which by legislation and numerous decisions are not requisite to its validity. The Code, sec. 1183, and decisions thereunder. We cannot think that such is the purport or the intent of the act. The motion in arrest of judgment was properly overruled. Indeed, the indictment in this case contains some surplusage and allegations not necessary to be made, but the essentail matters are properly charged. As it may be desirable to settle what are the indispensable requisites of such indictments, it is proper to say that under the decisions and statutes the following is full and sufficient in

the body of an indictment for murder: "The jurors for the State on their oaths present that A. B., in the county of E., did feloniously, and of malice aforethought, kill and murder C. D."

And it is sufficient in an indictment for manslaughter to follow the same form, omitting the words "and with malice aforethought" and substituting "slay" in the stead of the word "murder." These forms contain, in the words of the statute, "every averment neces- (864) sary to be proved."

Such, in substance, are the forms recognized as valid in England for many years past, under the above cited statute of Victoria 24 and 25, from which our act of 1887 is taken. Time not being of the essence of these crimes, "the omission to charge any date" is immaterial (Code, secs. 1189 and 1183), though the allegation of time can do no harm. It is only when time is of the essence of the offense that it was ever required to prove the date as charged, and hence, it is only in those cases that the omission to charge it could deprive the defendant of any benefit or information. *S. v. Peters, post,* 876.

While every indictment properly should have a caption, it is no part of the indictment, and its omission is no ground for arresting judgment, as has been often held. *S. v. Wasden,* 4 N. C., 596; *S. v. Brickell,* 8 N. C., 354; *S. v. Lane,* 26 N. C., 113; *S. v. Dula,* 61 N. C., 437. Nor would a misrecital of the county in the caption be ground of arrest of judgment. *S. v. Sprinkle,* 65 N. C., 463. It is regular and orderly for the bill to be signed by the solicitor, but such signing is not essential to its validity. *S. v. Mace,* 86 N. C., 668; *S. v. Cox,* 28 N. C., 440.

The power of the Legislature to prescribe the form of indictment for murder is upheld in *S. v. Moore,* 104 N. C., 743, and *S. v. Brown,* 106 N. C., 645, which are cited and approved.

Per Curiam. No error.

Cited: S. v. Peters, post, 883; *S. v. Pate,* 121 N. C., 664; *S. v. Barnes,* 122 N. C., 1036; *S. v. Hester, ib.,* 1050; *S. v. R. R.,* 125 N. C., 671; *S. v. Marsh,* 132 N. C., 1001; *S. v. Mitchell, ib.,* 1036; *S. v. Long,* 143 N. C., 673; *S. v. Wynne,* 151 N. C., 645; *S. v. Francis,* 157 N. C., 614; *S. v. Craft,* 168 N. C., 212; *S. v. Southerland, ib.,* 678.

(865)

STATE v. JAMES WILSON.

Eminent Domain—Constitutional Law—Municipal Ordinance—Police Regulation.

The authorities of the town of S., in the exercise of their powers and duties to keep in proper condition the streets in the town, caused a waterway to be constructed through the lands of the defendant, resulting, on several occasions, in the flooding of his premises. There had been no condemnation of the land or other acquisition of the right to the easement. The defendant placed an obstruction in the waterway, but on his land, by which a street was flooded and made insecure: *Held*, that whatever civil remedy the defendant might have against the municipality for damages resulting from the appropriation and injury of his lands, he had no right to obstruct the waterway and thereby imperil the safety and convenience of the public, and that he was properly convicted for the violation of an ordinance prohibiting such obstruction.

INDICTMENT for a violation of an ordinance of Statesville, tried on appeal from the court of a justice of the peace, at August Term, 1890, of IREDELL, before *Bynum, J.*

The affidavit and warrant charged that the defendant "did, on 16 August, 1889, willfully, with force of arms at and in the said city, dam up and obstruct the waterway and the flow of water from the south side of Walnut street, between Race street and Oak, in violation of the ordinances of the said city passed 2 July, 1888, ch. 40, Laws 1885, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The ordinance is as follows:

"Ordered, by the board of aldermen of Statesville, that no person shall place any obstruction in any waterway so that the water shall accumulate in any street, or in any manner obstruct the flow of water
(866) through or from any street of the city of Statesville, whether such obstruction be placed on his own property or that of another, and any one so offending shall be fined fifty dollars."

On the trial the State introduced evidence tending to show that Walnut street had a ditch running along the south side of it; that there was a ditch and waterway from the south side of the street into and across the lot of the defendant and across the lot of G. W. Clegg to Front street; and that defendant, in the month of August, 1889, stopped up said ditch by placing therein stakes, plank and dirt so as to dam up the water on Walnut street for one week, making the street wet and muddy; that before defendant obstructed the ditch and waterway it carried the water

from Walnut street to Front street, thence to a branch and out of town. It was admitted by the State that the obstruction was put in the ditch by the defendant on his own land, under his fence, etc.

The defendant introduced evidence tending to show that there was no waterway or ditch crossing his lot, and if there was, it was not of sufficient capacity to carry the water that ran in from Walnut street, but ran the water into the lot of defendant from Walnut street without any or a sufficient outlet.

Defendant introduced A. M. Walker, who stated that he was seventy-six years of age, and had lived in Statesville fifty-six years; was town magistrate in 1843, and continued to be for five or six years; was mayor in 1854-55-56; after this superintended street work up to within eight or ten years ago; laid off Walnut street. Defendant proposed to ask witness whether, from the time he knew the town up to within eight or ten years ago, the town or city of Statesville had made any waterway at the place where the alleged obstruction was done by defendant. This was offered for the purpose of showing that the town had not run the water through the land of defendant long enough to acquire an easement, and the defendant proposed to follow this evidence by (867) showing that the town had not condemned the lands where the obstruction was for a watercourse for the water running from Walnut street; and that he nor those under whom he claims had ever granted a right-of-way on his land for the water from the town.

Objection by State. Objection sustained. Exception.

Witness stated that the water always ran north when he knew it; across Wilson's lot is south. The last he remembered it running north was about 1878. Walnut street was raised so as to keep the water from running north.

Defendant proposed to prove by witness that the natural flow of the water was north, in the opposite direction from the obstruction, and that it had been running that way up to 1878. Objection by State sustained. Exception by defendant. Defendant then proposed to ask witness if the home of Wilson was not near this water—to be followed by evidence that the water coming in created a private nuisance in Wilson's lot, and that the obstruction was made to keep out the water and to abate this nuisance. Objection by State sustained. Exception by defendant.

Defendant, in his own behalf, stated: "In August, 1889, water came in from Walnut street; flooded the lot; had no outlet; backed in my cellar; it had to get a foot or more deep in the lot before it would run off; the lot adjoining was higher than mine; there had been some ditching done lately; there was no way for the water to flow out until it filled up enough to run out; I filled in the obstruction on my lot; there was no ditch there then to take the water off; there was an opening under

my fence from Walnut street in August, 1889—been there since July, 1888; I had that opening closed up, and the water backed in the street; the water was running in that opening when I bought the lot; (868) there has been a sort of a ditch from Walnut street to Front street through my lot and Clegg's lot."

There was much other evidence introduced as to the location of the street and existence of the waterway.

At the close of the evidence defendant asked the court to instruct the jury: That a waterway, within the meaning of the ordinance, is such a channel as will conduct the water not only out of a street upon an adjoining lot, there to stand, but carry it off to some drain by which it can escape from the corporation, and if the jury are not fully satisfied, from the evidence, that defendant had such channel, they should acquit.

Drainage must conform to natural laws; water, by natural law, descends, and if a proprietor protects his land against surface-water by embankment, or erecting an obstruction which throws water back into the street, he is not indictable unless the land thus protected is lower than the adjoining lands, and is the natural drainage for the town at this point.

The court refused the second instruction asked, and told the jury that the questions for them to determine were:

1. Was there a waterway as alleged by the State?

2. If yes, did the defendant obstruct the same?

That it did not matter whether the waterway was of sufficient capacity to carry off all the water from Walnut street, or whether water ran out of it on the land of the defendant, but was it the waterway provided by the city? That if the jury found that this was the waterway, and that defendant obstructed it, he was guilty. If, on the contrary, they found that there was a ditch made by the city along the side of Walnut street, and a ditch cut from that into the lot of the defendant, which turned the water into his lot, with no ditch across it and into the land of Clegg, and thence on to Front street, it would not be a waterway within the meaning of the ordinance, and defendant would not be guilty, even if he had stopped it up or obstructed it.

Verdict of guilty. Motion for new trial overruled. Defendant (869) appealed.

Attorney-General and R. H. Battle (Furches & Coble and C. H. Armfield filed briefs) for the State.

John Devereux, Jr., and W. M. Robbins for defendant.

AVERY, J. When this case was brought up by the defendant (106 N. C., 718) on appeal from the refusal of the court below to quash the

warrant, it was settled that the ordinance was valid, the town having authority, both under the general statute (Code, sec. 3820) and the charter (Pr. Laws 1885, ch. 40, sec. 56), to make and enforce it. The question whether such an obstruction of the flow of water from the street is indictable as a public nuisance, and cognizable in the Superior Court, is, therefore, no longer an open one.

The statute (Code, 3803) makes it the duty of the town, through its regularly constituted authorities, to "provide for keeping in proper repair the streets and bridges of the town, in the manner and to the extent they may deem best." The commissioners of the town, during the year 1878, thought it would promote the convenience and subserve the best interests of the public to raise the level of the street adjacent to the premises of the defendant, on which he placed the obstruction complained of, and on which he now lives, one foot higher by filling in earth; but by doing so the water that gathered just south of the street so repaired (Walnut) was, as the defendant insisted and proposed to prove, diverted from its natural course, and, instead of flowing across the street to the north, was forced into his lot, and ponded to the depth of a foot on a portion of it before it could be made to pass into a little drain, and across his premises to a branch on a parallel street farther south.

We must assume that the authorities of the town acted in good (870) faith, if not in obedience to the mandatory requirement of the statute, in changing the level of Walnut street, and made only proper repairs in that highway. They were liable to indictment for failure to keep it in such condition that it would be passable and safe. Bishop on Cont. Law, secs. 970 to 974.

The town had an unquestioned right-of-way in Walnut street when it is alleged that the flow of water was changed. How or when the easement was acquired does not appear, but the existence of it is admitted. If the town had widened instead of elevating the street, the additional land needed for that purpose could not have been taken for public use without condemnation, in some manner provided by law, and giving just compensation to the owner. Under the charter now in force in Statesville (Laws 1885, ch. 40, sec. 41), the mode of ascertaining damages is provided and specifically pointed out.

In a late exhaustive work on Eminent Domain, by Lewis (sec. 221), the author says that the people of Illinois, in revising their Constitution in 1870, inserted a new and important provision—that "private property should not be taken or damaged for public use without just compensation." He says further: "Every other State which has revised its Constitution since 1870, except North Carolina, which never had any provision on the subject, has followed the example set by Illinois by adding the word 'damaged,' or its equivalent, to the provision in question," viz.,

to the preëxisting prohibition against taking without just compensation. The fifth amendment of the Constitution of the United States was held, at an early day, to be a limitation on the power of the Federal and not the State government. *Barrow v. Mayor of Baltimore,* 7 Peters, 243.

Judge Gaston, in *R. R. v. Davis,* 19 N. C., 460, intimated strongly that section 17, Article I of the Constitution, should be construed as prohibiting the appropriation of private property for public pur-
(871) poses without payment of a fair equivalent; but the statute discussed in that case provided fully for ascertaining and paying the damage of the landowner for the land appropriated, and hence the point was not decided. Our Constitution has never contained, however, like most of the other State Constitutions, such an express inhibition as that imposed on the Congress of the United States against taking private property without just compensation. Where the word "damaged," or some word of similar import, has been added to "taken," in the organic law of various States, the courts have held that the effect was to give to the owner of the fee in the street the right to additional damage when the streets are elevated. Lewis Em. Dom., secs. 222 to 224 and 232.

But while our organic law may be construed to prohibit "taking," its language is not broad enough to apply in all cases where, as an incident to the construction or change of a street, an owner of adjacent land is injured by diverting the water and flooding his premises or by rendering his building insecure. No provision is made in the general road laws, or in railroad charters or in acts incorporating towns, as a rule, for compensating landowners who are not owners of the fee simple title to any part of the highway, railroad or street, or whose lands do not abut immediately on them, because of injuries inflicted incidentally on land other than that appropriated or contiguous to it, the corporation can, ordinarily, be made to answer in damages. If it were necessary to determine in this case whether the defendant's damage, on account of ponding water on his land, could be recovered only in repeated actions against the city, or whether it is deemed, in the absence of any special provision in our statutes or constitution in reference to *injury,* as distinguished from *taking,* to have been assessed when the street was opened, it might become important, if not essential, to first ascertain whether the flooding was caused by failure of the town to furnish a sufficient outlet by a natural or artificial drain for a stream, or for the escape
(872) of the accumulated surface-water and also, whether the defendant, or those under whom he claims, owned any part of the highway when it was condemned, granted or dedicated. *R. R. v. Wicker,* 74 N. C., 227; *Brown v. R. R.,* 83 N. C., 128; *Bridgers v. Dill,* 97 N. C., 222; *Fore v. R. R.,* 101 N. C., 527; *Emery v. R. R.,* 102 N. C., 234; *Murphy v. Chicago,* 29 Ill., 279.

But we do not think it essential that we should determine what the remedy of defendant is, if he *has* a remedy. The ordinance has been declared valid. It prohibits the obstruction of a city drain. The defendant admits that he obstructed the flow of the water when it entered his lot.

The judge below, in his charge, made the guilt of the defendant depend upon the preliminary finding by the jury that the obstruction was placed in a drain or ditch used by the city. It is not material, therefore, to know whether an action will lie or not, since the city was shown to be using the ditch. The defendant cannot, without making himself liable to indictment, take the law in his own hands, declare the flooding a nuisance, and abate it in such manner as is calculated to render the street impassable, even if it be conceded that the water was diverted and made to flow into the ditch for the first time in 1878, and that the way for the ditch was not condemned nor compensation made for prospective damage to the owner of the land, and that no easement has yet been acquired by the town in the waterway. *Owings v. Jones,* 9 Md., 108; *Nayes v. Shepherd,* 30 Me., 173. "No person, not even the adjacent owner, whether the fee of the street contiguous to his lot be in himself or the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities." 2 Dil. Mun. Corp., sec. 1032.

The defendant had no right, by obstructing a drain actually (873) used to carry off the water, to flood the streets, and was liable to respond in damages for any injury caused by creating such a nuisance. 1 Dillon Mun. Corp., sec. 379; 2 *ib.,* 1032.

So far from having the right to abate what he considered a nuisance by closing the ditch, the defendant, if in backing the water upon the street he made the highway unsafe, subjected himself to certain liability to indictment and a contingent responsibility in damages for injuries to others caused by this act.

It is not necessary to discuss *seriatim* the exceptions of the defendant. The principles we have laid down cover all of them.

There was no error in excluding the testimony, for the refusal to admit which exceptions were entered; nor is there sufficient ground for sustaining any of the exceptions to the charge that have been assigned as error.

No error.

Cited: S. v. Brown, 109 N. C., 806; *Staton v. R. R.,* 111 N. C., 282; *S. v. New,* 130 N. C., 740.

STATE v. PURDIE JACOBS.

Evidence—Witness—Guilt of Other Persons.

1. The fact that one person charged in the same bill has been convicted of the crime alleged is no bar to the conviction of the other parties indicted.

2. A witness whose credibility has been assailed by the cross-examination may be corroborated by evidence of prior consistent declarations and events.

INDICTMENT for murder, tried before *Brown, J.*, at May Term, 1890, of ROBESON.

(874) The appellant prisoner and three others were indicted together for the murder of Candis Arps. Upon their arraignment, they severally pleaded "not guilty."

On the trial a witness for the State, Alexander Oxendine, testified that he was present when the prisoner shot the deceased. He stated that others also fired guns at her. On his cross-examination, which tended to impeach his testimony, he said: "I testified, on my trial" (he had been indicted and tried for the same offense), "that Make and I did nothing, but that Purdie (the appellant) and Steve Jacobs did the shooting at Mrs. Arps. I did not know myself where Mrs. Arps lived, and don't know the date when she was shot."

Another witness for the State, Atlas Oxendine, testified that he saw the prisoner and others indicted with him "going towards Mrs. Arps' the evening before she was shot. Early next morning, on Saturday, saw prisoner and Steve Jacobs and Alex. Oxendine near the Pot Jacobs place, between prisoner's house and Mrs. Arps'. They were going towards prisoner's house. Purdie (the prisoner) asked, 'How far going?' Purdie said 'he had been to 'Squire McIntyre's.' He went on to say, 'Secrets are out; you will be apt to get into them, and don't say anything about seeing us this morning, or it will not be good for you.'"

Witness, cross-examined at length by prisoner's counsel, also stated that he made statement of above to 'Squire McIntyre.

'Squire McIntyre was also examined for the State, and testified that the prisoner was at his house early the next morning after the homicide; "that twenty minutes after prisoner left, Atlas Oxendine (witness next above mentioned) came to his house and stated that he saw Purdie and Steve Jacobs and Alex. Oxendine early that morning, and that Purdie said not to tell that he saw them, or it would not be good for

him." This statement of Atlas Oxendine to witness was objected (875) to by the prisoner. The State offered it only to corroborate Atlas Oxendine. Objection overruled. Exception by prisoner.

There was a verdict of guilty, and judgment thereupon of death.

There was a motion for a new trial, the prisoner assigning as error:

"1. That the exception to admission of evidence of witness McIntyre above set forth," was not sustained.

"2. Because the court failed to instruct the jury that they should not believe Alex. Oxendine's testimony, because he could not state any date or night when Mrs. Arps was shot." (The court did fail to so charge the jury.)

The motion was overruled.

The prisoner also moved in arrest of judgment upon the ground that "it appeared from the record that Steve Jacobs and Alex. Oxendine had already been convicted of the same murder of Mrs. Arps on this bill of indictment."

The motion was denied, and the prisoner excepted, and appealed to this Court.

Attorney-General for the State.
William Black for defendant.

MERRIMON, C. J., after stating the facts: There is no merit in any of the prisoner's exceptions. The motion in arrest of judgment is wholly without force. That two of the persons indicted with the prisoner for the murder charged in the indictment had been tried and convicted could not relieve or excuse him from answering for the crime charged against him. He and they were alike guilty, and it can make no difference that two of them were tried at one time and the prisoner at another.

As to the first exception to evidence, it appears, from the nature of the evidence of the witness Atlas Oxendine and the character of his cross-examination, that the purpose of the prisoner was to (876) impeach his testimony. It was competent, therefore, to corroborate him by proving that he had, before the trial, stated to the witness McIntyre, in substance, part of the material facts stated by him on the trial. This is settled. *S. v. Whitfield,* 92 N. C., 831; *S. v. Rowe,* 98 N. C., 629; *S. v. Brewer,* 98 N. C., 607; *S. v. Morton, post,* 890.

The evidence of the witness Alexander Oxendine was relevant and competent. The court had no authority to tell the jury that they should not believe it. It was their province to believe or disbelieve it. That the witness himself could not tell where the deceased lived, nor the time

when she was shot, did not destroy his testimony. That he did not might or might not go to his discredit, this depending upon attending facts as to his opportunities, length of time, etc.

We have carefully examined the record and find it in all respects sufficient to warrant the judgment. There is

No error.

Cited: Burnett v. R. R., 120 N. C., 518.

STATE v. GEORGE PETERS.

Indictment—Perjury—Form of Indictment—Formal Conclusion of Indictment—Evidence—Warrant.

1. When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit.

2. To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false.

3. The form of indictment for perjury prescribed by chapter 83, Acts 1889, is sufficient and legal.

4. The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are necessary in an indictment for any offense whatever, but are mere surplusage. *S. v. Kirkman*, 104 N. C., 911, approved.

5. When time is not of the essence of an offense, as in perjury, the omission to charge any time in the indictment is not ground to arrest the judgment. Code, sec. 1189.

6. Where the indictment for perjury alleges it to have been committed in an action wherein "the State was plaintiff and A. B. defendant," it is no variance if the warrant was entitled "State and City of G. v. A. B."

7. When the indictment alleges the perjury to have been committed in the "trial of an action between the State and A. B., it is immaterial whether the court, if it had jurisdiction of the subject-matter, erroneously or correctly assumed or refused to assume final jurisdiction, or whether it acquitted, convicted or bound over the defendant in such action. A preliminary trial is a trial of an action within the statute.

8. The statute has merely simplified the form of indictment for perjury. The constituent elements of the offense remain unchanged, and require the same proof as heretofore.

INDICTMENT for perjury, tried before *Womack, J.*, and a jury, (877) at May Term, 1890, of GUILFORD.

The indictment was as follows:

"The jurors for the State upon their oath present that George Peters, of Guilford County, did unlawfully commit perjury upon the trial of an action in the mayor's court of the city of Greensboro, before James W. Forbis, mayor, in Guilford County, where the State was plaintiff and Amos Phillips was defendant, by falsely asserting on oath that he (meaning the said George Peters), had not purchased any spirituous liquors from Amos Phillips less than half a pint on Sunday, 27 April, 1890, knowing the said statement to be false or being ignorant whether or not said statement was true, against the form of the statute in such case made and provided and against the peace and dignity of the State." (878)

The false swearing was alleged to have taken place before the mayor of Greensboro in the trial of Amos Phillips upon the following warrant, which was introduced in evidence:

STATE AND CITY OF GREENSBORO
against
AMOS PHILLIPS.

Before JAS. W. FORBIS,
Mayor.
Warrant for retailing.

STATE OF NORTH CAROLINA,
To the Chief of Police of the City of Greensboro,
Or other lawful officer of Guilford County—GREETING:

WHEREAS, Complaint has been made before me this day on the oath of W. J. Weatherly that Amos Phillips, on or about 28 April, 1890, with force and arms at and in the county aforesaid, and within the city limits, did willfully and unlawfully sell spirituous liquors inside the corporation to one George Peters in quantity less than five gallons without having license; against the statute in such cases made and provided, against the peace and dignity of the State, and in violation of the city ordinance, section 8, chapter 15, p. 110. These are, therefore, to command you forthwith to apprehend the said Amos Phillips, and him have before me at the mayor's office, then and there to answer the said charge and be dealt with according to law.

Given under my hand and seal this 7 May, 1890.

JAMES W. FORBIS, *Mayor.* [Seal.]

The evidence is substantially stated in the opinion.

The jury returned a verdict of guilty. Motion in arrest of judgment on the ground that the indictment was not sufficient in its averments to charge the crime of perjury. Motion denied. Sentence pronounced as in the record, from which the defendant appealed.

(879) *Attorney-General for the State.*
John W. Graham for defendant.

CLARK, J., after stating the facts: The defendant's counsel asked a witness, "Was not the warrant on which Amos Phillips was tried issued without a sworn complaint or affidavit being made by any person whatever?" The indictment charged the perjury to have been committed in that trial. The question was ruled out on objection by the State, and defendant excepted.

In *S. v. Bryson,* 84 N. C., 780, *Ashe, J.,* in construing the provisions of the act, which are now The Code, secs. 1133 and 1134, says that no written affidavit or complaint is required, and that the appellate court "can only look at the warrant, which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." Whatever might have been the effect if there had been no *oral* complaint on oath, and such objection had been taken by Phillips on the trial, it is clear that such objection could not have availed him when made for the first time on appeal. *A fortiori,* it could not be raised in this collateral way by this defendant. In England, where a written information, on oath, it seems, is necessary to the validity of a warrant, it was held by a full bench in the Court of Criminal Appeals, in a recent case—*Reg. v. Hughes,* 14 Cox C. C., 284 (1879)—on an indictment for perjury alleged to have been committed by a witness in a case where the warrant was issued without either written information or any oath whatever, that this irregularity could not avail the witness in such case when on trial for perjury committed in such action, any more than whether the court in such case pronounced a legal or illegal judgment. Those are matters which concerned the defendant in that case, but not the witness, if the court had jurisdiction of the offense charged in the warrant. In *S. v. Lavalley,*

9 Mo., 834, the court say that it is no defense for a person
(880) charged with perjury to show that the court committed error in its proceedings, provided it had jurisdiction of the subject-matter and of the parties, and that any other rule would change the issue, so that, instead of trying the defendant for false swearing, the court would review the regularity and correctness of the proceeding in another case. In *S. v. Alexander,* 11 N. C., 182, the court, upon the face of the war-

rant, had no jurisdiction of the action in which the false oath was taken. The jurisdiction depends, not upon the affidavit preliminary to issuing the warrants, but on the nature of the offense charged in the warrant.

The defendant asked the court to instruct the jury "that as the evidence of Weatherly and others did not establish the fact that the liquid which Phillips had was spirituous, and that as their evidence, with the other circumstances taken together, only afforded an inference that it was spirituous liquor, it was not sufficient to convict of an indictment for perjury," and, further, "that no witness corroborated the evidence of Weatherly as to the sale by Phillips to the defendant, nor was there any confirmatory circumstances as to the sale itself from Phillips to defendant, and that it amounted only, in either of above cases, to the oath of Weatherly against the oath of Peters, the defendant, and that such was not sufficient to warrant a conviction for perjury." The court did not give these instructions, and defendant excepted. A witness for the State testified that on the Saturday night before the Sunday, 27 April, 1890, on which the illegal sale of spirituous liquor by Phillips was charged to have been committed, he saw Phillips get a jug of white liquid, drawn from a barrel in a barroom, and pay for it, and take it and place it near where he afterwards saw him in the alley on the north side of the street, on the Sunday referred to, on which day he saw Phillips go to where it had been placed, several times, and return with a bottle, from which he poured out the drinks in a small glass, (881) holding much less than half a pint, to divers colored men, who drank and handed Phillips money, and he saw Peters in the crowd. Another witness, one Weatherly, testified that the liquid looked like corn whiskey; that Phillips poured it out of a bottle into a "short" glass, holding much less than half a pint; that he saw the defendant (Peters) drink and give Phillips a nickel, and that divers other colored men came to Phillips at the same place in the alley on the north side of the street, in the course of some hours. A third witness testified to the crowd of colored men coming to Phillips, who was on the north side of the street, into the alley described by the other witnesses, and that the defendant (Peters) was among them. The witness heard money rattling out in the alley, but did not look to see who had it and did not see any transaction between Phillips and Peters. There was also evidence by the mayor and another witness that on the trial of Amos Phillips, the defendant (Peters) was sworn and examined as a witness and testified that he did not buy any liquor in quantity less than half a pint from Amos Phillips on the day testified to by the State's witnesses, and that he was not on the north side of the street on that day. The false oath charged in the indictment is, that the defendant testified on the

trial of Amos Phillips that "he had not purchased any spirituous liquor from Amos Phillips, less than half a pint, on Sunday, 27 April, 1890." The materiality of the oath, and that the defendant so swore, are not controverted by any exception taken. We think there was sufficient evidence to go to the jury upon the question whether the liquid dispensed on that occasion by Amos Phillips was spirituous liquor.

One witness testified that he saw defendant purchase of Amos Phillips some of the liquid in quantities less than half a pint, on Sunday, 27 April, 1890, and pay for it. The testimony of other witnesses of sales by Amos Phillips of the liquid, at the same time and place,
(882) to divers others, and of defendant being in the crowd and on the north side of the street, together with defendant's denial before the mayor that he was on that day north of the street, together with all the circumstances in evidence, makes evidence corroborative of the single witness who testified as eye-witness of the sale by Phillips to Peters. *S. v. Brown,* 79 N. C., 642. It is not required that "the corroborative circumstances should equal in weight the testimony of one witness, but there must be enough, in addition to the testimony, to turn the scale as against the weight of the prisoner's oath on the former trial." 2 Bish. Crim. Prac., sec. 871. The instructions asked were properly refused.

The defendant moved in arrest of judgment, on the ground that "the bill of indictment was not sufficient in its averments to charge the crime of perjury." The bill of indictment is a substantial copy of the form authorized by chapter 83, Laws 1889, except that it adds the formal conclusion, "against the form of the statute in such cases made and provided, and against the peace and dignity of the State." These words are not required by the act cited, nor are they necessary or material in an indictment for any offense in this State, as was held by the Court in *S. v. Kirkman,* 104 N. C., 911. The same rule obtains in England. The House of Lords, in the famous perjury case of *Castro v. The Queen* (better known as the *"Tichborne" case*), L. R., 6 App. Cases, 299, *Held:* (*Lord Chancellor Selborne* and *Lords Blackburn* and *Watson* concurring in the opinion and affirming the court below) that by virtue of Statutes 14 and 15 Victoria (similar to our Code, sec. 1183) the words, "against the form of the statute and against the peace and dignity of the Queen," were not essential in any indictment, and their omission not ground either for a motion to quash or in arrest of judgment. But we take it that their use is mere surplusage. The defendant contends, however, that the indictment is defective, in that no time is laid. The act
(883) does not require it, and, indeed, as time is not of the essence of the offense, "the omitting to state the time at which it is committed" is not ground to stay or reverse the judgment. The Code, sec. 1189. It can neither benefit nor inform a defendant to charge the date

of the commission of the offense, except in those very few cases in which time is of the essence of the offense, in which cases only has it ever been required to prove the time as laid. *S. v. Arnold, ante,* 861.

It is urged here that the warrant in the case against Amos Phillips was entitled "State and City of Greensboro v. Amos Phillips," and that it charged that the offense was against the ordinance of the city of Greensboro, whereas the illegal sale of spirituous liquor is an offense only cognizable by State authority. No objection was taken below to the introduction of the warrant, nor was there any prayer for instruction that there was a variance between the allegation and proof. If we could notice such objection, when taken here for the first time, it is sufficient to say that the warrant in proper terms charges a sale of spirituous liquor without license and as an offense against the State. The additional averment in the warrant that it was a violation of a town ordinance also, was mere surplusage, as were the words, "and city of Greensboro," in entitling the warrant. *S. v. Collins,* 85 N. C., 511; *S. v. Brown,* 79 N. C., 642.

Objection was also taken here that, on the face of the record, the mayor had no jurisdiction of the offense charged against Phillips, and, therefore, the defendant could not be convicted of false swearing, the action being *coram non judice.* By virtue of The Code, sec. 3818, the mayor is a court, with the jurisdiction of a magistrate, and, as such, he had authority to investigate the charge of selling liquor without license. It does not appear whether he assumed final jurisdiction, or merely bound the party over to court, or acquitted the defendant, or dismissed the action. Nor is it material, since the subsequent erroneous or illegal judgment of the mayor could not affect the guilt or innocence of this defendant. The charge in the warrant determines this juris- (884) diction, and not what is done in the trial.

It is further objected that the allegation of the false oath as having been taken on the "trial of the action," etc. (naming the court and case), is not sufficiently definite. Still it is such allegation as is declared sufficient by the statute, and we cannot see that it can make any difference whether it was a "preliminary trial" or a trial with final jurisdiction. Either comes within The Code, sec. 1092. If the perjury was committed in any of the cases named in that section, other than "in the trial of an action," as in an affidavit, or deposition, or the like, the indictment should so charge it.

The many technicalities which have hampered the administration of justice in regard to false swearing moved the Legislature to enact section 1185 of The Code, and more recently the above-cited act, prescribing a simple form of indictment for that offense. Chapter 83, Laws 1889.

The authority of the Legislature to prescribe forms of indictment is sustained in *S. v. Moore,* 104 N. C., 743. The form of indictment here authorized points out to the defendant that the offense charged is perjury, the court and the names of the parties to the proceeding in which it is alleged to have been committed, the words alleged to have been sworn, and their falsity. The charge is simplified. But the constituent elements of the offense remain as before. They are included in the allegation, "did commit perjury," and it must still be shown in proof that the defendant made oath or affirmation substantially as charged, that the defendant was duly sworn by an officer competent to administer the oath, and in a matter of which he had jurisdiction, and in one of the cases specified in The Code, sec. 1092, i. e., "in a suit, controversy, matter or cause depending in any of the courts of the State, or in a deposition or affidavit taken pursuant to law, or in an oath or
(885) affirmation duly administered of, or concerning, any matter or thing whereof such person is lawfully required to be sworn or affirmed," that it was in a material matter, and the jury must be further satisfied that such oath or affirmation was willfully and corruptly false. When, however, falsity is proven, it has been held that the burden is on the defendant to show that it arose from surprise, inadvertence or mistake, and not from a corrupt motive. *S. v. Chamberlain,* 30 Vt., 557; 2 Whart. Cr. Law, sec. 1320 (9 Ed.).

Per Curiam. No error.

Cited: S. v. Arnold, ante, 864; *S. v. Gates, ante,* 833; *S. v. Flowers,* 109 N. C., 843; *S. v. Peeples, ib.,* 769; *S. v. Price,* 111 N. C., 704; *S. v. Champion,* 116 N. C., 988; *S. v. Hester,* 122 N. C., 1048; *S. v. Mitchell,* 132 N. C., 1036; *S. v. Long,* 143 N. C., 673; *S. v. Harris,* 145 N. C., 458; *S. v. Cline,* 146 N. C., 642; *S. v. Francis,* 157 N. C., 614; *S. v. Craft,* 168 N. C., 212.

STATE v. JOHN MCDUFFIE ET AL.

Fornication and Adultery—Evidence—Burden of Proof—Judge's Charge.

1. On an indictment for fornication and adultery, the husband of the *feme* defendant is a competent witness against her to prove her marriage to him. Code, sec. 588.

2. The single state being presumed to exist till the contrary is shown, the prosecution is not called on to prove the defendants are not married. Marriage being peculiarly within the knowledge of the defendants, the burden is on them to show it.

3. It is not error to refuse a prayer for instructions, however correct, when there is no evidence to support it.

4. An exception "to the charge as given" is too general.

INDICTMENT for fornication and adultery, tried before *Graves, J.*, at October Term, 1890, of MOORE.

It was in evidence that, in the spring of 1889, the defendants lived together in a small house, containing one room, near the west end of Moore County; that the witness boarded with them two weeks during that spring; that they slept together on a bunk, and wit- (886) ness saw them in the bunk together four different times during the two weeks; that he did not eat with them, but slept in the same house; that the next time he saw them together was at a church in Richmond County, in August, 1889, when the male defendant asked witness to go home with him, which witness did, and stayed one night; that defendants were together that night; the house had but one room; that the defendants were not married, as he knew.

Another witness, one Hackey, testified, without objection, that he and female defendant were lawfully married twenty years ago, and had never been divorced.

The defendants introduced no evidence, but asked the court to instruct the jury:

1. That the jury cannot convict the defendants upon any evidence of their living together in Richmond County, and this evidence is merely admissible for the purpose of corroborating the evidence of the substantive offense alleged to have been committed in Moore County.

2. That the burden is upon the State to satisfy the jury beyond a reasonable doubt that the defendants were not married, and if the State has failed to satisfy the jury beyond a reasonable doubt upon this point, the jury should return a verdict of "not guilty."

The court refused to give the instructions asked, and defendants excepted.

The court charged the jury, among other things, that the burden of proving defendants not married was not on the State, but being a matter peculiarly within the knowledge of defendants, it devolved upon them to show that they were married. The court further instructed the jury that if they found that the female defendant habitually surrendered herself to the gratification of the male defendant for two weeks, that would be sufficient to constitute the offense of fornication and adultery.

(887) The defendants excepted to the charge as given. Verdict of "guilty." Judgment. Appeal by defendants.

Attorney-General for the State.
W. C. Douglass and T. J. Shaw for defendants.

CLARK, J. It is said, in *McKinnon v. Morrison,* 104 N. C., 354, affirming prior authorities cited, that "an unpointed broadside challenge to *the charge as given,*" is too indefinite to be considered and that "the law is well settled in this respect." That case has been several times cited and approved.

The first prayer for instructions is legally correct. The State having given evidence of an offense committed in Moore County, any evidence tending to show fornication and adultery between the parties prior to the bar of the statute of limitations, or in another county, would be merely corroborative. *S. v. Guest,* 100 N. C., 410. But it was not error to refuse a charge, however correct in law, which there was no evidence to support. *Staton v. Mullis,* 92 N. C., 623; *Leak v. Covington,* 99 N. C., 559. There was no evidence of the defendants "living together in Richmond County." The house to which the witness was invited in August, 1889, is not stated to have been in Richmond County. No inference is drawn that it was so located, for the presumption is that the charge of the court was correct; but, indeed, if any inference is to be drawn, it is that the house was in Moore. The evidence is that the defendants were living in a one-room house on the western edge of Moore in the spring of 1889, and there being no evidence of a removal when the male defendant invited witness home to the one-room house in August, it not being stated where the house was, there is no presumption that it was not the same house. The fact that the defendants were at church in Richmond County when such invitation was given does not supply the lack
(888) of evidence on the point, for we know judicially that Richmond County lies partly on the western edge of Moore.

We concur with his Honor in the instruction given in lieu of the second prayer for instruction. Whether defendants were married or not was a matter peculiarly within their knowledge. If married, they could have easily shown that fact and at once have put an end to the proceeding. They were themselves competent witnesses. To call upon the State to prove a negative of this character would virtually repeal the statute. Parties might come to this State from other States or foreign countries, or indeed, from distant counties in this State. The State could not possibly prove, in many cases, that the parties had at no time and in no place ever been married. This construction would license concubinage. On the other hand, it is no hardship on the defendants, when so charged

with a scandalous offense, to prove that they live in honorable wedlock. A similar rule and for the same reason prevails in indictments for retailing without license. If the retailing is shown, the burden is on the defendant to show that he has license so to do. *S. v. Morrison,* 14 N. C., 299; *S. v. Emery,* 98 N. C., 668; *S. v. Sorrell,* 98 N. C., 738.

"The State need not prove that the defendants are unmarried. It will be presumed such is the case till defendants offer proof to the contrary." 8 A. & E., 563; Bishop Statutory Crimes, sec. 693.

Two other reasons are also to be given for this rule. In a recent case in New Jersey, for this offense, it is said: "The single state is natural, and during early life, the only possible one, nor is there any period at which it is necessarily terminated or merged in marriage. In the absence, therefore, of testimony tending to the contrary, the presumption is that the celibacy which exists in youth continues. Therefore, until drawn in question, no affirmative testimony on this point was required from the prosecution." *S. v. Gaunt,* 50 N. J. L., 491 (1888); *People v. Colton,* 2 Utah, 457. And again, while the (889) burden is on the State to prove the *res gestæ* of the offense, marriage or non-marriage is no part thereof. It is a *status* which exists prior to such acts and independently of them. The single state existing first in the absence of evidence is presumed to continue, and if it has been changed to the marriage state between the defendants, it is a matter peculiarly within their knowledge, and there is no good reason to call upon the State to prove a negative.

In civil cases the party who claims property, legitimacy or benefit under and by virtue of a marriage, has the burden of proving it. The objection is urged that the adoption of the same rule in criminal cases would enable grand juries to indict any married couple in the State. This is to presume that grand juries and solicitors are corrupt, or actuated by malice. In practice it will be found, as has been the experience in regard to retailing without license, that those who are dealing legitimately have no motive for concealment, and that grand juries and solicitors will respect the limitations of their duty. Indictments will not be found except in those cases in which an investigation is demanded by the surrounding circumstances, and in those very rare cases in which it will be found that the indicted parties were in fact married, it is better that they should show their *status* as married people, a fact which is best known to themselves, than that justice should fail in numberless cases by the State being burdened, not with proving the *res gestæ* of the offense, but with tracing the previous lives of the parties to show non-marriage, which would often be utterly impracticable. The experience of the lower courts is that, in ordinary cases, the marriage of

the defendants is, in fact, scarcely ever relied on, but the defense is that the parties do not cohabit, the burden of proving which lies upon the State.

(890) The defendants except here, for the first time, to the evidence of the witness who testified that he was the husband of the *feme* defendant, and rely upon *S. v. Ballard,* 79 N. C., 627, which holds that while an exception to evidence is waived if not taken at the time, yet, in criminal cases, if evidence rendered incompetent by statute is admitted without objection, the admission may still be assigned as error. It is not necessary that we call in question this rule, for, if we should concede its correctness, it has no bearing. The evidence, if objected to in apt time, would have been properly admitted. The Code, sec. 588, makes the husband or wife incompetent, and not compellable, "to give evidence for or against the other . . . in any action or proceeding on account of adultery, except to prove the fact of marriage." Indeed, the fact of marriage is not within the reason of the rule of public policy which makes the husband or wife incompetent to prove any transactions after marriage. In its nature marriage is intended to be not confidential, but public and notorious.

SHEPHERD, J., *dubitante.* No error.

Cited: S. v. Peebles, 108 N. C., 769; *S. v. Cutshall,* 109 N. C., 769; *S. v. Melton,* 120 N. C., 592; *Mitchell v. R. R.,* 124 N. C., 242; *Hinkle v. R. R.,* 126 N. C., 938; *S. v. Hicks,* 130 N. C., 709, 711; *Parker v. R. R.,* 133 N. C., 340; *S. v. Blackley,* 138 N. C., 622; *S. v. Connor,* 142 N. C., 708; *S. v. West,* 152 N. C., 834.

STATE v. ALECK MORTON.

Witness—Evidence.

1. Where the tendency of the cross-examination of a witness is to attack his credibility, or his relation to the facts about which he testifies is such as casts suspicion upon his statements, evidence of other circumstances connected with those deposed to by him, and of his prior consistent declarations, is admissible as corroborative testimony.

2. Upon a trial for murder, a witness for the State testified that he was present at the time of the killing, and identified the prisoner as the perpetrator of the act. Soon after, a number of persons assembled at the

place, and, in the presence of the witness, accused persons other than the prisoner of the crime, to which witness made no response: *Held*, that his silence, under such circumstances, was a fact going to his discredit, and it was error to exclude the evidence of it from the jury.

INDICTMENT for murder, tried at August Term, 1890, of (891) LENOIR, before *Armfield, J.*

The prisoner was indicted for the murder of Julia Emery, *alias* Julia Morgan. Upon her arraignment, she pleaded "not guilty."

On the trial the State introduced as a witness Giles Parker, who testified to facts and circumstances that tended strongly to prove the guilt of the prisoner. Among other things, he testified that, about the middle of July last, he received an anonymous letter through the postoffice, which he destroyed. Its contents tended to show that she was jealous of the deceased, and made threats against her. He said, "The letter was not signed. Eight or ten days after I got the letter, I went to see prisoner and asked her if she wrote me a letter. She said she did. I asked her how she got it to the office. She said she hired a black boy to carry it. I asked what Julia Morgan had done to her, and why she wanted to shoot her," etc., etc.

The State introduced, next after the witness mentioned above, Jacob Cox, a colored boy of the age of twelve years, who, under objection of the defendant, was permitted by the court to testify: "I brought a letter to the office for prisoner. She told me not to let anybody see it but Mr. Hunter. She gave me one cent for bringing it, and gave me five cents after that. This was in July, about one month ago."

The defendant excepted to the admission of the testimony of (892) Cox concerning the letter.

On the cross-examination of Ann Emery, mother of deceased, a witness for the State, defendant's counsel offered to prove by the witness that, on the night of the homicide, in the presence of Giles Parker (above mentioned), other persons, and not the prisoner, were accused of the homicide, and that Parker said nothing, without previously asking Parker if this was so. The proposed testimony was excluded, and defendant excepted.

There was a verdict of "guilty" and judgment of death, from which the prisoner appealed to this Court.

Attorney-General for the State.
George Rountree for defendant.

MERRIMON, C. J., after stating the facts: The first exception is unfounded in any aspect of it. The letter referred to by the witness Parker was important and competent evidence tending to show unfriendly motive

and hostile purpose of the prisoner towards the deceased shortly—two or three weeks—before the homicide. The nature of the testimony of that witness, and the character of the cross-examination of him, manifestly showed a purpose to impeach him, and particularly to question the accuracy of what he said in respect to the letter. It was, therefore, competent for the State to prove pertinent facts and circumstances corroboratory of this witness as to what he said in respect to receiving the letter—how he got it, the time, and the person from whom he received it. He testified that he received an anonymous letter about the middle of July last through the postoffice; that eight or ten days afterwards he saw the prisoner, and she said, in response to his inquiry, that she had written him a letter about that time, and that she sent the same to the postoffice by a colored boy. The witness, a colored boy, testified that about the time mentioned—about a month before he was testifying—at the request of the prisoner, he took a letter for her to the postoffice, with

(893) the caution given him not to let any one see it except a person mentioned. This evidence, not very definite of itself, taken in connection with the testimony of the impeached witness, tended, perhaps not very strongly, to show that the latter witness had received a letter from the prisoner about the time mentioned by him, and that the prisoner sent the same through the postoffice. The evidence tended to strengthen what the impeached witness said, and to increase the probability that it was true. If the evidence of the colored boy had been more definite as to time, and he had testified that the letter was addressed to the witness Parker, or that the prisoner had said that it was for him, then it had been much stronger, but as it was, it had some relevancy and point taken in connection with other evidence, and it was the province of the jury to determine its weight and force. *S. v. Green,* 92 N. C., 779; *S. v. Whitfield, ib.,* 831, and the cases there cited; *S. v. Freeman,* 100 N. C., 429.

The second exception must be sustained. If the witness Parker was present on the night of the homicide at the place where it was perpetrated, and had knowledge of the facts and circumstances as to which he testified, going so strongly to show that the prisoner was the guilty party, and heard persons accuse others than the prisoner of the crime, and he said nothing to the contrary, that he did not, in the absence of explanation, was a fact going to his discredit and competent to go to the jury on the trial as tending to impeach his testimony; he was not bound, then, to deny the truth of such accusation, or to tell the facts of which he had knowledge pointing to the prisoner as the guilty party, but it was unusual and singular that he did not. Without some cause prompting him to silence on such an occasion, it is improbable that he would have heard innocent persons accused of so grave a crime and said nothing in

their favor, when he knew, or had very strong reasons to believe, (894) that they were innocent and the prisoner was not. If such accusations were so made, silence on his part—no cause for it appearing—fairly implied that he acquiesced in such accusations, and that he did not know of the guilt of the prisoner. Such silence was some evidence to show that he did not then know of her guilt, or of the facts tending so strongly to prove it, as he testified he did, and she was entitled to the benefit of it as going, in some degree, to impeach his testimony.

In *Radford v. Rice,* 19 N. C., 39, this Court said: "Certainly, also, it (the testimony) might be impeached by proof of declarations made by him at variance with the testimony. A declaration of another in his presence and hearing, and not contradicted, is proper to be submitted to the jury as evidence that he acquiesced in and admitted the truth of such declaration." This was afterwards reiterated in *S. v. McQueen,* 46 N. C., 177. See also *Guy v. Manuel,* 89 N. C., 83; *S. v. Suggs, ib.,* 530; *S. v. Burton,* 94 N. C., 947.

The evidence offered and rejected was not as to a matter collateral to that as to which the witness Parker had testified. It would tend to show that he had made—assented to—statements inconsistent with his testimony in respect to the very matter about which he was examined. In such case it was not necessary to inquire of the witness before offering the disparaging testimony whether he did not assent to the accusation of persons other than the prisoner at the time mentioned. *S. v. Patterson,* 24 N. C., 345. It was certainly relevant to, and bearing directly upon, the issue to show that the whole or any material part of the testimony of the witness was not true, and evidence directly tending to prove this was competent.

New trial.

Cited: S. v. Jacobs, ante, 876; *S. v. Brabham,* 108 N. C., 796; *Burnett v. R. R.,* 120 N. C., 518, 519.

(895)

STATE v. M. SUMMERFIELD.

Municipal Corporations—Police Power—Town Ordinance.

The General Assembly may confer upon a municipal corporation the authority to forbid the exposure for sale of produce or other merchandise on any sidewalk, or the space in front of a building used as a sidewalk, in such

manner as may incommode passengers, notwithstanding the municipality may not have acquired an easement or title to the soil in the area within which the prohibition is intended to operate.

CRIMINAL ACTION, instituted by a warrant returnable before the court of the mayor of the town of Durham, and carried by appeal to the Superior Court of DURHAM, where it was tried at the October Term, 1890, before *MacRae, J.*

The special verdict of the jury and the ruling and judgment of the court were as follows:

The jury for their verdict find—

1. The town of Durham is, and was at the time of the commission of the alleged offense hereinafter specified, a municipal corporation, chartered under Laws 1868-69 and 1874-75, ch. 110, as amended by Laws 1888-89. That among other powers given the commissioners of said town by its said charter is the following: "Sec. 33. That the commissioners, when convened, shall have power to make and provide for the execution thereof, such ordinances, by-laws and regulations for the better government of the town as they may deem necessary: *Provided,* the same be allowed by the provisions of the act and consistent with the law of the land."

2. That the commissioners of said town, duly convened in meeting prior to 19 September, 1890, made and enacted the following ordinance or by-law, viz.: "Section 9, chapter 2. No produce, merchandise, cooked provisions, poultry, fruits, vegetables or other commodity shall (896) be kept exposed for sale in or upon any sidewalk or the space in front of building used as sidewalk, alley, gutter or street of the town, nor shall any stand be placed thereon for such purpose. Nor shall any such articles be exposed as samples on any of the alleys, sidewalk or the space in front of building used as sidewalk or street in such manner as to be in the way of persons traveling the same. Any person violating this provision shall, upon conviction, be fined five dollars for each offense."

3. That the sidewalk on Main street in said town is ten feet wide; that the distance from the outer curbing of said sidewalk to the buildings is more than ten feet; that the whole of said space from the outer curbing of the said sidewalk to the building is more than ten feet; that the whole of said space from the outer curbing to the building has been paved by order of the town authorities, but at the expense of the owner of the property, B. L. Duke; that said space used has never been condemned for the public use, nor held adversely by the town, but used as a sidewalk for a number of years, but not for twenty years; B. L. Duke leased said property to the defendant.

4. That the defendant's place of business is on Main street in said town.

5. That on 19 September, 1890, the defendant exposed merchandise, to wit, clothing, for sale and as samples on the said space not included in the said ten feet from the outer curbing, so as to be in the way of persons traveling on said space not included in the said ten feet.

Upon the said facts if the court be of opinion that the defendant is guilty, the jury find her guilty, but if the court be of the opinion that the defendant is not guilty, the jury find her not guilty.

The court being of opinion that the defendant was guilty, a verdict was rendered in accordance with that opinion and the defendant was adjudged to pay a fine of five dollars and costs. From which the defendant appealed. (897)

Attorney-General and W. W. Fuller for the State.
R. B. Boone for defendant.

AVERY, J., after stating the facts: Under the general police power, the Legislature may delegate to a municipality the authority to pass ordinances for the preservation of the health or the promotion of the comfort, convenience, good order and general welfare of its citizens, provided always that they are not in conflict with the provisions of the Federal and State Constitutions, framed for the protection of the citizens in the enjoyment of equal rights, privileges and immunities. *S. v. Moore,* 104 N. C., 714; *S. v. Pendergrass,* 106 N. C., 664.

Counsel for defendant rested their case here upon the ground that in passing the ordinance under which the indictment was framed, the town of Durham assumed control of or appropriated the land between the sidewalk and the store which belonged to defendant's lessor, Duke, and passed under her dominion by virtue of her lease, without making compensation for it. It must be admitted that the corporation has offered no testimony tending to prove an easement in the space two feet wide immediately in front of the building. While the street and sidewalk, for the purposes of this action, are considered as either condemned or dedicated to public use, it does not appear that the municipal authorities have exercised any control over the space mentioned except to put paving upon it, and the evidence is that the street was not paved twenty years before the mayor's warrant was issued. It is manifest, therefore, that the absolute ownership of the strip of land was still in the defendant's lessor, and the right to use it, subject only to such reasonable restraint as the Legislature or the town in the exercise of its delegated police powers might impose, passed to the lessee. *S. v. Purify,* (898) 86 N. C., 681; *Stewart v. Frink,* 94 N. C., 487. So that the only question presented is, whether the municipal authorities had the power to pass the ordinance for the violation of which the defendant was tried.

Under the charter of the town the commissioners, it seems, had the power to pass any ordinance in the nature of a police regulation that was "consistent with the law of the land," or, in other words, was not in conflict with the Federal or State Constitutions and was not prohibited by the express provisions of the charter itself. We infer from the statement that the municipal authorities are not expressly prohibited from passing the by-law by the charter, and, therefore, the discussion must be confined to the single question whether the Legislature could empower the commissioners to pass it. The ordinance applies to all classes of persons and is public in its character, and, therefore, if it is not calculated to restrain, but only to impose reasonable regulations upon the conduct of trade and for a legitimate purpose, the commissioners had authority to enact it. *S. v. Moore, supra; S. v. Pendergrass, supra.*

The courts have been disposed to construe much more liberally grants to municipalities of authority to exercise a limited control over the markets by prescribing reasonable regulations either for the protection of the health or the comfort or convenience of its people, than laws that purport to invest such corporations with more extraordinary powers. 1 Dillon Mun. Corp., sec. 380.

The ordinance prohibits all dealers from exposing, either on the sidewalk or other space in front of a building "used as a sidewalk, alley, gutter or street of the town, any produce, merchandise, cooked provisions, poultry, fruit, vegetables or other commodity."

The General Assembly having delegated to the corporation general police power, restricted only by any inhibition in the organic law or in the express provisions of the charter itself, we hold that the com-
(899) missioners were authorized to forbid by general ordinance the exposure of any of the articles named on the land used as a passway in front of the stores, as well as upon the sidewalks, in such manner as to be in the way of persons passing over such open space. It is admitted that the defendant exposed clothing for sale between the building occupied by her and the sidewalk. While the corporation could not claim that the land on which the clothing was placed constituted a part of the street, and while Duke, the owner, would have the unquestionable right at least at any time, before the expiration of twenty years from the laying down of the pavement over it, to extend his building so as to cover it, so long as the lessor and lessee leave it open for people to pass over it to the store the commissioners, in the exercise of their powers, may prohibit them from obstructing it by the merchandise. The fact that produce, merchandise, meats, etc., exposed in front of stores might, in the opinion of the commissioners, based on reasonable grounds, endanger the health of the citizens of the town or incommode them in passing by a way left open for them by the owner, or might frighten

horses attached to vehicles driven along the streets, would be sufficient to warrant the enactment under the general authority to prohibit nuisances, protect health and prevent individuals from so using their own property as to subject others to serious and unnecessary inconvenience or danger. *S. v. Stovall,* 103 N. C., 416; Cool. Const. Lim., star p. 58; *Intendent v. Sorrell,* 46 N. C., 49.

Affirmed.

Cited: S. v. Tenant, 110 N. C., 612; *S. v. Holloman,* 139 N. C., 646; *S. v. Haynie,* 169 N. C., 283; *S. v. Bass,* 171 N. C., 782.

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(900)

STATE v. E. G. NEWCOMB.

Liquor Selling—"Retailing."

1. The sale of liquors in quantities not less than a quart does not constitute the seller a "retailer," under the laws of this State.

2. The Commissioners of Guilford County have the authority to grant licenses to sell liquors in the city of Greensboro by measure, not less than a quart, without the permission of the board of aldermen of that city.

3. The present Revenue Act does not dispense with the necessity on the part of those who desire to *retail* liquors of obtaining a license. It simply, in that respect, imposes the same tax upon selling by the quart, and up to five gallons, as is imposed on the seller by measure less than a quart.

APPEAL from *MacRae, J.,* at August Term, 1890, of GUILFORD.

The indictment charges the defendant with having unlawfully retailed and sold to a person specified "spirituous liquor by a measure less than five gallons, to wit, by the quart, the said E. C. Newcomb not having then and there a license to sell and retail spirituous liquors by the measure last aforesaid," etc. The defendant pleaded not guilty.

The jury found, by their special verdict, that the defendant did, in August of the present year, sell a quart of liquor to the person specified; that at that time he had a license dated 7 July, 1890, authorizing him to carry on the business of *"liquor dealer,* for selling in quantities of one quart up to five gallons, at his place of business at Odell Building, South Elm Street, for the period commencing 1 July, 1890, and ending 1 January, 1891." This license was signed by the sheriff of said county and countersigned by the register of deeds thereof, and was in all re-

(901) spects sufficient in form. The place thus specified is situated within the city of Greensboro. Upon the special verdict the court directed a verdict of not guilty to be entered, and gave judgment thereupon in favor of the defendant. The Solicitor for the State excepted, and appealed to this Court, insisting that the license was void because granted to sell spirituous liquors in said city without permission first granted by the board of aldermen thereof, as prescribed and required (as contended) by the charter of that city (Pr. Laws 1889, ch. 219, sec. 75).

Attorney-General for the State.
James T. Morehead for defendant.

MERRIMON, C. J., after stating the facts: It is conceded for the State that if the license put in evidence on the trial by the defendant was valid, then he was not guilty. We are of opinion that it was in all respects valid and authorized by the statute (Laws 1889, ch. 216, sec. 32), which, among other things, provides that "every person, company or firm for selling spirituous . . . liquors . . . shall pay a license tax semiannually in advance, on the first day of January and July, as follows: First, for selling in quantities of *five gallons or less* for each six months, to be collected by the sheriff," etc. The same section authorizes the county commissioners, as prescribed, to "issue an order to the sheriff to grant a license so to sell," "except in territory where the sale of liquors is prohibited by law."

The charter of the city of Greensboro (the statute Pr. Laws 1889, ch. 219, sec. 75) provides "that it shall not be lawful for the commissioners of Guilford County to grant any license to *retail* spirituous liquors within the limits of the city without permission first obtained from the board of aldermen in being at the time of the application to the county commissioners, and if any license shall be granted without permission in writing, attested by the clerk of the board, and exhibited to the county commissioners, and filed with the clerk of the board of county commissioners, the same shall be utterly void," etc. It (902) is contended for the State that selling such liquor by *the quart* is *retailing* the same within the meaning of the statutory provision just recited, and, therefore, the license relied upon by the defendant was void, inasmuch as it was granted by order of the county commissioners of Guilford without the permission of the board of aldermen of the city of Greensboro.

We think this is a clear misapprehension of what is meant by retailing spirituous liquors in the above and other statutes.

The statute (Code, sec. 1076) provides that "if any person shall retail spirituous liquors by the small measure, or any other manner than is prescribed by law, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court." The statute (Code, sec. 3701) prescribing how a license to retail spirituous liquors shall be granted, provides that "every person desiring to sell spirituous or malt liquors, wines, cordials or bitters, in quantities *less than a quart,* shall, before engaging in said sale, file his petition, stating the place and house in which he proposes to retail, and obtain an order to the sheriff from the board of county commissioners of the county to grant him a license to retail at that place, which order they shall grant to all properly qualified applicants," etc. This is the statute, and the only one that prescribes what constitutes retailing by the small measure as contemplated by the statute (Code, sec. 1076), and it is the license to thus retail that the charter of the city of Greensboro forbids the county commissioners of the county of Guilford to direct to be issued without the permission of the board of aldermen of that city granted in the way prescribed. *Muller v. Comrs.,* 89 N. C., 171; *S. v. Brittain, ib.,* 576. The statute (Code, sec. 3701) has not been repealed or modified. The several revenue laws passed by the Legislature since that statute was enacted repeal preceding similar laws, including chapter 55 of The Code, only so far as the preceding ones referred to are incon- (903) sistent with subsequent ones. It will be found that none of subsequent date repeal, in terms or by implication, the statutory provision last above recited. License to retail spirituous liquors must be granted now as heretofore.

The statute (Laws 1889, ch. 216, sec. 32), which imposes a tax of $50 for the license to sell spirituous liquors for six months in quantities of five gallons *and less,* does not affect the statute above cited, defining and regulating the sale of such liquors by the small measure; it only has the effect to make the tax for the license the same in amount for retailing as for selling by the quart and not exceeding five gallons. Hence, it is provided in the section last cited that "no license taken out under this section shall authorize any sale or any greater or less quantity than specified in said license."

The license in question did not purport to grant the defendant the right to *retail* spirituous liquors in the city of Greensboro, nor did he so retail, so far as appears from the record. The county commissioners had authority to direct that a license be granted to him to sell spirituous liquors, by a measure not less than a quart nor greater than five gallons, in that city, and this without permission of its board of

aldermen. They did not have authority to direct a license to be granted to him to *retail* such liquors there without such permission, nor did they do so. The license in question is, therefore, valid.

Affirmed.

Cited: S. v. Edwards, 113 N. C., 654.

(904)

STATE v. M. W. MARTIN.

Injury to Personal Property—Indictment.

An indictment for injury to personal property, under section 1082 of The Code, amended by chapter 53, Laws 1885, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been *unlawfully* perpetrated.

APPEAL from *Womack, J.,* at May Term, 1890, of CHATHAM.

The indictment charges that the defendant "wantonly and willfully did injure five yards of cloth of the goods and chattels," etc. Upon the plea of "not guilty," there was a verdict of "guilty." The defendant moved in arrest of judgment, assigning as grounds of the motion that the indictment did not charge that the act was done "unlawfully." The motion was denied, and the court gave judgment against the defendant. He excepted and appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J., after stating the facts: The statute (Code, sec. 1082, as amended by Laws 1885, ch. 53) prescribes that "If any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court." The indictment charges, in the very words of the statute, that the act was done "wantonly and willfully." It thus charges the essential and leading quality of the criminal offense created by the statute, and these terms sufficiently imply that the act was done unlawfully. Lawful acts are not done wantonly and willfully.

No error.

(905)

STATE v. JAMES FLEMING.

Burglary—Indictment—Statute.

1. Under chapter 434, Laws 1889, creating two degrees of burglary, to support a charge of burglary in the first degree it is essential that the indictment should contain an averment, and, upon the trial, the proof should establish the fact that the house was, at the time of the commission of the alleged crime, in the actual occupation of some person.

2. But one charged with burglary in an indictment drawn under the common law may be convicted of burglary in the second degree.

3. And one charged with burglary in the first degree may be convicted of the second degree if the proofs, upon the trial, are sufficient to establish that grade of the crime.

4. One charged with burglary may be convicted of larceny, or of the crime designated in section 996 of The Code.

5. Upon the trial of an indictment for burglary, the proof tended to show that the felonious entry was made either through a window, the blinds of which were closed, but not fastened, or through a door which had been bolted, and the court charged the jury that, "In order to constitute a breaking . . . it is not necessary that the inmates of the house should have resorted to locks and bolts. If the blinds and door were held in their position by their own weight, and, in that position, relied upon by the inmates as a security against intrusion, it is sufficient fastening": *Held*, to be correct.

INDICTMENT for burglary, tried before *Womack, J.*, at September Term, 1890, of PITT.

Miss Denby James, a daughter of the prosecutor, was sworn and examined on the part of the State, and was the only witness who testified as to any facts with reference to the closing or fastening or condition of the doors, windows, etc., of the dwelling-house specified in the indictment, on the night of the alleged burglary.

Her evidence on this point was as follows:

"Some one opened the blinds and went in mother's room where (906) the children were, and then came through the partition door to my room. The window was up. It was hot weather. The blinds were fastened with a catch on the inside. I had shut the blinds myself. The person who entered through the window made his escape by passing out of the same window, and as he went out I heard a noise as of some one sliding out of the window upon the ground. Very shortly thereafter I heard a noise that sounded like the click of the door of the kitchen, which was under the same roof as my bedroom and opening outside, and I heard a noise as of some one walking in the kitchen. I had fastened

the kitchen door by bolting it. The intruder must have come out of the door by which he entered. . . . On cross-examination, the witness testified that in shutting the blinds that night she did not examine to see whether the blinds were fastened or not, and that she could not say and did not know whether they were fastened or not when she closed them."

There was no other evidence as to whether the blinds in shutting were held by their own weight together or against any object.

The judge charged the jury as to the breaking as follows:

"In order to constitute a breaking in this case, either the window blind must have been fastened or else the door to the dining-room and cook-room opening to the outside must have been fastened. To constitute a fastening in either instance it is not necessary that the inmates of the house should have resorted to locks and bolts. If held in their position (having been shut by the witness, Denby James), by their own weight and in that position relied on by the inmates as a security against intrusion, it is sufficient. It would not be sufficient breaking if the blinds, or door were ajar however slightly, and the prisoner (907) simply increased the size of the opening and through it entered.

The jury must be fully satisfied from the evidence in the case that either the window blind or the dining-room door was so shut, fastened and relied upon as a security against intrusion at the time of the entry into the house; for burglary cannot be committed by the entering through an open door or window."

To which charge the prisoner excepted. The judge also charged the jury that on the bill of indictment upon which the prisoner was tried he could not be found guilty of burglary in the first degree, but the jury could render either of the three following verdicts, viz.: guilty of burglary in the second degree; guilty of larceny, or not guilty; to which charge the prisoner excepted. There was a verdict of guilty of burglary in the second degree. Rule for new trial for misdirection by the court as set forth above. Rule discharged. Motion in arrest of judgment for defect in the bill of indictment, in that it fails to charge the particular fact constituting burglary in either of the two degrees as created and defined by chapter 434, Laws 1889. Motion overruled. Judgment, and prisoner appealed.

Attorney-General for the State.
Nixon & Galloway (by brief) for defendant.

CLARK, J. The charge of the court as to what would be a sufficient "breaking" is fully sustained by the precedents. If a door or window is firmly closed, it is not necessary that it should be bolted or barred. *S. v. Boon,* 35 N. C., 244; Whart. Cr. Law, sec. 759 and 767, and cases

cited. Take the case of raising a window not fastened, although there was a hasp which could have been fastened (*Reg. v. Hyams,* 7 Car. & P., 441, and *S. v. Carpenter,* 1 Houston (C. C.), 367); or where the prisoner, by raising or pulling down the sash, kept in its place merely by pulleyweight (*Rex v. Haines,* Russ & Ryan, 451); or by pushing open a closed door, not latched (*S. v. Reid,* 20 Iowa, 413); or closed but not locked (*Hild v. State,* 67 Ala., 39); or firmly closed, (908) though there was no fastening of any kind on the door (*Finch v. Commonwealth,* 14 Grat., 643); or (*Ryan v. Bird,* 9 Car. & P.) where the glass of a window had been cut, but every portion of the glass remained in its place until the prisoner pushed it in and so entered; or where a window was on hinges, with nails behind it as wedges, but which, nevertheless, would open by pushing, and was so opened by the prisoner; in all of which cases the "breaking" was held to be sufficient. If the entrance was either by pulling open the blinds which had been firmly closed, whether fastened by the catch or not, or through the door, which had been bolted, the above decisions apply.

The indictment charged the offense as in the old form, without alleging that the dwelling-house was in the actual occupation of any one at the time of the commission of the crime. This was not required at common law, nor under the Code, sec. 995, but now, under the provisions of chapter 434, Laws 1889, the omission of that averment makes the indictment good only as an indictment for burglary in the second degree, and for that offense the defendant was convicted. To constitute a sufficient indictment for burglary in the second degree it is not required to use the negative averment that the dwelling-house was not actually occupied at the time of the commission of the crime. Burglary being sufficiently charged, as at common law, the omission of the additional averment of actual occupation required by the act of 1889 to constitute the capital felony of burglary in the first degree leaves simply the indictment good for the other degree of burglary, in which that averment is not essential. It is not necessary in an indictment for manslaughter to negative the allegation of malice aforethought, though its absence is part of the settled definition of the offense.

We do not understand the provision of the statute that, on an (909) indictment for burglary in the first degree, the jury can return a verdict of burglary in the second degree, "if they deem it proper so to do," to make such verdict independent of all evidence. The jury are sworn to find the truth of the charge, and the statute does not give them a discretion against the obligation of their oaths. The meaning of this provision evidently is to empower the jury to return a verdict of guilty of burglary in the second degree upon a trial for burglary in the first

degree, if they deem it proper so to do from the evidence, and to be the truth of the matter. This is in analogy to a verdict of manslaughter which may be rendered on an indictment for murder.

If the court had erred in charging that the defendant could not be convicted of burglary in the first degree, we do not see how the defendant could except thereto. The charge that the jury, if satisfied of the larceny but not of the burglary, could convict of the larceny, was correct. *S. v. Grisham,* 2 N. C., 13. As, however, the conviction was not of larceny, but of the greater offense, the defendant, in no view of the case, was prejudiced. Indeed, the court might have told them further that they might, if the evidence justified it, find the defendant guilty of breaking into a dwelling-house not burglariously, under The Code, sec. 996 (an offense which is punishable to the same extent and in the same measure as larceny), but there was no request so to charge, and the omission to charge it is not error. *S. v. Bailey,* 100 N. C., 528; *McKinnon v. Morrison,* 104 N. C., 354; *Taylor v. Plummer,* 105 N. C., 56.

The objection taken in this Court that the judgment should be arrested because it is not charged in the indictment that the offense was committed since the act of 1889, is disposed of by the opinion in *S. v. Halford,* 104 N. C., 874, in which a similar point was raised, and in which *Merrimon, C. J.,* points out the inapplicability of the case
(910) of *S. v. Wise,* 66 N. C., 120, which is again relied on in the argument of the case. Since here the charge and proof are both of an offense committed subsequent to the act changing the punishment, *S. v. Wise* cannot apply. Were this not true, whenever the punishment of any offense is changed by statute it would be necessary that all indictments therefor for all time (until the punishment is again changed) should contain an averment negativing the commission of the offense prior to the passage of the act. Such cannot be required. Should the proof in any case show, that, in fact, the crime charged as committed subsequent, was, in fact, committed prior, to the amendatory act, in the absence of any saving clause therein, the principle laid down in *S. v. Wise* would apply.

No error.

Cited: Emry v. R. R., 109 N. C., 602; *S. v. McKnight,* 111 N. C., 690, 692; *S. v. Alston,* 113 N. C., 667; *S. v. Gadberry,* 117 N. C., 822, 831; *S. v. Covington, ib.,* 864; *S. v. Locklear,* 118 N. C., 1159; *S. v. Johnston,* 119 N. C., 896; *S. v. Freeman,* 122 N. C., 1017; *S. v. Newcomb,* 126 N. C., 1107; *S. v. Spear,* 164 N. C., 457.

STATE v. McG. MANNING.

Selling Mortgaged Property—Intent—Evidence—The Code, Section 1089.

Where the disposition by the mortgagor of any property embraced in a chattel mortgage necessarily results in hindering, delaying or defrauding the mortgagee, it will be presumed that the intent to produce such result existed, and an instruction to the jury that every one is conclusively presumed to intend the consequences of his act would be correct; but where such result would not naturally or necessarily follow from the act alleged—*e. g.*, that sufficient property remained, subject to the mortgagee, to pay the debt—the intent with which the disposition was made is a question of fact to be passed upon by the jury, under section 1089 of The Code.

CRIMINAL ACTION, under section 1089 of The Code, tried at (911) June Term, 1890, of PITT, by *Boykin, J.*

The facts are stated in the opinion.

Attorney-General for the State.
James E. Moore for defendant.

SHEPHERD, J. The defendant mortgaged a mule and other property to one Keel, and disposed of the mule while the mortgage was in force. There was evidence tending to show that at the time of the disposition of the mule the other property included in the mortgage was sufficient to pay the mortgage debt.

The defendant asked the court to charge the jury that the "mere selling or trading of the mule did not make (him) guilty"; that "they must find that he did it with intent to hinder, delay or defraud the right of the mortgagee."

His Honor instructed the jury that while it was true that the act must be accomplished, with the intent as charged, the law presumed such intent if the act was "willfully and knowingly done," and "that everyone was conclusively presumed (to have) intended the consequences of his acts."

This is undoubtedly correct as a general proposition, but its unqualified application in the present case was, we think erroneous, as his Honor assumed to be true a very important fact, which should, under proper instructions, have been submitted to the jury. This was whether the selling of the mule would have naturally or necessarily resulted in the consequences mentioned, to wit, the hindering, delaying or defrauding the rights of the mortgagee.

The statute (Code, sec. 1089), under which the indictment is drawn, is essentially different from those which make the simple doing of a forbidden act unlawful, as in the cases of removal or disposal of crops before the liens of the landlord are satisfied, the sale of spirituous liquor without license and the like. Under this statute the forbidden act must, in order to be indictable, be accomplished with a specific intent, (912) and the courts cannot disregard this clearly expressed purpose of the Legislature.

Now it is very plain, as stated by his Honor, that if an act must necessarily produce a certain result, it must be presumed that such a result was intended, but whether such a result necessarily follows an act must, as we have said, be first found by the jury before the presumption can arise.

If the property included in the mortgage (other than the mule), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. Suppose $500 worth of property is mortgaged to secure a debt of $10; can it with reason be said that a disposition of a small part of the property would necessarily hinder, delay or defraud the mortgagee? This would be applying a much harsher rule of construction to a penal statute (which, of course, must be construed strictly) than is recognized in the trial of civil cases for the fraudulent disposition of property, and we cannot believe that such was the intention of the Legislature.

This view also finds support in the language of the latter part of the statute in which it is provided that upon the failure of an officer, after diligent search, to find the property, or the failure to produce it upon the demand of the mortgagee, there should be only a *prima facie* case as to the disposition and intent.

To further illustrate, take for instance *S. v. Barbee,* 92 N. C., 820, in which the defendant was indicted for shooting at a railroad train with intent to injure the car, etc. If the shooting had been done from a point a mile distant from the train, the court would have erred in telling the jury that the law presumed the intent from the act of shooting, but it was properly left to the jury to say whether the act was done in such close proximity to the train as to "naturally and necessarily result" in such injury, in which case the law would have presumed that the (913) defendant intended the consequences of his act.

His Honor, in the present case, after stating these general propositions of law should have directed the jury to determine what were the necessary consequences of the disposition of the mule, and in doing this that they should consider the amount of the debt, the value and availability of the undisposed property and its character, and if they

believed that the disposition of the mule would naturally or necessarily result in the hindering, delaying or defrauding of the debt, the law presumed that the defendant intended such a result.

What we have said has reference only to the presumption of intent; for, no matter how much property may be reserved, if the actual criminal intent be proved, the defendant would be guilty.

New trial.

Cited: S. v. Holmes, 120 N. C., 575.

STATE v. JOHN A. BARKER.

Constitution—Grand Jury.

1. A grand jury had a well-understood meaning at the adoption of our Declaration of Rights, and one of its most essential features was that the concurrence of twelve of its members was necessary to the finding of a presentment or indictment.

2. An act of the Legislature making the concurrence of nine sufficient is not authorized by the Constitution of North Carolina.

INDICTMENT for perjury, tried before *Meares, J.,* at September Term, 1890, of the Criminal Court of NEW HANOVER.

The defendant pleaded in abatement to the indictment, and it (914) was admitted by the State, that when the bill was found there were only eleven members of the grand jury present, the twelfth grand juror having been excused by the foreman on account of his being a brother-in-law of the prosecutrix. Under the act of Assembly establishing the said court, the number of the grand jury is fixed at twelve, and it is provided that the concurrence of nine of that body shall be sufficient to the finding of an indictment. Laws 1885, chap. 63.

His Honor overruled the plea, and the defendant excepted. The trial proceeded, and there was a verdict of "guilty."

Other exceptions were taken to the rulings of the court in the course of the trial, but, as they were not passed upon in the opinion, it is unnecessary that they should be repeated.

Attorney-General for the State.
S. C. Weill for defendant.

SHEPHERD, J., after stating the facts: "No freeman shall be taken or imprisoned or disseized or outlawed or banished or in any ways destroyed, nor will we pass upon him or commit him to prison unless by the legal judgment of his peers or unless by the law of the land." Such is the language of King John in *Magna Carta,* which instrument was called by *Sir Edward Coke* "the charter of the liberties of the Kingdom upon great reason because, *liberos facit,* it makes the people free."

"To have produced it (says *Sir James MacIntosh*), to have preserved it, to have matured it, constituted the immortal claims of England upon the esteem of mankind."

The particular provision which we have quoted, or its substance, is to be found in the Federal and various State Constitutions, and the great principles which it asserts are no less cherished in America than in the mother country. It is true, that "the law of the land," in
(915) respect to the trial of persons accused of crime, is not specifically defined, but it was so well understood in England in reference to the necessity of an indictment in capital felonies, that *Erskine,* in his speech in 1784 in defense of the Dean of St. Asaph, said, in the presence of the judges of the king's bench, "If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him even upon the records of the Supreme Criminal Court, but could only commit him for safe custody, which is equally competent to every justice of the peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him by throwing out the bill with the names of all your lordships as witnesses on the back of it." So jealous of their liberties, however, were our North Carolina ancestors that they were not content with adopting the foregoing provision, but they were careful to further insert in their Declaration of Rights a particular definition of the general words, and also to extend the privileges conferred to all "criminal charges" whatever.

This they did by declaring "That no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment." In thus putting the construction of the general language beyond all controversy they wrought wisely and well, as the Supreme Court of the United States in *Hurtado v. California,* 110 U. S., 516, has recently held that the seemingly equivalent words, "due process of law," in the 14th amendment of the Constitution of the United States, did not deprive the State of California of the right to provide that a man could be put upon trial for his life upon "information" only. The declaration mentioned has always been a part of the fundamental law of North Carolina, and is to be found in our present Constitution in its full vigor and unaltered in any particular, except as to petty offenses, where

the punishment cannot exceed a fine of $50 or a term of imprison- (916)
ment for thirty days; and even in these cases there is a right of appeal to the Superior Court, where they may be tried *de novo.*

It is conceded that the words "presentment and indictment" imply the existence of a grand jury, and that the provision referred to should be read as if those words had been included. This being undoubtedly true, we are now to inquire whether, under the Constitution, a bill of indictment can be found without the concurrence of at least twelve of the grand jurors.

Judge Cooley, in his work on Constitutional Limitations (59), says that "Constitutions are to be construed in the light of the common law and of the fact that its rules are still in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of common law rules, but only that for its definitions we are to draw upon that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of of a well understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." We think it can hardly be questioned that, when our first Constitution was adopted in 1776, the mode of prosecution upon the indictment of a grand jury was "a well understood system" among all English-speaking people, and especially in respect to the number requisite to the finding of a bill. Indeed, there seems not a dissenting voice among the authorities that concurrence of twelve of the grand jury is necessary, although it has frequently been held that that body may consist of any number from twelve to twenty-three. Originally the body now called a grand jury consisted of only twelve persons, and they were chosen for each hundred (Bracton, Book 3, p. 116), (917)
and an early Saxon law in Ethelred's reign (A. D. 978 to 1016) directed "that twelve thanes, with the sheriff at their head, should go and, upon their oaths, inquire into all offenses." Bennett (in his note to *Rex v. Marsh,* 33 E. C. L., 72) says that "in early times each jury presented only for its own hundred, and, when consisting of only twelve, *entire unanimity* was necessary to their action. But afterwards, in 42 Edward III (A. D. 1368), the sheriff was directed to return, in addition to the usual number of twelve, a panel of knights, which formed what was called *'le grande inquest.'* . . . .Their duty was to present for the whole county instead of simply for the hundred, twelve being still required for a finding, in accordance with immemorial antiquity. . . . It never, however, reached higher than twenty-three, so that the original twelve might always remain a majority of

the whole body, and be able to present on the same finding of the same number, as of ancient times. . . . That twelve continued to be the *minimum number* of a grand jury is equally clear, for as early as 14 Elizabeth, in *Clyncaird's case* (Coke Eliz., 654), it was distinctly held that the grand jury could not consist of less than twelve, and that the indictment should show that it was upon the oath of twelve men." See, also, *S. v. Symonds,* 36 Me., 128. The discriminating annotator is amply sustained by other authorities. Thus we find *Sir Edward Coke* (Coke Litt., 1266) defining an indictment to be "an accusation found by an inquest of twelve or more upon their oath," and to the same effect is Comyn's Dig. (indictment A) and 4 Hawks. P. C. (1 Book, 2 ch., 25). *Sir Matthew Hale* (2 P. C., 161) says that "if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be," and *Lord Denman* (in *Rex v. Marsh, supra*) quotes with approval the words of the same author that "it may be the presentment was by a less number than twelve, in which case it is not good."

(918) *Sir William Blackstone* (4 Com., 306) is equally explicit. He says: "But to find a bill, there must at least twelve of the jury agree, for so tender is the law of England of the lives of the subjects that no man can be committed at the suit of the king of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors, that is, by twelve, at least, of the grand jury in the first place assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree." See, also, 1 Whart. Crim. Law, sec. 465. In addition to the foregoing authorities, we have the language of *Nash, C. J.,* in *S. v. Moss,* 47 N. C., 69, that "every free person charged with a criminal offense has a right to the decision of twenty-four of his fellow citizens upon the question of his guilt; first, by a grand jury, and secondly, by a petit jury, of good and lawful men." To the same effect are the words of *Judge Gaston* in *S. v. Davis,* 24 N. C., 158. He says that "there must be twelve at least, because the concurrence of that number was *absolutely necessary* to put the defendant on his trial. *King v. Inhabitants of Southampton,* 2 Black., 718; 2 Burr, 1088; 1 Chit. Crown Law, 705."

In the face of all these authorities, it is too plain for argument that whenever it was requisite that an indictment should be found, the concurrence of twelve grand jurors was absolutely necessary. In some of the States the constitutions provide for a less number, and in a few others it is done without any constitutional warrant. Whether this is necessary, says Thompson and Merriam on Juries, sec. 654, "presents an interesting question which seems never to have been satisfactorily determined."

There can be no doubt that the mode of procuring and the quali- (919) fication of grand jurors may be changed from time to time, but we regard the concurrence of twelve in the finding of a presentment or indictment as a fundamental principle. It is urged that if the Legislature can change the qualification of grand jurors, it is also competent for it to change the number necessary to the finding of a bill. It is sufficient to say, in answer to this argument, that such changes as to the qualification of petit jurors are also made from time to time, but no one, in this State at least, has ever had the hardihood to contend that a smaller number than twelve can make a constitutional petit jury. If the concurrence of nine is sufficient, why, indeed, should not that of a lesser number—say two or three—be valid, and thus, step by step, what has always been considered as one of the greatest safeguards of the freedom of the citizen be broken down and swept away. We do not concur with those authors who say that, in a popular government, the grand jury is not as important as when used to protect the citizens from the tyranny and oppression of kings. Experience has shown that, even in popular governments, the rights and privileges of the citizen may be ruthlessly invaded, and we are sure that our people are not prepared to adopt a precedent which, followed by others of a like character, will gradually pave the way to a total abrogation of one of the "greatest bulwarks of liberty."

It may be that, in the interest of convenience and economy in the trial of offenses of a low grade, the accusation by presentment or indictment should be dispensed with, and this has already been done, as we have seen, in respect to a certain class of offenses. Const., Art. IV, sec. 27. Whether it is wise to make any further exceptions is a question which is addressed to the people, but while the Constitution continues to require the intervention of a grand jury we must, in the absence of any provision to the contrary, uphold the system in its essential features as it existed and was understood by the authors of our Declaration of Rights.

That the concurrence of twelve is fundamental and cannot be (920) altered by the Legislature, we have the language of this Court in *S. v. Davis, supra. Judge Gaston,* after saying that the concurrence of twelve was absolutely necessary, proceeds as follows: "These great principles of the common law were brought over to this country by our ancestors, and, with an extension of their application to other offenses, were, by the Constitution, made a part of our *fundamental law, and cannot be violated either by the judiciary or the Legislature.*"

In *S. v. Moss, supra,* it is said by *Nash, C. J.,* that "The power of the judiciary to adjudge an act of the General Assembly unconstitutional is too firmly established to be questioned"; and *Cooley* (see Const. Lim.,

46) states "that to do this is so plain, and the duty is so generally, and we may almost say universally, conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject." Indeed, the judiciary of North Carolina were among the first to exercise this right (Dr. Battle's address on Supreme Court, Appendix 103 N. C.); and without such a check, says Daniel Webster (Works, vol. 3, p. 29), "no certain limitation could exist on the exercise of legislative power." Courts, however, should exercise this power with *great care,* for "every act of the Legislature must be presumed to be constitutional and within its authority, and is to be declared unconstitutional only when no doubt exists." *S. v. Moss, supra.*

Entertaining no doubt that the Constitution contemplated a grand jury as it substantially existed at common law, and that one of its most essential features was that twelve, at least, of its members should concur in the finding of the bill, we must hold that so much of the act in question that dispenses with the concurrence of such a number is void.

The plea in abatement should have been allowed.

Error.

Cited: S. v. Perry, 122 N. C., 1022; *S. v. Lewis,* 142 N. C., 636; *S. v. Brittain,* 143 N. C., 669; *S. v. Wood,* 175 N. C., 816.

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(921)

STATE v. A. J. PRITCHARD.

Bribery— Extortion— Evidence— Intent— Indictment— Officer—The Code, Section 1090.

1. Bribery consists in the offering or receiving of any unlawful present or reward to or by any person in order to influence his conduct in the exercise of any public duty.

2. Extortion consists in the unlawful taking of money or other thing of value by an officer, under color of his office, when there is nothing due, or more than is due, or before it is due.

3. In indictments for both bribery and extortion, it is essential to allege, upon the trial, to prove, that the act charged was done with a willful and corrupt intent.

4. It is also necessary, in an indictment for extortion, to charge, and, upon the trial, to prove, that the unlawful fees were demanded "under color of office."

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5. The statute (Code, sec. 1090) creates two offenses. In an indictment for either, it is necessary to allege, and, on the trial, to establish, the fact that the accused officer was required to take an oath of office before entering upon his duties; and, for a violation of the latter clause, it is necessary to aver in the indictment, and prove upon the trial, a corrupt intent.

APPEAL from *Armfield, J.*, at Spring Term, 1890, of BERTIE.

The defendant pleaded not guilty to the indictment, which was as follows:

STATE OF NORTH CAROLINA—Bertie County.

Superior Court, Fall Term, 1889.

The jurors for the State, upon their oath, present:

That on 28 October, 1889, one A. J. Pritchard, late of the county of Bertie, being then a justice of the peace in and for the aforesaid county, duly and legally appointed and authorized to discharge the duties of that office, did, on the said 28 October, 1889, at and in said county, issue in the name of the State of North Carolina, and (922) directed to any lawful officer of said county, a warrant for the arrest of the person of one Virginius Spry, which said warrant was made returnable before him, the said A. J. Pritchard, as a justice of the peace of the aforesaid county, at his office in the town of Windsor, upon a day to the jurors unknown; and the said A. J. Pritchard, not regarding the duties of his said office of justice of the peace, but perverting the trust reposed in him, and contriving and intending the citizens of this State, for the private gain of him, the said A. J. Pritchard, to oppress and impoverish, and the due execution of justice as much as in him lay to hinder, obstruct and destroy, did, on the aforesaid day, at and in the aforesaid county, willfully, corruptly and extorsively take, receive and accept from one E. E. Smith, for and on behalf of the defendant in the said warrant of arrest, to wit, the said Virginius Spry, a certain sum of money, to wit, one dollar, as an inducement in consideration for the dismissing of the aforesaid warrant of arrest against said Virginius Spry; and in consideration of said sum of money so paid and received as aforesaid, the said A. J. Pritchard, justice of the peace as aforesaid, did willfully and corruptly neglect and omit to bring to trial the aforesaid Virginius Spry, as of right, and according to his duty as justice of the peace as aforesaid he ought to have done, and did not try the said Virginius Spry on the said warrant of arrest, but suppressed the same, against the duties of his said office, to the great hindrance of justice, and against the form of the statute in such case made and provided, and against the peace and dignity of the State.

In support of the indictment the following evidence was introduced by the State:

C. L. Grant: "On 28 October, 1889, I was constable. The defendant gave me a warrant against Virginius Spry for an assault and
(923) battery on Mike Heffron. He was then a magistrate and mayor of Windsor. I took it and went to arrest Spry, and did not find him. In about two weeks after that I saw Spry, who told me the matter had been settled—that Smith had paid the costs. I saw the defendant and told him what Spry said, and the defendant said that was true; that Smith had paid the costs and fine, and that he had forgotten to recall the warrant. He then paid me my cost—one dollar. One dollar was my legal fee. The defendant said he thought it best to settle it that way, as Mr. Smith said it would cause great inconvenience to have his boat stopped. Spry worked on the boat. The defendant said he had collected fifty cents for the State. He said he had neither charged nor taken anything for himself."

E. E. Smith: "The defendant had a warrant out for Spry, a hand on my boat. I saw him and told him that Spry had directed me to settle the matter; that I did not want Spry brought to town off the boat, as it would entail a great expense in stopping the boat. He refused to settle the matter. After talking with him a while, and going with him to a lawyer's office and taking advice, the defendant said he would dispose of the case; that he would take no fee for himself, but as the constable had been there twice he ought to be paid, and he would take one dollar and a half—one dollar for the constable for making the arrest, and fifty cents fine for the State. . . . Spry was mate on my boat. I told the defendant that Spry had asked me to settle the matter, as I did not want the boat stopped. He went with me to see a lawyer, and consulted with him before he would agree to dispose of the matter that way. He took no costs or fee or anything for himself, but steadily refused to take anything. He took fifty cents for the State. I took a receipt and gave it to Spry."

It was admitted that the defendant was a justice of the peace.
(924) There was no other evidence offered by the State.

The defendant testified: "I issued a warrant for Spry, at the instance of Heffron, for an assault, and gave it to the constable. It went on for a time, and the constable said that he could not find Spry. I told him to keep the warrant and be on the lookout for him. Soon after that E. E. Smith came to me and said Spry wanted him to settle the case against him. I declined to do so. Mr. Smith represented that if Spry was brought to town it would stop his boat and interfere with his business, and importuned me to settle it. I told him I thought the matter could not be settled that way, and he asked me to go with him

and consult a lawyer about it. I did so. After a while, on the advice of counsel and considering that I had heard from Heffron all of the evidence in the case, I did what I would have done if Spry and Heffron had both been there. I imposed on the defendant Spry a fine of fifty cents. I refused and did not take any fee for myself. I collected one dollar and fifty cents, and paid the constable one dollar for making the arrest and fifty cents I paid to the sheriff of the county, and I entered the case on my docket as disposed of in that way. I entered it upon the docket the same day. I told Mr. Grant about it four or five days afterwards. I thought I was acting lawfully. I took advice to that effect. I did not take or receive anything for myself."

W. L. Williams testified for the defense: "I was present at the time spoken of by Mr. Smith. Mr. Smith and the defendant came into my office and there was a great deal of talk. Smith said there was a warrant out for Spry. He appealed to the defendant not to stop his boat. The defendant refused to dispose of the case. I told him if he had looked into the case and was satisfied that it was a trivial affair, that he had a right to fine him and stop the case. After repeated refusals he finally disposed of the case by taking, I think, one dollar and fifty cents. Smith offered to pay the defendant his fees, but he (925) refused to receive anything for himself. . . . The defendant refused to take anything for himself, but did impose a fine for the State and a fee for the constable. I am a practicing attorney in the courts of this State."

There was no other testimony offered in the case.

The defendant requested the court to charge:

1. To find the defendant guilty the jury must be satisfied from the evidence that he acted in bad faith and from a corrupt motive in disposing of the matter as he did.

2. The defendant Spry had a right to waive arrest and attendance before the court and appoint an agent or attorney to settle the matter for him, and if the defendant did no more than impose a fine and costs within his jurisdiction as a magistrate, he would not be guilty unless he was acting in bad faith and from a corrupt motive.

3. The conduct of the defendant in refusing to take any fee for himself, if that were so, and his taking the advice of counsel, if he did take counsel, were both facts going to show that the defendant acted in good faith, and if he did so act he would not be guilty.

4. Unless defendant took money or something for himself, or secured some advantage by his acts, then he would not be guilty.

5. Unless the defendant extorted the money from Spry by virtue of his office he would not be guilty. If it was paid voluntarily by Spry it could not be extortion, but it would be receiving a bribe, and to find the defendant guilty the jury must find that he took a bribe corruptly.

6. If the defendant acted as a prudent and cautious man would be reasonably expected to do, and honestly, then he would not be guilty.

7. If the jury believe that the defendant took the money honestly, and reasonably thinking he had a right to do so, he would not be guilty.

The court declined to give these instructions, and charged the (926) jury that if the defendant took the money for himself or any one, knowing at the time that the warrant had not been executed, the jury will find him guilty. The defendant excepted.

After conviction, the defendant moved in arrest of judgment for defects in the bill of indictment. This motion was refused, and the defendant excepted.

The judgment of the court was that the defendant be removed from his said office of justice of the peace for Bertie County, and pay a fine of twenty-five dollars and be imprisoned in the common jail for ten days. From which judgment the defendant appealed.

Attorney-General for the State.
D. C. Winston for defendant.

AVERY, J., after stating the case as above: The judge who tried the case below evidently acted upon the idea that the indictment was sufficient as a charge of extortion. This offense is defined to be the unlawful taking by an officer (*de facto* or *de jure*), by color of his office, from any person, any money or thing of value that is not due, or more than is due, or before it is due. 1 Bish. Cr. Law, sec. 573; 4 Bl. Com., 141; *People v. Whaley,* 6 Cowen (N. Y.), 661; *S. v. McEntyre,* 25 N. C., 171; *S. v. Cansler,* 75 N. C., 442.

In order to prove this charge, it is necessary to show that the fees were demanded willfully and corruptly, and not through any mistake of law or fact. 2 Bishop Cr. L., secs. 396, 399 and 400; Roscoe Cr. Ev., marg. p. 833, and note; *Comrs. v. Shed,* 2 Mass., 227; *Cutler v. State,* 36 N. J. (7 Vroom), 125; *People v. Whaley, supra; S. v. Cansler, supra.* While the rulings of the courts have been somewhat conflicting upon this point, the weight of authority, as well as reason, lead (927) us to the conclusion that all officers, and especially those who are acting judicially, have a right to demand that a jury shall pass upon their intent in taking the fees, and find that the act was willful and corrupt, before they can be lawfully convicted of this serious charge. The words, "under color of his office," imply that the officer has taken advantage of his position and corruptly used the relation that he sustains to the government to drive others to submit to his exactions. 1 Bishop Cr. Law, sec. 587.

We find, upon examination, that in the two cases cited by the Attorney-General from the Tennessee Reports (*S. v. Critchett,* 1 Lea, 271, and *S. v. Merritt,* 5 Sneed, 67) the Court was considering indictments framed under a section of the Code of that State, the substance of which is set out in one of the opinions. In the case of *Coates v. Wallace,* 17 Sergeant & R., 75, the Supreme Court of Pennsylvania, too, construed a statute giving a penalty for taking fees not due, or more than was due.

We think that the court erred in refusing to submit the question of intent to the jury, if the indictment cannot be sustained as a charge of some other offense than extortion at common law, or even if it is sufficient as a charge of the offense created by the last clause of section 1090 of The Code.

It seems essential, too, that it should be charged in the indictment, as well as proven on the trial, that the money was taken "under color of office." All of the definitions and all of the approved precedents of indictments for extortion at common law contain the words "under color of his office." 2 Wharton Cr. Law, sec. 1576; 2 Wharton Precedents of Indictments, Form 902; *S. v. Bisaner,* 97 N. C., 503; Archbold Cr. Pl., 438; Bishop Cr. Procedure, secs. 320, 321; *S. v. Cansler,* 75 N. C., 442; 2 Bishop Cr. Law, 393; *People v. Whaley, supra; Rex v. Boines,* 6 Mod., 192; *Runnells v. Fletcher,* 15 Mass., 525.

But it was suggested by the Attorney-General that the indictment could be sustained under section 1090 of The Code, which (928) creates two distinct offenses, one of which is a misdemeanor, punishable at the discretion of the court (by fine or imprisonment in the common jail not exceeding two years, or by both), while a person convicted of the other, the corrupt violation of his oath of office, must also be removed from office. If the indictment is sufficient under the last clause of said section, then it was proper to charge, and it was necessary to prove, the corrupt intent, and it would follow, as in a trial for extortion at common law, that it was error to refuse to allow the jury to pass upon the motive of the defendant. But it is not necessary to discuss the question whether the testimony would have warranted a conviction of the misdemeanor created by the first clause of said section, because it is of the essence of either offense described in said section that it should be charged and proved that the accused officer was required by law to take an oath of office before entering upon the discharge of his duties. If the indictment had been drawn so as to properly charge the misdemeanor under the first clause, some grave questions would have arisen as to the sufficiency of the evidence to justify a conviction, and it would have been also necessary to modify the judgment. We have not deemed it proper to follow the argument of counsel, and pass upon all of the various questions presented. It is not necessary

that we should determine whether the receipt of money voluntarily tendered by a person other than Spry, who was amenable under the indictment pending before the defendant's court and supposed to be to some extent under the power of the latter, would constitute the offense of extortion at common law, if properly charged. We omit to pass, also, upon the question whether Smith, the employer, could lawfully tender a submission for his servant at all, or, if at all, before Spry had been arrested. It was suggested, also, that the indictment might (929) be sustained as a charge of bribery at common law. Bribery is the voluntary giving or receiving of anything of value in corrupt payment of an official act done or to be done. 2 Bishop Cr. Law, sec. 85 and note. The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office. So, in indictments for bribery, too, it seems that it must be charged that the money was given or received corruptly, and the proof must correspond with the charge. Archbold Cr. Pleadings, 437, sec. 6; Bish. Cr. Pr., sec. 99; Roscoe's Cr. Ev., 343, *et seq.* We conclude, therefore, that the exception of the defendant to the refusal of his Honor to submit the question of intent to the jury should be sustained.

New trial.

SHEPHERD, J., concurring: This case was submitted to the jury entirely upon the ground that the defendant was properly charged with the offense of extortion. I concur in the disposition made of the appeal, for the reason that the indictment does not sufficiently charge such an offense. The facts set forth savor more of bribery or malfeasance in office than of extortion. I do not agree, however, that it is necessary to prove a corrupt intent in all cases of extortion. If an officer takes more fees than are due, or before they are due, by mistake of *fact,* he is excusable; otherwise, where he takes them by mistake of *law.*

2 Bishop Criminal Law (3d Ed.), 385, ch. Extortion, says: "But in these matters, as in others relating to the intent, there is a difference between ignorance of the law and ignorance of fact; though the former does not excuse, the latter, where there is no carelessness, does."

The authorities are conflicting, but I prefer the law as laid down by this Court in *S. v. Dickens,* 2 N. C., 407: "Every officer is bound to know what the law is upon the subject of fees to be taken by (930) himself. He cannot excuse himself for taking more than the legal fee by saying he was misled by the rates published, or by the advice of an attorney. . . . If such or the like excuses were admitted it would hardly ever be possible to convict an officer of extortion—he might always contrive to ground his conduct upon misappre-

hension or improper advice." This case has been frequently cited, with entire approbation, by this Court, notably by *Pearson, J.*, in *S. v. Boyett,* 32 N. C., 336 (in which case he quotes the above language), and also by the present *Chief Justice* in *S. v. McBrayer,* 98 N. C., 619. It has, I think, been ever regarded as the settled law in North Carolina.

The ill-reported case of *S. v. Bright,* 4 N. C., 437, does not necessarily conflict with this view, as the mistake there may have been one of fact, and the court may also have been influenced by the peculiar form of the verdict. This obscurely reported case, and the very brief and general opinion, ought not to have the effect of overruling the law as carefully laid down in *S. v. Dickens,* and expressly approved by this Court in the later decisions mentioned.

MERRIMON, C. J. I concur in what is said by *Justice Shepherd.*

Per Curiam. Error.

Cited: S. v. Kittelle, 110 N. C., 587; *S. v. Norris,* 111 N. C., 655; *S. v. Hatch,* 116 N. C., 1004.

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(931)

STATE v. CHARLES CONNER ET AL.

Oysters—Statute—Residence—Master and Servant.

The defendants were indicted for unlawfully taking oysters in violation of sections 3376 and 3379 of The Code. It was proved that they were, at the time of the commission of the acts charged, residents of the State of Virginia, but were in the employment of one W., who was a resident of North Carolina: *Held,* that the defendants were not guilty if they, in good faith, were acting as servants of W. in the commission of the alleged unlawful acts.

APPEAL from *Whitaker, J.,* at Spring Term, 1890, of HYDE.

The indictment charges that the defendants, "in Hyde County, unlawfully and willfully did use tongs or drags for the purpose of taking oysters from the navigable waters of North Carolina. . . . Not then and there having resided in the State of North Carolina for twelve months next preceding the day on which they began to use said tongs and drags as aforesaid, contrary to the statute," etc.

Luther Swindell, a witness for the State, testified that in February, 1890, he saw the defendants catching oysters with tongs in Pamlico Sound, and that they told him their homes were in Virginia. They also told him they were working for H. M. Warburton.

It was in evidence, on behalf of the defendants, that they were in the employ of H. M. Warburton—that they were "oystering" for him, used his tongs and lived in his house. It was also in evidence that H. M. Warburton was a resident of Hyde County and had been since August, 1888, and paid tax there in 1889.

The defendants requested the court to instruct the jury "That if, from the evidence, the jury should find, as a fact, that the defendants oystered with tongs in Pamlico Sound, being servants or em-
(932) ployees of H. M. Warburton, a resident of the State, that they should return a verdict of not guilty."

The court refused to so charge, and "instructed the jury that if they believed, from the evidence, that these defendants were residents of the State of Virginia, and being such, did catch oysters with tongs in Pamlico Sound, even though the defendants were acting as the servants of H. M. Warburton, a resident of the State, that then they would be guilty, and they should so find."

The defendants excepted. Verdict of guilty. Judgment, and appeal.

Attorney-General for the State.
No counsel for defendants.

DAVIS, J., after stating the facts: The State has the right to impose such limitations and restrictions upon the mode and manner of taking fish, oysters, terrapins, etc., in the navigable waters of the State as it may deem wise and just and conducive to the public good. Chapter 43 of The Code contains a great many enactments relating to the subject. These laws have been enacted at different times, and though codified and reduced to a single chapter in The Code, that chapter is a very long one, and some of its sections, when construed with reference to others, do not seem very clear.

Section 3376 declares: "This chapter shall not be construed so as to allow any person who is not a citizen of the State to use drag-nets or other instruments in any of the waters of the State for the purpose of catching terrapins or oysters, and all persons not citizens of the State who violate this provision are made guilty of a misdemeanor and subjected to a penalty of $100."

Section 3389 declares "That every person . . . who shall commit any of the offenses in this chapter created shall be guilty of a mis-
demeanor."

(933) Section 3379, which is a very long one, enacts, among other things, that "no person shall use, or cause to be used, in any of the navigable waters of the State . . . any tongs or drags for the purpose of taking oysters, unless he shall have resided continu-

ously in the State at least twelve months next preceding the day on which he shall begin to take fish or oysters: . . . *Provided further,* this section shall not extend to servants employed to fish by any person allowed to fish in the navigable waters of the State."

Then follows a long provision enacted in 1883, designed to prevent the fraudulent use of any apparatus for taking fish or oysters by nonresidents, "under the name and ownership" of a citizen.

It was for the alleged violation of this section that the defendants were indicted. If they were the servants and employees of Warburton, *bona fide* using his "tongs or drags" to take oysters for him, were they guilty? If it was not unlawful for Warburton to take oysters, might he not take them *per alium?* Would not his servants and employees, when taking oysters for him, be guiltless of a violation of the law, though nonresidents?

Of course, any evasion of the law is a violation of the law, and if the defendants were not the *bona fide* servants or employees of Warburton, who was a resident, they would be guilty; but this view of the case was not presented, and even if the State had the power to enact such a law, there *is no enactment* that would make the defendants guilty if they were in the *bona fide* service of one having the right to take oysters in the navigable waters of the State.

We think there was error in refusing the instructions asked and in the instructions given.

Error.

Cited: S. v. Young, 138 N. C., 572.

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(934)

STATE v. W. R. HERNDON.

Habeas Corpus—Certiorari—Certifying Opinion.

1. Upon a petition of *habeas corpus*, the judge who hears the writ judges, in his sound discretion, what amount of testimony is proper to be heard, and whether the petitioner should be admitted to bail, and his action in that regard is not subject to review; but when he declines to hear any testimony, or to investigate the case upon the return of the writ, on the ground that it appeared that a true bill for a capital offense has been found by a grand jury against the petitioner, this is a ruling of law which the petitioner is entitled to have reviewed and reversed.

2. As the statute gives no appeal in such cases, the court will exercise its constitutional power of supervision of the lower courts by a writ of *certiorari.* Const., Art. IV, sec. 8.

3. If, upon such *certiorari*, the Court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no *procedendo* issues to any particular judge, but the petitioner can exercise his statutory right to apply, *de novo*, to any judge authorized to grant the writ of *habeas corpus*.

4. The Court, in its judgment, may direct an opinion certified down in advance of the statutory time.

(MERRIMON, C. J., dissented.)

HABEAS CORPUS, heard before *MacRae, J.*, at DURHAM, on 25 October, 1890.

Upon the return of the writ, it appearing that the petitioner was in jail by virtue of a true bill for murder duly returned by the grand jury of Durham County, his Honor "declined the application of the prisoner to examine the witnesses in this matter with a view to the admission of the prisoner to bail, upon the ground that the true bill found by the grand jury shows probable cause," and remanded the prisoner to jail. This is an application for a writ of *certiorari*, to the end that the ruling of the judge may be certified to this Court and reviewed.

Attorney-General for the State.
W. W. Fuller, J. S. Manning and R. B. Boone for defendant.

(935) CLARK, J. If the judge, upon the investigation of the evidence on a petition for *habeas corpus*, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or *certiorari* lies, either in favor of the State or the petitioner. *Walton v. Gatlin*, 60 N. C., 318; *S. v. Miller*, 97 N. C., 451. The *quantum* of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. When, however, on the return of the writ, the judge declines to hear evidence because an indictment for a capital offense has been found against the petitioner, this presents a ruling of law which the petitioner is entitled to have reviewed by this Court. The statute nowhere provides for an appeal in such case, but the Constitution, Art. I, sec. 18, guarantees the writ of *habeas corpus*, and if such ruling has the effect to deny its efficacy to any one who, on investigation of the evidence, might have been entitled to bail, this Court, by virtue of the Constitution, Art. IV, sec. 8, has "the power to issue any remedial writ necessary to give it a general supervision and control over the proceedings of the inferior courts." It appearing that, upon the return of the writ, the judge declined to hear evidence or

investigate the charge, the writ of *certiorari* should issue, that we may be further advised concerning the matter. *Walton v. Gatlin, supra; Biggs, ex parte,* 64 N. C., 202; *S. v. Jefferson,* 66 N. C., 309.

A certified transcript of the record being in court, by consent it is docketed and taken as a return to the *certiorari.* From such transcript it appears that, on the return of the writ, the judge declined to hear any testimony, upon the ground that the true bill was probable cause. The question, then, is whether the finding of a true bill either deprived the judge of the power to investigate the evidence and admit the prisoner to bail, or was so conclusive of the fact that there was probable cause as to deprive a citizen of the right to have the cause of his detention, and his right to be admitted to bail, inquired into by (936) virtue of this great writ of right. We think not. The grand jury, it must be remembered, hear the State's witnesses only, and only such of them as may be sent before them by the solicitor, or by order of the court. The Code, sec. 1741. It may happen, and often does, that, upon hearing the State's evidence only, the conviction is ample to justify the grand jury in finding a true bill for murder; yet, upon an examination of the witnesses for both sides by a judge, upon the writ of *habeas corpus,* it may appear that there was no probable cause as to the charge of murder, but that it is a case of manslaughter, and, therefore, bailable, or excusable homicide, or it may be that there is no probable cause, upon the whole evidence, that the defendant was the guilty party. The defendant should not be deprived of this right guaranteed to him by the Constitution, and be compelled to lie in jail, probably for months, when an intelligent judge, upon hearing the whole evidence, the benefit of which is denied to a grand jury, might properly adjudge that there was no probable cause as to the capital offense, at least, and admit the defendant to bail. We are aware that, in *S. v. Mills,* 13 N. C., 420, a most eminent judge has indicated *arguendo* an opinion that, after a true bill is found for a capital offense, the petitioner is debarred the right to have his claim to be admitted to bail inquired into upon a writ of *habeas corpus.* But that decision was made under the former Constitution and statutes. Under the former statute, when it appeared upon the return of the writ that the prisoner was in jail upon process for trial upon a capital offense, the prisoner could not be bailed. Revised Statute, ch. 55, sec. 3; Revised Code, ch. 55, sec. 3. Now, however, The Code, sec. 1161, provides that any *Justice* of the Supreme Court or judge of the Superior or Criminal Court "shall have the power to bail persons committed to jail *charged* with crime *in all cases.*" This, we take it, means that any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ (937)

of *habeas corpus,* adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. Sections 937 and 1624 (2) provide that if, upon return of the writ, it appear that the petitioner is in custody by virtue of a judgment, he shall not be bailed. Section 1644 provides that, upon the return of the writ, the judge "shall examine into the facts contained in the return and into the cause of the restraint," and "hear the allegations and proofs *on both sides,* and do what to justice shall appertain in delivering, bailing or remanding the party." In treating the finding of the grand jury as conclusive of probable cause, and refusing to hear any evidence or proof, we think the judge denied the prisoner the remedy he was entitled to have by virtue of this last section. The true bill was no proof of the charge, nor did the judge hear any proof for the petitioner at all, though offered.

The judge, having refused to hear the evidence and to pass upon the right of the prisoner to be admitted to bail, committed error, and it must be so adjudged. *Lynch v. People,* 38 Ill., 494; *Comrs. v. Rutherford,* 5 Rand (Va.), 646; *Lumm v. State,* 3 Port. (Ind.), 293; *People v. Cole,* 6 Park Cr. Rep., 695; 2 Hawks. P. C., ch. 15, sec. 79; Hurd Habeas Corpus, 439; Church Habeas Corpus, 540. There are other cases, as where the prisoner is so sick as to be in danger of his life, or the prosecution is unreasonably delayed, and the like, in which the prisoner has been let to bail after indictment found. *Kirk's case,* 5 Mod., 454; *U. S. v. Jones,* 3 Wash. C. C. Rep., 224; Bacon's Abr. Bail, Cr. Cas. D; Hurd Habeas Corpus, 445. In a recent historical case, Jefferson Davis, after an indictment found for treason, was admitted to bail by the United States Court. But these and like cases stand on a different footing from the present application, and are only authority that a *habeas corpus* may lie after indictment found for a capi-
(938) tal offense. A statutory remedy is now given, where the trial is unreasonably delayed, by The Code, sec. 1658.

Where the charge is of a capital felony, which is *prima facie* not bailable, the courts are very slow to admit to bail, for there is shrewd authority that "all that a man hath will he give in exchange for his life," and after indictment found it is only in a clear case and with great caution that a judge will admit to bail, for, while the indictment is no presumption of guilt on the trial before the petit jury, it is otherwise in the application for bail. The presumption then is in favor of the correctness of the action of the grand jury, and it may be that testimony was before them which is not produced before the judge. We merely decide that the finding of the true bill does not preclude the application. Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court.

The Code, sec. 1626, gives the prisoner the right to apply for the writ to any of the *Justices* of the Supreme Court, or any judge of the Superior Court. Section 1626 (4) requires an averment in the petition that the legality of the restraint has not been already adjudged upon a prior writ of *habeas corpus*. As this judgment annuls and sets aside the ruling of the judge below, there is now no former judgment which passes upon the petitioner's right. He can, therefore, apply, *de novo*, to any one of the judges, as authorized by the statute, to whom he could have applied in the first instance. This is not an appeal from a judge, as judge holding the courts of any district, nor is it a case where the error must be corrected by the individual judge who committed it. Therefore, no *procedendo* issues. The judgment below denying the right to have witnesses examined is overruled, and the proceedings are remanded to the Superior Court of Durham County, to the end that the petitioner have leave to renew his application, if so advised. There being no prior adjudication preventing a new application (939) by the petitioner, we cannot interfere with his statutory right to select the judge to whom he shall apply.

The value and efficacy of this writ depends largely upon the promptness with which it is heard. It has, therefore, been suggested that one reason why an appeal or *certiorari* should not lie is because of the necessary delay which would be caused thereby. There might be some force in the suggestion if the appeal or *certiorari* were granted on behalf of the State and the petitioner should lie in jail pending the hearing here. This can hardly be urged, however, when the effect of the decision here may be to grant the prisoner the privilege of bail, of which, otherwise, he would be entirely deprived. Besides, the court has the power to advance such cause and hear it at any time out of its order. Rule 13.

The statute (Laws 1887, ch. 41), which is also Rule 48 of this Court, requires the clerk of this Court, on the first Monday in each month, to certify down all opinions which shall have been on file ten days. We do not understand that this Court is thereby deprived of its power to have opinions, when it deems proper, certified down at an earlier date. On motion of petitioner's counsel, it is, therefore, ordered that the Clerk of this Court forthwith certify his opinion and decision to the Superior Court of Durham County.

MERRIMON, C. J., dissenting: I think the law of this State, in respect to bail, especially as to persons charged with and committed to prison to answer for capital crimes, as prevailed before the adoption of the present Constitution, has not been materially, if at all, modified by statute. The present Constitution simply declares that "excessive bail should not be required."

The statutory provision (Code, sec. 1161) cited in the opinion of the Court and interpreted as having some modifying effect (exactly what is not stated), it seems to me, ought not to be so construed. It pre-
(940) scribes that "Any *Justice* of the Supreme Court, or judge of a Superior Court, or of a Criminal Court, shall have power to bail persons committed to prison charged with crime in all cases. Any justice of the peace or chief magistrate of any incorporated city or town shall have the same power in all cases where the punishment is not capital." The purpose of this regulation certainly is not to declare that persons committed to prison to answer for capital crimes shall be entitled to be let to bail in all cases and at all events, or to prescribe in what particular cases or class of capital cases, or under what circumstances of them, the persons in prison to answer for them shall be let to bail. The regulation does not purport to do so, nor has it such purpose. It simply implies that the judges designated shall have authority to let persons in prison on account of crime to bail in capital as well as other cases, when the person is entitled, under the general law of the State, to have bail. It confers on them general power as to bail. The other regulation (Code, sec. 1160) has like meaning. It provides, as to persons who are charged with crime and have not yet been committed to prison: "Any *Justice* of the Supreme Court, or a judge of a Superior Court, or of a criminal court, in all cases," may let the person so charged to bail. This likewise implies such power as to capital crimes, in all cases where the party charged is entitled to bail. That this is the correct interpretation appears the more manifest from other statutory provisions regulating the subject of bail, which expressly recognize a distinction between offenses that are bailable and such as are not. Thus, the other regulation (Code, sec. 1156) provides that, "If the offense with which the prisoner is charged be bailable, " etc., . . . "or the offense be not bailable, the prisoner shall be committed to prison." And so, also, the statutory regulation in respect to *habeas corpus* (Code, sec. 1647) provides that the petitioner shall be let to bail "if the case be bailable," etc.
(941) The distinction between bailable offenses and such as are not bailable is distinctly recognized in many places and connections, but there is no constitutional or statutory regulation that at all prescribes in what case or under what circumstances a person charged with a capital offense, but not committed, or charged and committed to prison and held to answer, shall be let to bail. In such cases the prisoner may have bail as allowed by the common law, and not otherwise.

At common law all persons charged with capital felonies were before conviction, bailable, but the Constitution of this State of 1776, section 39, modified that law by providing that "all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is

evident or presumption great." That Constitution, however, including the provision just cited, has been superseded by the present Constitution, which contains no such provision. Hence, the right to bail in capital cases is left as at the common law. Code, sec. 641. By that law bail might be granted in such cases only by a high judicial officer, upon thorough scrutiny of the facts and great caution. *Sir William Blackstone* says: "It is agreed that the Court of King's Bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder or any other offense, according to the circumstances of the case. And herein the wisdom of the law is manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offense. The law has, therefore, provided one court, and only one, which has discretionary power of bailing in any case; except only, even to this high jurisdiction, and, of course, to all inferior ones, such persons as are committed by either house of Parliament, so long as the session lasts; or such as are committed for contempts by any of the King's Superior Courts (942) of justice." 4 Black. Com., 298, 299. The power thus conferred upon the Court of King's Bench is conferred upon the *Justices* of the Supreme, and the judges of the Superior and Criminal Courts in this State. But such power ought not, cannot, properly be exercised arbitrarily; it should be done with great care, and upon thorough scrutiny of the evidence going to prove the prisoner's guilt. If it satisfies the judge that he is guilty, he should not allow bail, unless in very exceptional cases, such as where the prisoner is afflicted with some disease, and his continued confinement in prison will probably result in death.

The indictment for a capital offense raises a strong presumption of the prisoner's guilt, and he ought not to have bail unless he alleges and proves to the satisfaction of the judge that he is not guilty, except in the exceptional cases mentioned. The law intends that persons solemnly accused of capital crimes, when the evidence tends strongly to prove their guilt, shall not have opportunity to flee and escape justice; they must, therefore, be detained in jail, not to punish them, but to the end that they may certainly answer for the crimes charged against them. Their rights should be carefully observed, but the rights of society of the State should be observed as well. If, in possible cases, the prisoner is not guilty, when the evidence proves his guilt to the satisfaction of the court, this is his misfortune, and he must submit to the inconvenience and distress occasioned thereby until, in the course of the law, he shall be tried. Until the adoption of the present Constitution it was understood to be the law of the State that after indictment for a capital of-

fense a prisoner was not bailable. This was so by reason of the provision of the Constitution of 1776, above recited. It was, therefore, that the late *Chief Justice Ruffin* said, in *S. v. Mills,* 13 N. C., 420,

"for, after bill found, a defendant is presumed to be guilty to
(943) most, if not all, purposes, except that of a fair and impartial trial before a petit jury. The presumption is so strong that, in the case of a capital felony, the party cannot be left to bail." See also *S. v. Dew,* 1 N. C., 94. For the reasons stated, the law is now otherwise to the extent that the prisoner may rebut the strong presumption raised by the indictment.

I do not concur in the disposition made of this case. The writ of *certiorari* allowed by the court in contemplation of law was directed to the judge before whom the *habeas corpus* proceeding was pending, and who heard the same, commanding him to certify to this Court the whole record of the proceeding, to the end it might review his action and correct his alleged errors. By consent, the case was treated as if he had done so. *Upchurch v. Scott,* 60 N. C., 520; *Cox v. Gee, ib.,* 516; *Johnson v. Mallett, ib.,* 511. The writ put this Court in relation with him as judge, and, as it decided there was error, its decision should have been certified to the judge below, directing him to proceed to hear and dispose of the proceeding before him according to law. But by order of this Court the proceeding is left incomplete and unfinished, and the petitioner is told simply that he may file another petition before some other judge. It seems to me that this course is at least disorderly, and not warranted by principle, precedent or practice, nor is there necessity for it. This Court had no relation in the case with the Superior Court of the county of Durham. The writ of *certiorari* was not directed to that court, nor did it have jurisdiction of the matter. It is true that *habeas corpus* proceedings are largely summary in their character, but they should have logical order, consistency and completeness. It might not be convenient for the judge below to further hear and dispose of the case, and if not, he might make an order transferring it to another judge, to be heard and disposed of by him. A judge, observing well

settled practice, frequently grants the writ of *habeas corpus* upon
(944) application, and makes it returnable before another judge, who hears and disposes of the matter. This is necessary frequently for the convenience of judges, the parties and witnesses, and with a view to economy.

Per Curiam. Error.

Cited: S. v. Jones, 113 N. C., 671; *Rhyne v. Lipscombe,* 122 N. C., 657; *In re Holley,* 154 N. C., 166; *In re Wiggins,* 165 N. C., 458.

STATE v. CLINGMAN HARRELL.

Affray—Evidence—Reasonable Apprehension.

Where one engages in a fight willingly, he is guilty of an affray, and it is immaterial that he fought under a reasonable apprehension that his adversary had formed a purpose to make a violent assault upon him; nor is it any defense that during the encounter he fired a shot at his enemy under the belief that he was in danger of great bodily harm.

(AVERY, J., dissented.)

APPEAL from *Bynum, J.*, at Spring Term, 1890, of MITCHELL.

The evidence tended to prove that William Cox, now deceased, and James Sivige, on one side, and the appellants on the opposite side, engaged in a dangerous fight with guns and pistols. All of the parties except Cox were indicted for an affray, and pleaded "not guilty." The appellants contended that they fought only in defense of themselves, and did no more than they might lawfully do in that respect.

On the trial, there was evidence tending to prove that all the parties fought willingly, the appellants successfully, and wounding both their opponents.

The appellant, Clingman Harrell, was examined as a witness (945) on his own behalf and that of his coappellants, who are his sons.

He was examined at length, and, particularly, he offered to testify that the parties fought at the house of Neely Campbell; that he first saw Cox and Sivige two miles from that place, going in the direction of it; that he apprehended their purpose in going up that way brandishing their pistols. He further proposed to give what knowledge he had, and the grounds of his apprehension of their purpose; to state that, in the forenoon of same day (the day of the fight), he saw them and others flourishing their pistols; that his brother informed him that they threatened his sons, and were pursuing them to kill them; that, in consequence of this information and what he saw, he hastened to find his sons to prevent a difficulty and save his boys.

The Solicitor for the State objected to the admission of the proposed evidence. The court sustained the objection, and the appellants excepted.

The appellants further proposed to ask the witness this question and obtain an affirmative answer to the same: "When you fired a shot, did you believe you and your boys were in danger of great bodily harm or death?" Objection by solicitor sustained by the court, and exception by the appellants.

There was a verdict of "guilty," and judgment thereupon against the defendants, from which they all, except Sivige, appealed to this Court.

The other facts necessary to an understanding of the questions considered are stated in the opinion.

Attorney-General for the State.
W. H. Malone for defendants.

MERRIMON, C. J., after stating the facts: The testimony proposed by the appellants and rejected by the court was irrelevant and immaterial. They and others were indicted for an affray, for fighting together in a public place, to the terror of the good citizens of the State there-
(946) about. The evidence rejected could not prove that they did or did not so fight, nor could it prove that they fought only in their own defense. The apprehensions of the witness, and the grounds of them, did not enter into and make up an element, or give quality thereto, of the offense, nor did these at all relieve him and his sons from guilt, if they fought as charged. Evidence of what was done, or attempted to be done or said, or what was not done or not said by the parties at the time of the fight, just before it began, during its progress and just at its close—such things as made a part of the *res gestæ*—was pertinent and relevant to prove the offense charged, or the innocence of the parties. As to that offense, no matter what may have been their intent or the provocation to them, or their fears or apprehensions, if they fought otherwise than on the defensive, such evidence might be pertinent and important in some classes of cases. This is not one of them. *S. v. Norton,* 82 N. C., 628; *S. v. Downing,* 74 N. C., 184. Nor could the belief of the witness, in the course of the conflict, that he and his sons were about to be shot or suffer great bodily harm, prove that he and they fought only in their own defense. However fiercely and aggressively he might have joined in the fight, he might have had such belief, but this would not prove that he was on the defensive. The surrounding facts and circumstances—not his simple belief—constituted evidence to show that he fired his gun, not as an active aggressive participant in the fight, but only on the defensive.

A witness for the State testified—the appellant objecting—that the fight terminated when Cox and Sivige were wounded and fled; that two of the appellants were going pretty fast in the direction of them when he stopped them; that one of them had his gun, and they cried out after the wounded men "to stop and shoot it out like men." This evidence was competent, certainly as to the appellants who pursued the wounded men, because it tended to show their willingness to fight
(947) and to prolong the conflict, though their adversaries were disabled.

The appellants requested the court to instruct the jury specially that a man has a right to defend himself when attacked—to repel force by force; that, when attacked with felonious intent, he is not bound to fly, but may stand and fight, and kill his assailant if necessary, etc.; that a man may take his adversary's life whether the danger is real or not, if the danger is apparently so imminent as that a prudent man might suppose himself in such peril as to deem it necessary to kill, etc. The court declined to give in terms the instructions asked for, but we are of opinion that it gave the substance of so much thereof as the appellants were entitled to have. This is not a case in which it became necessary or proper to enter into an explanation of the law in respect to assaults with felonious intent, and point out when a party shall retreat, or when he may stand and fight, and kill his assailant, etc. The offense charged is a simple affray, which, as the evidence showed, was a serious one.

The court gave the jury full, fair and intelligent instructions. As to the appellants and a party who was acquitted, it told them, among other things, that "the mere presence of a man at a difficulty is not sufficient evidence of aiding and encouraging, but, being present, they must do or say something tending to aid or encourage the parties fighting." It told the jury repeatedly and plainly that the appellants had the right to fight in their own defense, and being father and sons they had the right to fight in defense of each other; it directed the attention of the jury to the evidence, its purposes and application, and told them that some of the parties might be guilty and others not guilty. The latter part of the instructions obviously had particular reference to the father and the party acquitted, because, while there was evidence tending strongly to prove the father's guilt, there was other evidence tending not so strongly to show his innocence. The appellants had no just grounds of complaint at the instructions the court gave (948) the jury, and it was sufficiently comprehensive to embrace every material aspect of the case. We may add that the exception simply "to the charge as given" is too indefinite, and, in effect, no exception.

No error.

AVERY, J., dissents.

Cited: S. v. Shields, 110 N. C., 499; *S. v. Goff,* 117 N. C., 763; *S. v. Kimbrell,* 151 N. C., 704, 707; *S. v. Crisp,* 170 N. C., 791; *S. v. Wentz,* 176 N. C., 750.

STATE v. ALBERT CAMPBELL.

Arrest—Officer—Homicide—Trespass.

1. A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without warrant, except when such offenses are being committed in his presence; nor can a justice of the peace confer such authority by a mere verbal order or command.

2. The authority given by section 1124 of The Code to private persons to make arrest without warrant only extends to the offenses therein mentioned and committed under the conditions therein prescribed.

3. The power conferred upon officers by section 1125 of The Code to summon private persons to aid them in the execution of their duties is limited to the cases mentioned in that section, and while they are actually being perpetrated, or are imminent. It does not go to the extent of authorizing the persons thus summoned to make arrests, without warrant, where the offense has been accomplished and the offenders have dispersed.

4. The rule is otherwise as to felonies. In such cases, if the crime is committed in the presence of a private person, it is his duty to make the arrest without waiting for a warrant or summons of an officer, but if it has been committed not in his presence he may not arrest without warrant.

5. The deceased had been engaged, some hours previous, in a dangerous affray, in which he had been severely wounded, and was on his way home, carrying a pistol in his hand. A justice of the peace commanded the prisoner to follow and arrest him. In attempting to do so, deceased resisted, displaying his pistol, when prisoner killed him: *Held*, that, as prisoner had no authority to make the arrest, he was not justified in the killing.

(949) INDICTMENT for murder, tried at Fall Term, 1890, of MITCHELL, before *Merrimon, J.*

The prisoner is indicted for the murder of Wilburn Cox. Upon his arraignment he pleaded not guilty. On the trial the evidence material to be stated here was substantially as follows:

Several hours before the homicide in question the deceased and another—both of them disorderly and violent men—on one side, had engaged with several other persons on the opposing side in a dangerous affray, both sides using guns and pistols. The deceased and his associate fired their pieces repeatedly at the opposing party without effect, but the latter fired their pieces upon the former, wounding them severely, whereupon they gave way and fled, the deceased hiding himself in the woods, and his associate taking refuge in a house not a great way from the scene of the affray, and there having his wounds dressed. The deceased, in the course of a few hours, left the woods and went to the house of a person not far from that of the justice of the peace presently to be mentioned, and had his wounds dressed, and determined to

go to his home, two or three miles distant. He was admonished not to go down the road, lest he might be killed. He swore violently that he would go down the road, saying that he was not able to walk across the mountain. A person present consented to take him home behind him on a horse, and they presently started on the way to his home. They had gone but a short distance when they came in view of a justice of the peace and several other persons, when the justice of the peace, without issuing a warrant, orally summoned the prisoner (950) and others there present to go and arrest the deceased as an affrayor who was going on his way, and having on his person a pistol. The prisoner at first hesitated to go, but presently he and another followed on after the deceased and soon overtook him at a place where he had stopped and was telling a person of the affray and his wound.

The prisoner, testifying in his own behalf, among other things, said: "I went on down, kept in sight of him; sometimes he was not in sight, most of the time we were. When I overtook the deceased he was riding behind Wilson Short—was on a horse behind him. They were talking to George Brown; laid my hand on Cox and said 'Consider yourself under arrest.' He said 'Hold on,' and jumped off his horse on further side from me. As he was getting off I told him 'I was deputed as an officer by 'Squire Wise to arrest you and take you back, and you must go.' Then I walked around the horse after him, and when I got round I grabbed him by the arm, and he jerked loose from me, and I grabbed at him again, and caught him by the waist-band of his pants, and he drew his pistol with his left hand up on to his right arm bearing on me. I told him to 'stop! stop!' He walked three or four steps sidling, turning his left side to me, and then he turned with his right side and snapped his pistol straight at me. I told him to stop then again. He turned at once, and then around the other way on me again, and then I fired. When I shot, deceased had his pistol held back with his left hand pointed at me. At the time I shot, I thought and believed I was likely to be killed or suffer by his acts and conduct."

The deceased then moved off hastily a few yards, fell to the ground, and at once died.

It was admitted by the prisoner that he shot and killed the deceased, and that the only authority he had to arrest him was a verbal deputation made by a justice of the peace. The prisoner relied (951) upon the statute (The Code, sec. 1125) conferring powers on justices of the peace and others to arrest persons violating the law, etc., etc., and asked the court to instruct the jury "that, if they believed the evidence of the prisoner's witnesses and his own evidence, the justice of the peace had jurisdiction and power, under the facts and circumstances of the case, to confer upon the prisoner, by verbal deputation

or order, authority to arrest the deceased, and the prisoner was warranted in using force sufficient to overcome resistance and arrest him; and that if it was necessary to kill the deceased in order to overcome such resistance and make the arrest, the prisoner was justified or excusable, and should be acquitted."

The court refused to give such instructions, and instructed the jury "that the justice of the peace was not possessed of jurisdiction or power, under the facts or circumstances disclosed by the evidence, to authorize the prisoner, by verbal deputation or order, to arrest the deceased, and that in no view of the evidence for the prisoner was he justified in taking the life of the deceased."

The prisoner excepted. There was a verdict of manslaughter, and judgment against the prisoner, from which he appealed.

Attorney-General for the State.
W. H. Malone for defendant.

MERRIMON, C. J., after stating the facts: The deceased was not chargeable, so far as appears, with any felony. His participation in the affray a few hours before he was slain would render him chargeable with simply a misdemeanor. And so, also, if he and his associate disturbed the peace and quiet of the neighborhood simply by their loud and boisterous threats, cursing and disorderly conduct, and if he (952) had about his person a concealed weapon at the time the prisoner undertook to arrest him, he would only be chargeable with a misdemeanor.

The prisoner, a private person, had no authority to arrest the deceased for a riot, rout, affray, or other breach of the peace, without a proper warrant authorizing such arrest, directed to him as allowed by the statute (The Code, sec. 1219), unless he was present at the time of the perpetration of such offense; nor could a justice of the peace, by his merely verbal order or command, confer upon him such authority; nor could he have authority to arrest him for a mere misdemeanor, other than such as those just mentioned, without such warrant. The statute (The Code, sec. 1124) prescribes that "every person present at any riot, rout, affray, or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders." That is, if need be, in such case, the private person shall arrest the offenders and take them before a proper officer, to the end he may issue a proper warrant for and deal with them according to law in such cases. The purpose is to make it the positive duty of every person present at any such breaking of the peace to interpose and endeavor to suppress and prevent the same. Hence, if one make

an arrest in such case in good faith, he will not be a trespasser. On the contrary, he will be encouraged and protected in the use of all proper means to suppress such breaches of the peace and in bringing the offenders before proper officers to be dealt with as the law directs.

In case of felonies, however, a private person may arrest the felon without a warrant, and it is his duty to do so if he is present at the time it is committed. In such case, he may and ought to arrest and, as soon as practicable, take him before a proper officer, to the end that he may be duly held to answer for the offense. In such case, the private person would not be justified unless a felony had actually been committed. It is better and safer to obtain a warrant when this (953) may be promptly done. *S. v. Roane,* 13 N. C., 58; *Brockway v. Crawford,* 48 N. C., 433; *S. v. Bryant,* 65 N. C., 327; *S. v. Shelton,* 79 N. C., 605; *Neal v. Joyner,* 89 N. C., 287; 1 Hale P. C., 587, 588; 1 Chit. Cr. Law, 17 *et seq.;* 4 Bl. Com., 293.

It is, however, insisted with great earnestness that the statute (The Code, sec. 1125) conferred upon the justice of the peace power to summon the prisoner to arrest the deceased, as he undertook to do. We think this contention is unfounded; that it is not warranted by a just interpretation of the statute or by the facts of the case. The section of the statute cited provides: "Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray, or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so." This provision has reference to cases where the offenses mentioned—not every misdemeanor—are actually being perpetrated—going on to completion—or where they are imminent—about to be perpetrated. In such emergency, it is the duty of the officers specified to suppress and prevent the offenses and arrest the offenders. In so discharging such duties, they are not necessarily left alone; they may, and ought, when need be, to summon any person, whether then present or not, to aid them. This statute makes it imperative on the person so summoned to aid, whether he be present at the perpetration of the offense when summoned, or not. It is the duty of every person, when summoned, to aid in the restoration and preservation of the public peace, and to prevent a breach of it. As to those persons present when such offenses are being perpetrated, it is their duty to interfere, and, if need be, without warrant, arrest the offending parties. The Code, sec. 1124.

But it is not part of the purpose of the section of the statute above recited to confer upon the officers therein specified au- (954)

thority to summon and empower private persons, after the offenses mentioned have been committed and the offenders have dispersed and gone away, to go after and arrest them without warrant. The statute does not so provide in terms, nor is there anything in it that can bear such interpretation. Such exercise of power does not at all come within its purpose, nor is there any reason why it should.

After the offense, the emergency requiring such prompt and summary action had passed by, the justice of the peace or other proper officer should, upon appropriate affidavit, issue a State warrant for the offenders, directed to the sheriff or other appropriate officer, or, if none can be conveniently found, then to *a private person,* who would, in that case, thus be fully empowered to make the arrest, giving notice of the warrant and his authority. The private person would thus have like authority with the sheriff for the specified purpose, and he might, in case of resistance by the person to be arrested, use such force as would be necessary to make the arrest, but in case the latter should flee, the offense being a misdemeanor, he would not be justified in killing him. But after the offenses—misdemeanors—mentioned above have been committed, and the offenders have dispersed, a private person has no authority of himself to arrest the offenders without warrant as just indicated, nor can he go out to make such arrest by the mere order of a justice of the peace or any other officer. It is otherwise as to felonies actually committed.

If a private person, of his own purpose, without warrant, undertakes to make an arrest of a party guilty of only a misdemeanor otherwise than in the cases and in the way above pointed out, he at once becomes a trespasser, and the party whom he so undertakes to deprive of his liberty may resist him by such force as may be necessary to (955) defend himself successfully. Except in the cases of emergency pointed out, private persons should bring such offenders to justice through the proper officers of the law. The law so intends and requires.

In the present case, as we have seen, the deceased had participated in an affray several hours before he was killed, in which he was wounded. The affray was ended, and the deceased had fled at first to the woods. Afterwards, he went to a house, and the inmates dressed his wounds, and he had started on his way home. He was not then committing any breach of the peace, as contemplated by the statutory provisions above recited. The prisoner pursued him; he resisted (as he might do in his defense) unsuccessfully, turned to fly, and the prisoner at once slew him by a pistol shot. The prisoner had no authority to arrest him, and none whatever to take his life. The excuse offered is that a justice of the peace summoned and ordered the prisoner to pursue and arrest him. But the justice of the peace, for the reason

stated above, had no authority to confer upon the prisoner such power to arrest him; he could do so only by duly issuing a State warrant for him, directed to the prisoner, as a private person, in the absence of a proper officer. After the affray was ended, the justice of the peace had ample time and opportunity to issue a State warrant for the apprehension of the deceased before he was slain, and for the other offenders. There was no necessity for the unlawful verbal order he gave the prisoner. There was not then any offense in course of perpetration or imminent as contemplated by the statute. The necessity for the arrest was not then emergent. The mere fact that the deceased was a violent man and had a pistol on his person was no reason for sending the prisoner without a warrant to arrest him; indeed, such fact afforded stronger reason why the law should be observed. As it was not such reason, although the prisoner's intentions may have been sincere, he must suffer for his grave offense, committed through misapprehension of his authority and duty. The life of a violent man shall not be taken (956) carelessly and recklessly, or otherwise than for crime and in the way provided by law. The law, in its humanity, does not allow human life to be taken except for the gravest crimes and upon the most thorough and solemn scrutiny as to the guilt of the offender. In a matter so momentous all the essential forms of the law should be observed.

No error.

Cited: Martin v. Houck, 141 N. C., 322; *S. v. Durham, ib.,* 756; *Brewer v. Wynne,* 163 N. C., 322; *S. v. Rogers,* 166 N. C., 389; *S. v. Fowler,* 172 N. C., 911.

STATE v. H. T. CARLTON.

Case on Appeal—Record Controls—Prosecutor, When Taxed With Costs.

1. When the appellant's case on appeal is served in time, and no exception or countercase is served, it becomes the "case on appeal."
2. When there is a discrepancy between the case on appeal and the record, the latter controls.
3. When the judge below finds that the prosecution is not required by the public interest, or that there was not reasonable ground therefor, the prosecutor is properly taxed with the costs. The Code, sec. 737; *Comrs. v. Merrimon,* 106 N. C., 369, modified and typographical error corrected.

APPEAL from an order of *Womack, J.,* at June Term, 1890, of DURHAM, taxing the prosecutor with costs.

The defendant was tried before a justice of the peace for willful trespass on land after being forbidden and without license to enter, and was adjudged guilty. On appeal to the Superior Court, the defendant was acquitted. The case on appeal, as made out by the appellant, and to which no exception or countercase was served, states that the
(957) judge found the prosecution to be neither frivolous nor malicious, but adjudged, without any further finding of fact, that, as a matter of law, the prosecutor must, in any event, pay the costs. The record of the judgment, however, shows that the court adjudged that there was not reasonable ground for the prosecution, and that it was not required by the public interest, and taxed the prosecutor with the costs. From this judgment the prosecutor, S. P. Gooch, appealed.

Attorney-General for the State.
R. B. Boone for appellant (prosecutor Gooch).

CLARK, J. Only the appellant's statement of case on appeal is sent up in the transcript, but as it appears that service thereof was accepted by the solicitor within the time allowed, and no exceptions thereto nor countercase was served, it stands as the case on appeal. *Russell v. Davis,* 99 N. C., 115; *Booth v. Ratcliffe, ante.*

There is, however, a contradiction between the record proper and the case on appeal, and the record must govern. *Farmer v. Willard,* 75 N. C., 401; *S. v. Keeter,* 80 N. C., 472; *Adrian v. Shaw,* 84 N. C., 832; *McCanless v. Flinchum,* 98 N. C., 388. From the record, it appears that the judge held that the prosecution was not required by the public interest, and that there was not reasonable ground for the prosecution. The court thereupon properly adjudged that the prosecutor pay costs, as required by the Code, sec. 737. *S. v. Roberts,* 106 N. C., 662.

The appellant probably relied on this case having come up by appeal from a justice of the peace. In such cases, as is held in *Merrimon v. Comrs.,* 106 N. C., 369, the *county* is not liable, in any event for costs in either court, by virtue of the Code, sec. 895. There is no provision, however, that in such appeals the prosecutor may not be taxed
(958) with costs, as in a case originating in the Superior Court, whenever the prosecution is adjudged not based on reasonable ground nor required by the public interest. Code, sec. 737.

As to causes of which a magistrate has final jurisdiction, when no appeal is taken from that court, it would seem, by virtue of the Code, sec. 3756, the prosecutor could only have been taxed with costs when the prosecution is adjudged frivolous or malicious, while section 737 extended to justices' as well as other courts, the power to tax prose-

cutor with costs also in cases where there was no reasonable ground for the prosecution, or it was not required by public interest. Whatever difficulty there might have been in reconciling these apparently conflicting provisions of the Code is practically removed by chapter 34, Laws 1889, which purports to amend section 737, but which, also, being later in time, must modify section 3756 where it conflicts with it. This statute of 1889 applies to justices', as well as other courts, and provides that the prosecutor shall be taxed with the costs if the defendant is discharged from arrest for want of probable cause. The opinion in *Merrimon v. Comrs.*, 106 N. C., 369, must be modified by adding to the instances in which the prosecutor in a case before a magistrate can be taxed with the costs, that of the defendant being discharged for want of probable cause, though it is still only when the prosecution is adjudged frivolous or malicious that any court is empowered to imprison the prosecutor for nonpayment of costs. Code, sec. 738. In this connection it is well to note that in line 11 of page 371 of 106 N. C. (*Merrimon v. Comrs.*) the word "defendant" is a misprint for "complainant." This, however, can readily be seen by the context.

Per Curiam. No error.

Cited: S. v. Price, 110 N. C., 600; *S. v. Truesdale,* 125 N. C., 701; *Southerland v. Brown,* 176 N. C., 190.

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(959)

STATE v. T. H. SCOGGINS AND G. M. GEAMS.

Liquor Selling—Intent—Minors—Evidence.

1. Upon the trial of an indictment for a violation of the statute (Code, sec. 1077) forbidding the selling or giving liquors to minors, it will be presumed that the seller had knowledge of the fact that the person to whom the liquors were furnished was a minor.

2. Several persons may be charged in the same indictment and convicted for a single unlawful sale of liquors.

3. Where there was evidence that the person to whom the liquors were charged to have been sold was eighteen years old; that his appearance clearly indicated he was a minor; that he repeatedly, within two years, went into defendants' barroom with an adult acquaintance, to whom he had given the money to purchase liquors before entering the bar; that the adult would call for the drinks and pay for them, and the defendants would pour out the drinks and hand them to the minor and adult: *Held,* the defendants were guilty of a violation of the statute, no matter what may have been their actual intent.

STATE *v.* SCOGGINS

INDICTMENT (under section 1077 of the Code) for selling liquor to a minor, tried at the June Term, 1890, of DURHAM, before *Womack, J.*

The defendants appealed.

Albert Rigsbee, witness for the State, testified: "I am eighteen years old and unmarried. The defendants sold spirituous liquors at retail in the town of Durham. I never bought liquor from either of them directly. When I wanted a drink I would ask some person of full age if he wanted a drink, and would give him the money outside of the bar, and we would go in together. He would call for the liquor; the defendants would set up two glasses; we would pour out our liquor and drink, and he (the grown person) would pay for it. I couldn't say how often I have done that in two years, but some two or three times a week. Both defendants would set up the liquor. I would give the money out (960) of doors, and the defendants would know nothing about it."

The witness' appearance clearly indicated that he was a minor. The State rested its case, and the defendants introduced no evidence.

The solicitor asked his Honor to instruct the jury that, if they believed the evidence, the defendants were guilty.

The defendants demurred to the evidence for that it did not show that both parties participated in any one sale.

His Honor overruled the defendants' demurrer to the evidence, to which the defendants excepted. His Honor charged the jury that if they were fully satisfied that the evidence was true, then the defendants were guilty. To which charge defendants excepted.

Verdict of guilty. Judgment that defendants pay a fine of twenty dollars each and costs, from which they appealed, assigning error in failure of his Honor to sustain the demurrer, and the charge as given.

Attorney-General for the State.
J. S. Manning and R. B. Boone for defendants.

AVERY, J. The witness Rigsbee was only eighteen years old, and in the conduct of their business all dealers in spirituous liquors are presumed to act with a knowledge of that fact. He had repeatedly, within two years before the finding of the indictment, gone into the room where the defendants, as partners, retailed spirituous liquors, after giving to some adult, who accompanied him to the counter of the barroom, the money to pay for two drinks, and had seen the defendants set out two glasses in response to a call by his companion for drinks for both, and after the drinks were taken by both, had seen the defendants receive payment for them from the person to whom the witness had furnished the money on the outside, but never in the presence of either of the defendants.

This is not one of those cases in which the jury must find (961) whether there was an actual intent on the part of the defendant to evade the statute. The law presumes that they intended the natural consequences of their own act, and if they sold in violation of the express terms of the statute, they were guilty *ipso facto,* whatever might have been their actual purpose. *S. v. McBrayer,* 98 N. C., 619; *S. v. Lawrence,* 97 N. C., 492. The law raises a presumption that the defendants knew that Rigsbee was under twenty-one years old, and there is no evidence to rebut it, but, on the contrary, the testimony as to his youthful appearance strengthens the artificial force given by statute to the bare proof of his age. When, therefore, they saw Rigsbee come into their barroom time and again, and repeatedly placed glasses upon the counter at the request of his adult companion, but for the use of both, it was an attempted evasion of the law, so palpable that the court was warranted in passing upon their guilt upon demurrer to the testimony, and instructing the jury to return a verdict accordingly.

The dealers, in this instance, delivered the spirituous liquors directly to a boy, known to them to be under twenty-one years of age, by handing him a bottle and glass. If it is not a sale, it is, within the meaning of the statute, giving the spirituous liquors to the minor, though another may have paid for it. The evil intended to be remedied was the demoralization of young persons by furnishing to them intoxicating drinks and leading them into ruinous habits, even with the permission of a parent. *S. v. Lawrence, supra.*

The demurrer was upon the ground that there was no testimony sufficient to show a sale by both defendants on any particular occasion. The judge instructed the jury that, if they believed the evidence, both were guilty. In misdemeanors there are no accessories, but all are either principals or not guilty at all. Where one partner is present and sees the other partner sell to a boy under twenty-one years old, or either or (962) both permit a clerk to do the same thing in their presences, an indictment will lie against both or either who may be present, just as though he had actually delivered the drinks. *S. v. Caswell,* 21 Tenn., 399; 2 Wharton Cr. Law, sec. 2458.

No error.

Cited: S. v. Best, 108 N. C., 749; *S. v. Kittelle,* 110 N. C., 561, 572, 587; *S. v. McLean,* 121 N. C., 595; *S. v. R. R.,* 122 N. C., 1061; *S. v. Powell,* 141 N. C., 785.

STATE v. A. WEBBER

Municipal Ordinance—Evidence—Disorderly and Bawdy Houses —Nuisance.

1. A municipal corporation can exercise only such powers as (1) those which are granted in express words; (2) those necessarily or fairly implied from the charter, and (3) those essential to the declared objects and purposes of the corporation—not such as are simply convenient, but those which are indispensable.

2. Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate or prevent nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house.

3 Nor has such municipal corporation the power to establish rules of evidence.

4. If a part of an ordinance is void, all other clauses with which the invalid part is necessarily connected or which are dependent on it are also void.

5. Under a general power in a charter to suppress houses of ill fame, a city may pass an ordinance forbidding owners to rent houses for the purpose of being used as bawdy houses, or with a knowledge that they will be so used by the lessee, but its authorities are not thereby empowered to define what is a house of ill fame, or declare a given house to be a bawdy house.

(963) INDICTMENT for violation of a city ordinance, tried on appeal from the municipal court of Asheville in the Criminal Court of BUNCOMBE, before *Moore, J.*

The defendant in the court below excepted to the charge of the judge that the mayor and board of aldermen of the city of Asheville had power to pass the ordinances for a violation of which he was indicted. The charter of the city of Asheville (section 18, chapter 111, Private Laws 1883) provided that "the aldermen, when convened, shall have power to make, and provide for the execution thereof, such ordinances, by-laws, rules and regulations for the better government of the city as they may deem necessary." And section 3802 of The Code empowers the authorities of all towns to pass laws for abating or preventing nuisances of any kind."

The ordinances upon which the indictment was founded were the following:

"Sec. 657. That the occupant or owner of any house or room, or part of same, within the city of Asheville, who shall suffer or allow prostitution therein, or males and females to cohabit therein, without then

and there being lawfully married, shall be deemed the keeper of a house of ill fame, and be fined, on conviction, the sum of fifty dollars.

"Sec. 658. Circumstances from which it may reasonably be inferred that any house is inhabited or frequented by disorderly persons, or persons of notoriously bad character, shall be sufficient to establish that such house is a disorderly or house of ill fame.

"Sec. 659. Any person or persons being the owner or owners, occupant or occupants of any house of ill fame, and shall continue the same, or allow the same to be continued, for two days after being so adjudged, shall, on conviction thereof, be fined fifty dollars, and the chief of police shall close up and guard such house or houses, and keep the inmates within the same until a warrant or warrants can be procured for the arrest of the owner or owners, occupant or (964) occupants."

The defendant excepted to the refusal of the court to instruct the jury, upon the testimony, that the defendant was not guilty.

Attorney-General for the State.
V. S. Lusk for defendant.

AVERY, J., after stating the case: In *S. v. Calley,* 104 N. C., 858, it was held that, in order to prove the charge of keeping a bawdy house, or house of ill fame, it must be shown that it was a common resort for people of both sexes for the purpose of prostitution, and that it was not sufficient to prove acts of illicit intercourse on the part of the occupants without showing also that it was kept for the convenience of people who visited it to indulge in lewdness. The aldermen were not authorized, by virtue of the power given them by the Legislature, to "abate or prevent nuisances," or to pass "such ordinances, by-laws, rules and regulations for the better government of the city as they deemed necessary," to enact a law declaring that not only suffering or allowing prostitution, but permitting single acts of illicit sexual intercourse in a house or room should constitute the owner or occupant of the room or house the keeper of a house of ill fame. To lay the foundation for suppressing, they first declare (in section 657) *that a bawdy house* which the law declares not one. In the next section (658) they assume, without warrant, the right to enact a rule of evidence, and that section, whether in consonance with or repugnant to the established rules of testimony, is void. Competent testimony would be admissible on the trial of a properly constituted case, under the general law of evidence, not by reason of the passage of a by-law without authority. But it is scarcely necessary to say that circumstances which justify the reasonable inference that a house is either (965)

"inhabited or frequented by disorderly persons, or persons of notoriously bad character," are not, without further testimony tending to show actual disorder or prostitution, sufficient to go to the jury to establish a charge of keeping either a disorderly house or a bawdy house. It is provided in section 659 that when any owner or occupant, after it is "so adjudged" (viz., under the preceding void ordinance affixing a penalty, and the other void ordinance changing the rules of evidence) that his home, building or room is a house of ill fame or bawdy house, shall continue for two days longer to allow "disorderly persons, or persons of notoriously bad character," to frequent such house or room, he shall be fined fifty dollars, and the chief of police shall guard such house, and keep the inmates within the same, until a warrant can be procured for the arrest of such owner or occupant. This last section is void, because it hinges on, and is dependent upon, the two preceding sections, they being so connected that the liability to the fine under the last section depends upon a previous conviction under section 657, which was enacted without authority, and that conviction could be made under the evidence declared sufficient without the power to do so in section 658. "If a part of a by-law be void, another essential and connected part of the same by-law is also void." 1 Dillon Mun. Corp., sec. 354 (421) and note 2 (4 Ed.); *Comrs. v. Hitchings,* 5 Gray (Mass.), 482.

In volume 1, sec. 89 (55), *Dillon* says: "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against
(966) the corporation and the power is denied." The power to prevent nuisances does not, directly or by implication, carry with it the authority to hold the owner of a building, who may never himself visit it, responsible for the nuisance of keeping a house of prostitution, bawdy house, or house of ill fame, committed by his tenant without his knowledge or consent, and subject him to a fine, to say nothing of the disjunctive liability to be deemed the keeper of a house of ill fame and to have the inference drawn against him on account of the bad character rather than the conduct of those who occupy his houses as lessees or frequent them. Such a by-law is not only unauthorized, but unreasonable.

If the power to suppress bawdy houses had been given in express terms, as has been done in some instances, the city could not even then have usurped the authority to enact that persons not guilty of nuisance

under the established principles of law should be deemed guilty of keeping bawdy houses, and to prescribe new rules of evidence to be adopted on the trial. *Charlton v. Barber,* 54 Iowa, 360; *Dorst v. People,* 51 Ill., 286; *Mt. Pleasant v. Bruse,* 11 Iowa, 399; Wood Nuisances, secs. 740, 741; 1 Dillon, secs. 309, 310.

If the words, "be deemed the keeper of a house of ill fame and," were treated as surplusage, the ordinance, after striking them out, would not be valid, because the city had no express authority to impose a penalty on owners as well as occupants, not only where prostitution but also where any illicit intercourse whatever is allowed in a house or a room separately leased or sublet, and, under a general power to suppress, much broader than that given to the city by the charter or general law, such a by-law would have been declared unreasonable. Under a general power to suppress houses of ill fame, it has been held that an ordinance was valid which forbade owners from renting their houses to others for the purpose of using them as bawdy houses or with a knowledge that they were to be so used, but such gen- (967) eral law does not empower a city to declare that a given house is kept as a house of prostitution, or to define and declare what is a house of ill fame. 1 Dillon Mun. Corp., sec. 376 (310); *ib.,* 375 (309), and notes.

The violation of a valid ordinance is, under the provisions of section 3820 of The Code, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. *S. v. Hunter,* 106 N. C., 796.

There was error. The judge below, upon the introduction of the ordinances and the development of all the evidence, ought to have instructed the jury to return a verdict of "not guilty," and there must be a

New trial.

Cited: S. v. Tenant, 110 N. C., 614; *S. v. Austin,* 114 N. C., 861; *Love v. Raleigh,* 116 N. C., 307; *S. v. Thomas,* 118 N. C., 1225; *Edgerton v. Water Co.,* 126 N. C., 96; *Slaughter v. O'Berry, ib.,* 185; *S. v. Higgs, ib.,* 1025; *S. v. Ray,* 131 N. C., 816; *Godwin v. Telephone Co.,* 136 N. C., 260; *S. v. Dannenberg,* 150 N. C., 801; *Comrs. v. Henderson,* 163 N. C., 116; *S. v. Darnell,* 166 N. C., 301; *S. v. Prevo,* 178 N. C., 745; *S. v. Fink,* 179 N. C., 716.

STATE v. N. B. LEWIS.

Constitution, Art. IV, Sec. 11—Officers de facto.

1. Upon the death of one of the judges of the Superior Courts, the Governor has the authority, under Article IV, section 11 of the Constitution, to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge.

2. The proper interpretation of Article IV, section 11 of the Constitution, is, that while the Governor is taking a reasonable time for deliberation and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which the successor of the deceased judge will be assigned by the general law immediately upon such successor's qualification.

3. An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without injury, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, such as taking an oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

4. Where the Governor issues a commission to one of the judges of the Superior Courts, authorizing him to hold certain terms of the Superior Courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned, a *de facto* judge so long as he assumes to act in that capacity; and this is so, although the commission was issued without authority of law.

5. Where the Constitution has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that, in fact, the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could for any reason have lawfully issued it.

6. It is the duty of the Supreme Court to resolve all doubts in favor of the constitutionality of a statute passed by the Legislature, or of an official act of the chief executive officer of the State.

(DAVIS, J., concurred in the ruling of the Court that a judge acting under a commission from the Governor is a judge *de facto*, but dissented from construction placed upon Article IV, section 11, of the Constitution.)

ASSAULT AND BATTERY with a deadly weapon, tried at the July (968) Term, 1890, of ROCKINGHAM, before *Whitaker, J.*

The judge was acting by virtue of the following commission from the Governor:

RALEIGH, 8 July, 1890.

(969)

To Hon. Spier Whitaker—GREETING:

We, reposing special trust and confidence in your integrity and knowledge, do by these presents appoint you to hold Fall Terms of the Superior Courts of Rockingham County, beginning 22 July, 1890, and Stokes County, beginning 4 August, 1890, in the Ninth Judicial District, in lieu of Hon. William Shipp, deceased, and do hereby confer upon you all the rights, privileges and powers useful and necessary to the just and proper discharge of the duties of your appointment.

In witness whereof, His Excellency, Daniel G. Fowle, our Governor and Commander-in-Chief, hath signed with his hand these presents, and caused our Great Seal to be affixed thereto.

Done at our city of Raleigh this 8 July, in the year of our Lord one thousand eight hundred and ninety, and in the one hundred and fifteenth year of our American Independence.

DAN'L. G. FOWLE, *Governor.*

By the Governor:

WM. L. SAUNDERS, *Secretary of State.*

There was a verdict of guilty. Prayer for judgment. Motion in arrest of judgment for that Judge Shipp having recently died, and the office of Superior Court judge for the Eleventh Judicial District being now vacant by reason of the Governor's failure to appoint his successor, as required by the Constitution and laws of North Carolina to do, there is no one authorized to hold the court, which in the order of rotation should have been held by Judge Shipp.

The appointment of Judge Spier Whitaker to hold his regular term of court is without authority under the Constitution, he being in the order of rotation of judges, required to hold the court of the Second District, Judge Shipp's successor, under sections 11 and 25 of Article IV of the Constitution, being the only person required to hold said term of said court. (970)

That this case is, therefore, *coram non judice.*

His Honor having found as a fact that Judge Shipp was dead before his special commission to hold this court was issued, arrested the judgment, and the solicitor appealed.

Attorney-General and R. H. Battle and Samuel F. Mordecai for the State.

No counsel contra.

AVERY, J., after stating the case: If Judge Whitaker was acting either *de jure* or *de facto* as judge of the Superior Court of Rockingham County in opening and organizing that court, and in presiding at the trial of the defendant until the jury returned a verdict of guilty, it was error to allow the motion of the defendant and enter the order arresting the judgment. Were we to concede not only that the Governor did not have the power, under the Constitution, to appoint him and clothe him with the rightful authority, but that his acts as a *de facto* officer also ceased to be valid and binding as to the public and third persons, when he declared in open court his purpose to abdicate because he was of opinion that the said term could not have been lawfully held except by a successor regularly appointed and commissioned by the Governor to fill the vacancy caused by the death of Judge Shipp, still his refusal to proceed further with the business of the court would not affect the validity of any previous act done under color of his appointment from the Governor, and when he was holding himself out to the public as the rightful incumbent by virtue of the special commission entered of record. Judge Whitaker was a *de facto* officer so long as he continued to preside and to assert his power under, and by virtue of, the commission issued by the Governor, even if we concede, for the sake of argument, that he was not the rightfully constituted
(971) judge of the Superior Court of Rockingham County, and that his power as a *de facto* officer continued only so long as he exercised it.

Chief Justice Butler, in the case of *S. v. Carroll,* 38 Conn., 449, after a very exhaustive examination and review of the English and American authorities, defines and classifies officers *de facto* as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity

in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such."

If it be admitted that the Governor was not empowered by Article IV, section 11 of the Constitution, to require Judge Whitaker to hold the term of Rockingham court, which Judge Shipp, before his death, had been assigned to hold, still, when the commission was issued, even without authority, and the appointee undertook to discharge the duties required of him, he was, in so far as it affected the public and the rights of third persons, *de facto* judge of the court so long as he assumed to act in that capacity belonging to the third class mentioned in the opinion of *Chief Justice Butler.*

The defendant, finding the judge holding the court by au- (972) thority of a commission from the Governor requiring him to discharge that duty, without objection, if he had ground for raising any, pleaded "not guilty" to the charge of assault and battery, and, after a trial, in which no exceptions were entered to the rulings of the court, the jury returned a verdict of "guilty." Up to this point his Honor was assuming his judicial functions, and it is not material if his real purpose was to make a case on appeal for this Court, in which the validity of his official acts as judge of that court would be brought in question, because, so long as he proceeded in the transaction of the business of the term, he was judge *de facto* of the Superior Court of Rockingham County, and his acts were valid and conclusive on the defendant Lewis as though he had claimed himself, and been admitted by all others, to be the judge *de jure* of that court. If the defendant should be again put upon trial for the same offense, there can be no question that the record of this trial, including a copy of Judge Whitaker's commission, would sustain a plea of former conviction.

After the judge had determined that he was not empowered to hold the court by virtue of the commission, he ordered, on motion, that the judgment be arrested. If, by his own volition, he ceased to be a *de facto* officer after the verdict was entered, then he had no authority to arrest the judgment. If he was still a *de facto* officer, there was no sufficient reason why the judgment of the court should not have been pronounced, as it must hereafter be entered, on motion of the solicitor.

The principles we have stated, as embodied in the opinion in *S. v. Carroll, supra,* are sustained by the decisions of this Court, as well as the courts of other States. *Burke v. Elliott,* 26 N. C., 355; *Gilliam v. Reddick, ib.,* 368; *Norfleet v. Staton,* 73 N. C., 546; *S. v. Edens,* 95 N. C., 693; *S. v. Speaks,* 95 N. C., 689; *Attorney-General v. Crocker,* 138 Mass., 214; *Petersbed v. Stone,* 119 Mass., 465; *S. v. Carroll,*

(973) *supra,* and authorities cited; *Diggs v. State,* 49 Ala., 311; *Venable v. Curd,* 2 Heard., 582; *Conover v. Devlin,* 15 How. Pr., 470; *S. v. Williams,* 5 Wis., 308; *Woodruff v. McHenry,* 56 Ill., 218. The views which we have thus far presented have the approval of all the members of the Court.

A majority of the Court concur in resting our ruling upon two additional grounds:

1. That there is nothing in the record which, in legal contemplation, excludes the possibility that the Governor appointed the judge to hold two special terms—one in Rockingham and the other in Stokes County—and if he did not have the power to require the judge assigned to a different district to hold "specified regular terms," under the provisions of section 11, Article IV, it will, nevertheless, be presumed that he was exercising his rightful authority in ordering the holding of special terms.

2. That the Governor did not, in fact, transcend his authority if he issued the commission—not because it appeared to him that special terms were necessary in the counties named therein, but under the idea that he was empowered to require the judge appointed to hold "specified" regular terms on account of the death of the judge assigned to the Ninth Judicial District, and while he had under consideration the selection of his successor.

Section 11, Article IV of the Constitution, is as follows: "Every judge of the Superior Court shall reside in the district for which he is elected. The judge shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years; *but, in case of protracted illness of the judge assigned to preside, or any other unavoidable accident to him,* by reason of which he shall be unable to preside, the Governor may *require any judge to hold one or more specified terms* in said district in
(974) lieu of the judge assigned to hold the courts in said district."

Section 913 of The Code is as follows: "The Governor shall have power to appoint *any judge* to *hold special terms* of the Superior Court in any county, and, by consent of the Governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years, and whenever a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor."

Section 11, Article IV of the Constitution, in its bearing upon the statute in reference to special terms, has been more than once construed by this Court, and it is now well settled that the Governor, under its express provisions, has the power to require a judge to hold one or more special terms in different districts from that to which he has been assigned in the regular course of rotation. *S. v. Speaks,* 95 N. C., 689.

In *S. v. Watson,* 75 N. C., 136, *Justice Rodman,* for the Court, says: "The reason assigned by the Governor in the commission, stated to be that two judges had agreed to a partial exchange of districts, does not, in our opinion, avoid the commission. The *Governor is not bound to assign* any reason *in the commission, or to this Court.* As to all the world, except the *Legislature, he is the final judge of the fitness of his reasons.* It may be that he desired to accommodate the judges, and no public inconvenience occurred to him as probable. If so, we cannot say that the reason was insufficient, and that, being insufficient, it avoided the commission. In doing so, we would clearly encroach on the executive duty and responsibility."

It is the duty of this Court to resolve all doubts in favor of the constitutionality of a statute passed by the Legislature, or of an official act of the chief executive officer of the State. As the Court say in *S. v. Watson, supra,* the Governor was not bound to assign a reason, nor must we, because a reason has been embodied in the commission, conclude that the Governor had no other sufficient grounds for (975) requiring Judge Whitaker to hold the court. It may be, for aught that appears to the contrary in the record proper, that the Governor acted on a certificate framed under the provisions of The Code, sec. 914, and sufficient to warrant his calling a special term at the time when the regular terms were ordinarily held. He had the power to do so, and might issue the order direct to the judge. Neither the certificate forwarded to the executive office nor the notice sent down to the county commissioners (The Code, sec. 915) constitute an essential part of the record of the term. This Court is not bound to conclude that courts were not special terms because they are called "fall terms" in the commission, nor because they were held at the time appointed by law for holding the regular fall sessions. Judge Shipp being dead, the Governor had the power to call special terms of the courts, both in Rockingham and Stokes counties. We should always assume that he did not, in fact, exceed the limit of his powers under the Constitution when, consistently with every fact disclosed, it may be that his acts were valid. If it be granted that the successor of Judge Shipp, had he been appointed and inducted into office, would have been the proper officer to hold the regular term of the court in Rockingham at the precise time when Judge Whitaker presided there, this Court is not at liberty to jump to the conclusion that some delay in filling a vacancy is not allowed, in order that the Governor, when he thinks the public interests will be best subserved by doing so, may take time to consider and inquire as to the fitness of persons whose names are suggested for a position so important and responsible. Where the appointment is

tendered and declined, or if, for any other reason, there is delay, while the chief executive is instituting inquiry for the purpose of selecting a suitable person to fill the office, he is not prohibited from requir-
(976) ing a judge, who is not engaged in holding the courts of another district, to hold one or more terms in that to which there is no judge assigned. If the Governor should purposely and unreasonably postpone the exercise of the appointing power, for that, like any other misfeasance in office, the Legislature may call him to account.

Since section 11, Article IV of the Constitution, as amended in 1875, was construed in *S. v. Monroe,* 80 N. C., 373, to prohibit only the holding by any judge twice in four years of the whole series of courts comprehended in one district, and that case has since been approved in *S. v. Speaks,* 95 N. C., 689, it is too late to contend that the constitutional convention intended to put an end to all exchanges, or the holding of the courts in the same county oftener than once in four years, with only the two exceptions—where the judge assigned is disabled by protracted illness or some accidental injury. Courts have been held in all portions of the State by judges acting under commissions from the Governor, and we are not disposed to entertain a proposition to overrule adjudications so often acted upon by the chief executive officer of the State.

In section 25, Article IV of the Constitution, we find the provision that "if any person elected or appointed to any of said offices shall neglect and fail to qualify, such office shall be appointed to, held and filled as provided in case of vacancies occurring therein," viz., by the Governor. Suppose the Governor should appoint one to fill such a vacancy, and the appointee should accept, but fail to qualify immediately, would the Governor have the right, and would it be his duty, without regard to circumstances, to make a second appointment without delay, because there was some official work awaiting the qualification of the new appointee? Would the courts be justified in declaring the acts of the old incumbent void because the Governor's first appointee, in lieu of the person elected and declining, neglected to qualify, and the
(977) Governor had unreasonably postponed making a second appointment?

Where the Constitution has clothed the Governor with the power to require a judge to hold a court in a district different from that to which he is by general law assigned, upon certain conditions, as to the fulfillment of which he must, of necessity, be the judge, when he issues the commission this Court will assume, if he could, for any reason, lawfully require such service of a judge, that, in fact, the emergency had arisen that called for the exercise of the authority given him by law. *S. v. Watson, supra.* Constitutional as well as statutory provisions, made in pursuance of the organic law, are often so framed that the

Governor is left to determine in his discretion whether the contingency, on the happening of which he is to exercise a certain power, has arisen. Cooley Const. Lim., marg. pp. 41 and 187; *Kendall v. Inhabitants of Kingston,* 5 Mass., 533. And in such instances there is no power lodged elsewhere to correct a mistake of judgment on his part. The Legislature can notice a willful abuse of authority. It is provided in section 914 of The Code that the Governor may order a special term of the Superior Court to be held in a county, whenever it shall appear to him "by the certificate of any judge, a majority of the board of county commissioners, or otherwise," that a certain state of facts exists. He is the sole judge of the sufficiency of the evidence to satisfy him that the business of a court is such as to require the holding of a special term. The Legislature could not require the Governor to exercise his power of appointment within a given period, and, therefore, the statute must be understood (in a qualified sense growing out of this limit to their authority) as meaning that the successor, *when appointed,* "shall hold the courts of the district allotted to his predecessor" that shall not have been previously held.

But, looking exclusively to the phraseology of section 11, Article IV, we think that we are warranted in resting our ruling (978) upon the ground that the Constitution, by its express terms, empowered the Governor to appoint Judge Whitaker to hold the two "specified terms," in lieu of the judge assigned to the district, because he had not, for want of sufficient time to select among the eligible lawyers, or for other good reason, designated the successor to Judge Shipp, who had died after being assigned by law to the Ninth Judicial District. The word "accident," in its legal sense, has been defined to be "(1) an event happening without the concurrence of the will of the person by whose agency it was caused; (2) an event that takes place without one's foresight or expectation." The death of Judge Shipp, of course, is due to divine agency, and, therefore, the first of the two definitions could not be adopted upon our theory in this case, but, on the other hand, the additional qualifying and intensifying word "unavoidable" would imply not simply the passive state of having no agency in bringing about the event, but the active exertion of one's powers to prevent it. Death is an event that takes place without the "foresight or expectation" of its victim, as well as in spite of the natural resistance of his vital powers and energies, and is an "unavoidable accident," happening not only without the concurrence of the will of the man, but because, by summoning all of his will power, he cannot prevent it. Webster says that the word "accident" is often used in the sense of "an undesigned and unfortunate occurrence of an afflictive nature; a casualty; a mishap, as to die by accident." The same author defines "un-

avoidable" as meaning "incapable of being shunned or prevented; inevitable." Combining the synonyms of the two words, it seems that we might say with propriety and accuracy that Judge Shipp, though dead, had, on account of an "inevitable mishap, or an occurrence to him of an afflictive nature" that could not have been "prevented," been unable to preside. If, using the word "accident" in the sense of chance,

we hold that the framers of our organic law meant to provide
(979) only for the contingency of the judge being disabled by some

unforeseen injury to him, can we give effect to the adjective "unavoidable" by looking into the facts attending his mishap, and declaring judicially that it could not have been shunned by any degree of care on his part, and that any occurrence to him, except death, was utterly inevitable, had he exerted all of his power to obviate it? Anderson, in his Law Dictionary, p. 12, says: "An accident is an event or occurrence which happens unexpectedly from the uncontrollable operations of nature alone, and without human agency," and that unavoidable accidents are such as are "inevitable or absolutely unavoidable because affected or influenced by the uncontrollable operations of nature." *Ib.*, p. 13. The same author gives also another definition as follows: "An accident not occasioned in any degree remotely or directly by want of such care or skill as the law holds every man bound to exercise." But, from the nature of the case, the framers of the Constitution could not have intended to make their meaning dependent upon the decision of a question of negligence, and must have used the words in the other sense in which they are defined by the authors. This interpretation brings this section into harmony with section 25, Article IV, where it is provided that until a newly elected officer, or one appointed in place of a newly elected officer failing to qualify, shall comply with the conditions precedent to his lawful induction into office, the incumbent shall hold over. In that event, the duties are discharged by the person whose regular time has expired, even while the Governor is searching for a suitable person to appoint in lieu of another chosen to succeed him. In our case, we interpret the Constitution to mean that while the chief executive officer is taking a reasonable time for deliberation, and acquiring information that will aid him in choosing

a competent and worthy officer, he may require an unoccupied
(980) judge to hold a specified term or terms of the courts of the district

which his appointee will be assigned by the general law immediately on his qualification. If we have fairly construed the language of the framers of the Constitution, the consequences of giving the section a proper interpretation are to be considered by those intrusted with making statute law and suggesting alterations in the organic law. But we see no ground for apprehending that a Governor

will ever abuse his power by such unreasonable delay as to impose upon eleven judges the duties and labor of twelve. Such an unreasonable dereliction in the discharge of a duty imposed by the Constitution as would appear palpably to be a willful abuse of his power would make him amenable before the General Assembly, the highest of all criminal tribunals in the State.

The order arresting judgment in this case is reversed, and the court below will proceed to enter such judgment as it may deem proper, if the solicitor shall pray the judgment of the court.

DAVIS, J., concurring in the conclusion reached by the Court, but dissenting upon other grounds: Judge Whitaker was a *de jure* judge, and his acts while holding, *de facto,* a regular term of Rockingham Superior Court, which was, by law, to have been held by Judge Shipp, or by his successor in the event of a vacancy, were valid, and this is sufficient to decide the question before us. But I do not concur in the opinion that the Governor had the power to require him to hold that court, under Article IV, section 11 of the Constitution, or to appoint him to hold it, under section 913 of The Code, and I will content myself with a brief statement of my opinion, without elaboration.

I think Article IV, section 11 of the Constitution, as amended by the Convention of 1875, means to provide for the inability of a living judge regularly assigned in order of rotation to preside in any district, to do so because of his protracted illness, "or any other (981) unavoidable accident to him, by reason of which he shall be unable to preside," in which event "the Governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of said district"; and I do not think that, by any fair and unstrained implication, it can be made to apply to a vacancy, for that is provided for in clear, express and unmistakable language in section 25 of the same article, and section 11 provides only for courts to be held in lieu of the disabled living judge, who, as soon as his disabilities shall be removed, will return to hold his courts, and not in lieu of his successor who fills the vacancy caused by his death, resignation or otherwise, unless he also shall be under some temporary disability. Under section 913 of The Code, the Governor has power to "appoint any judge to hold a special term of the Superior Court in any county," and to consent to the exchange of courts by judges, but he has no power to appoint a special term of the court except as provided, and only as provided, by sections 914 and 915 of The Code, for it will be observed that the constitutional provision (Article IV, section 14 of the Constitution of 1868), as it existed when *S. v. Watson,* 75 N. C., 136, was decided, authorized the Governor, "for good reasons,

which he shall report to the Legislature at its current or next session, to require any judge to hold one or more specified terms of said courts in lieu of the judge in whose district they are." This provision does not appear in the amended Constitution. I am not aware of any construction that has been placed upon Article IV, section 11 of the present Constitution, or upon section 913 of The Code, by this Court, that will confer upon the Executive, power to appoint or require a judge to hold a regular term of the court in a vacant judicial district.

S. v. Watson, 75 N. C., 136, does not construe either, but is
(982) based upon and is a construction of Article IV, section 14 of the Constitution of 1868, which, by express language, conferred upon the Governor, for "good reasons, which he shall report to the Legislature," etc., power to require a judge "to hold one or more specified terms in lieu of the judge in whose district they are." And that case does not do more than declare that the Governor, under that section of Article IV of the Constitution of 1868, "is the final judge of the fitness of his reasons" as to all the world except the Legislature, to which he is required to report them.

There is no such provision in the present Constitution or laws, and it is no authority in construing the provisions now being considered.

S. v. Monroe, 80 N. C., 373, so far as it relates to Article IV, section 11, only asserts that it does not restrict the Legislature from creating an extra term of the Superior Court of any county, and designating the presiding judge to hold the same, and *S. v. Speaks,* 95 N. C., 689, so far as this question is concerned, only asserts that the acts of an officer *de facto* are as binding as if he were an officer *de jure,* and in that all concur.

It is not contended by me that the amended Constitution intended to put an end to all exchanges, or that the Legislature has not the power to provide, within the limits of the Constitution, for the creation of additional or special courts, inferior to the Supreme Court, and to provide for the manner in which they may be held, but I do not think that the courts which Judge Whitaker was required to hold were special terms or additional courts provided for by any law. This Court is bound to take judicial notice of the times and places at which the regular terms of the Superior Courts are held, and we are bound to know, judicially, that it was the regular Fall Term, and not a special term, of Rockingham court that Judge Whitaker was required to hold.

We are charged with the knowledge that the Governor had no power to appoint a special term of Rockingham Superior Court, except
as provided for in sections 914 and 915 of The Code, and there is
(983) no evidence to warrant the assumption or presumption that the

Governor was acting under those sections. So far from it, it appears from the record, and is found as a fact, that it was a regular term which was to have been held by Judge Shipp.

I do not think that the Governor is the sole judge of the sufficiency of the evidence to satisfy him that the business of the court is such as to require the holding of a special term, and even if we could presume, without any evidence and against the record and knowledge with which the court is charged, that Judge Whitaker was required to hold a special term of Rockingham Superior Court, the Governor had no power to appoint such a court to be held at the same time as the regular term; and if it appeared, at any time other than a regular term, by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that the business of the county required it, the duty of the Governor is imperative, whatever may be his opinion as to the necessity of the special term, to order it. The language of the statute is *"shall,"* and his executive duty is to obey.

But it is said that the death of Judge Shipp was an *accident,* within the meaning of Article IV, section 11 of the Constitution. I cannot concur in this view. It would never occur to me to say that Judge Shipp was "unable to preside" at Rockingham court by reason of the *accident* of his death. Death would put no *accidental* suspension to his ability to hold the court, but it would create a *vacancy,* and no one could hold it *in lieu of him* until the vacancy was filled, for there was no one in existence *in lieu* of whom it could be held. One may fill a *vacancy* created by the death or resignation of another, but can it be said that he is acting in lieu of the dead man? His power to act ended with his life, and when that ended, his place was (984) vacant, and, until filled, there was no one to act, or for whom another could act.

So much of the opinion as is based upon the supposed necessity that might otherwise be imposed upon the Governor to act hastily is an argument *ab inconvenienti,* the force of which is, I think, greatly lessened, if not rendered nugatory by the provisions of sections 914 and 915 of The Code, under which special terms, if any necessity or emergency may exist, may be appointed in the manner plainly prescribed by law, without the exercise of any doubtful or uncertain power which may not exist.

Concurring in the conclusion arrived at, and regretting that I cannot concur in the entire opinion of the majority of the Court, which, however harmless it may be at the present time, may, I fear, in the future, become a dangerous precedent in the hands of an unwise or unconscientious executive, I feel constrained to enter my dissent to so much of the opinion as holds that the Governor had the rightful power to

require Judge Whitaker to hold the regular Fall Term of Rockingham Superior Court, made vacant by the lamented death of Judge Shipp, who, in the order of rotation, would have been the proper judge to preside.

SHEPHERD, J., concurring: I concur in the decision upon the grounds first stated in the opinion of the Court. As the other questions are of much importance, and, to my mind, not free from difficulty, and as their consideration is unnecessary to the disposition of this appeal, I do not desire to be understood as agreeing to all that has been said in reference to them.

Per Curiam. Reversed.

Cited: Van Amringe v. Taylor, 108 N. C., 201; *S. v. Davis,* 109 N. C., 782, 783; *S. c.,* 111 N. C., 734; *S. v. Turner,* 119 N. C., 845, 846; *Hughes v. Long, ib.,* 55; *S. v. Shuford,* 128 N. C., 592; *S. v. Hall,* 142 N. C., 715; *S. v. Fulton,* 149 N. C., 487; *Markham v. Simpson,* 175 N. C., 139; *S. v. Wood, ib.,* 814, 815, 816; *S. v. Harden,* 177 N. C., 584.

APPENDIX

PRESENTATION OF PORTRAIT OF CHIEF JUSTICE TAYLOR

The portrait of JOHN LOUIS TAYLOR, the first Chief Justice of the Supreme Court of North Carolina (under its organization in pursuance of the act of 1818), was presented, on behalf of his descendants, to the Court on 16 December, 1890, by Thomas S. Kenan. In the course of his remarks, some interesting facts relating to the life of the distinguished jurist were given.

CHIEF JUSTICE TAYLOR was born in England, and came to New Bern, in Craven County, when about 20 years of age, in company with John Devereux and Pierce Manning. He read law at Salisbury, Andrew Jackson being a fellow-student. He was very much attached to Jackson and voted for him for President, although politically opposed to him. After he was appointed Chief Justice he returned to England on a visit to his relatives, and while in London had the miniature taken from which this portrait was executed by Mr. James L. Busbee, son of Charles M. Busbee, Esq., of Raleigh. The work is well done and is a great credit to the young artist.

The Chief Justice married Miss Rowan, of Fayetteville, after whose death he married a sister of JUDGE GASTON. He moved from New Bern to Raleigh in 1812, and occupied the house on Hillsboro Street known as the "Saunders place" and now the property of S. A. Ashe. It was built for him and under his supervision. He died in 1829 and was buried on the premises, but his remains were subsequently removed to Oakwood Cemetery.

He was a man of great literary taste, a lover of humor, and abundant in his hospitality, and was regarded by the bench and the bar of the State as one of the most distinguished of our judges. These data were obtained from his descendants.

There is also a memoir of him reported in 16 N. C., 309, which was prepared shortly after his death.

CHIEF JUSTICE MERRIMON, in accepting the portrait on behalf of the Court, said that in his lifetime JUDGE TAYLOR was a distinguished and brilliant member of the Court and lives today in the memory of the bench and bar.

He directed that a minute of this proceeding be made in the records of the Court, and that the portrait be placed in proper position upon the walls of the Supreme Court room.

INDEX

ACCOUNT.

1. Where an action is brought within two years after qualification of administrator by the next of kin, to enforce account and distribution of the estate, and the defendant plead that he had fully administered and settled the estate: *Held*, it was not necessary to allege, to maintain such action, that two years had elapsed next after the qualification of administrator. *Allen v. Royster*, 278.

2. The administrator might consent to account sooner, and if there was no such consent, or any reasons why there should be delay, he could set them up as defense to the action. *Ib.*

3. It was not essential for the complaint to allege that there is "no necessity for retaining the funds," under section 1512 of The Code. *Ib.*

4. An administrator is not entitled to be allowed counsel fees for defending an action by next of kin to compel him to final settlement, when he unreasonably, willfully and dishonestly delays to account with them. *Ib.*

5. An administrator is not entitled to commissions on such sums as he ought to have accounted for and failed so to do. *Ib.*

ACTION TO RECOVER LAND.

1. Where, in an action to recover land, the defendants show adverse possession under color of title for seven years, under known and visible lines and boundaries, continuous and successive, and next preceding the institution of this action, the plaintiffs cannot recover. *Simpson v. Simpson*, 552.

2. A grant to G. and E., conveying certain lands by definite metes and bounds, contained also these words: "Containing, in whole, 35,280 acres, 5,000 acres of which, being previously entered by citizens, is hereby reserved." Entry had been so previously made, definitely locating such reservation, and a grant thereon was subsequently made: *Held*, that the words, "hereby reserved," have the effect of excepting the 5,000 acres from the grant, and mean that such land should be left to be granted to the citizens who had entered it. *Brown v. Richard*, 639.

3. In an action for the recovery of the possession of such lands, a part of which was known and designated as the "Stevely lands," the plaintiff claimed title under a deed from the sheriff to land sold under execution against the "Estate Company." This corporation claimed under two deeds, each containing the following clause, describing the land conveyed to it: "The undivided shares of all the land remaining unsold and contained within the boundaries of the 30,080-acre tract granted by the State to G. and E.," etc. The *boundaries* in the grant referred to embraced 4,071 acres (the "Stevely lands") of the 5,000-acre exception—the *locus in quo: Held*, the exception in the grant applying to the boundaries as well as to the land itself, no part of the

ACTION TO RECOVER LAND—*Continued.*

"Stevely lands" are conveyed in the deeds to the "Estate Company," and the plaintiffs acquired no interest in such lands by their purchase under execution. *Ib.*

4. The sole reception of the profits by one tenant in common of land, or by his bargainee, under a deed purporting to convey the whole interest for any period less than twenty years, is not an ouster, nor is the verbal refusal to let his cotenant in, for a greater interest than such cotenant is entitled to hold, an ouster. *Gilchrist v. Middleton*, 663.

5. Where one tenant in common brings an action against his cotenant, claiming sole seizin in the land held in common, and the latter sets up in his answer a general denial of the title and right to immediate possession, as alleged, such denial is equivalent to a confession of ouster in ejectment, and precludes the defendant from afterwards setting up the cotenancy on the trial for the purpose of subjecting the plaintiff to the payment of costs. *Ib.*

6. In such cases the excluded tenant in common should demand of his fellow who is in possession to be let in to the extent of his true interest, and on failure or refusal of the latter within a reasonable time to comply with such demand, the former may maintain an action for possession. *Ib.*

7. Where a plaintiff wrongfully claims in his complaint sole seizin in himself, his cotenant in possession may subject him to the payment of the costs by averring in his answer what the undivided interest of each of the cotenants really is, and avowing his willingness, if proper demand had been made, to have let the plaintiff in and accounted for rents received. *Ib.*

8. One tenant in common is allowed to sue alone and recover the entire interest in the property against another claiming adversely to his cotenants as well as to himself, in order to protect their rights against trespassers and disseisors. *Ib.*

9. But where it appears from the proof offered to show title, or is admitted on the trial, that a defendant who has confessed ouster by denying the plaintiff's title is in reality a tenant in common with the latter, it is the duty of the court to instruct the jury to ascertain and determine, by a specific finding, the undivided interest of the plaintiff, and to assess his damages in proportion to such actual undivided interest. *Ib.*

10. In an action for the possession of certain lands, the defendant answered, alleging that the plaintiff, pursuant to previous understanding, purchased them for defendant, but took title, to be held in his own name until he could pay the purchase-money advanced, to which payment the rents were to be applied. Plaintiff went into possession and so continued for several years: *Held*, (1) that the defendant was entitled to have plaintiff declared a trustee to hold the lands for his benefit, to the extent of defendant's interest therein; (2) that the statute of limitations was no bar to defendant's action. *Hinton v. Pritchard*, 128.

ACTION TO RECOVER LAND—*Continued.*

11. In an action to recover land bought by the plaintiff at an execution sale under a judgment obtained by himself, he is not a competent witness to prove the date of the debt on which such judgment was rendered, when the judgment debtor is since deceased and defendant claims under him. *Sumner v. Candler*, 86 N. C., 71, approved. *Buie v. Scott*, 181.

12. In such action, if it appear that no homestead was laid off, advantage can be taken of it, though not specially pleaded by defendant. *Mobley v. Griffin*, 104 N. C., 112, approved. *Ib.*

13. Where the plaintiff failed to connect himself with the former owners of a tract of land, and failed to show color of title or adverse and continuous possession for twenty-one years: *Held*, that the court properly instructed the jury to return a verdict for the defendants. *Brown v. King*, 313.

14. In an action of ejectment, and the modern substitute for it—an action for the possession of land—the plaintiff must allege and show that defendant held adverse possession at the time of action brought, and that he is entitled to the immediate possession. *Ib.*

15. A plaintiff, in an action to recover land, who claims under a deceased mortgagor, is not competent to prove, in his own interest, payments on the mortgage note made by such mortgagor. *Simpson v. Simpson*, 552.

16. In evidence of her chain of title the *feme* plaintiff introduced a mortgage given to indemnify the mortgagors, under whom she claimed, against loss by reason of their suretyship to the mortgagee in the sum of money due by note which they had endorsed. She offered to show further by her coplaintiff, to whom the note was endorsed payable, and in their own interest, that $50 was paid on the note before judgment: *Held*, the maker of the note and the mortgagor being dead, such testimony should be excluded, under section 590 of The Code, as being a transaction with deceased persons. *Ib.*

17. Where it appeared from the testimony that the land in dispute was bid off at the sale under mortgage at a small price (which was not shown to have been paid), pursuant to a previous agreement between the trustees conducting the sale and the bidder, who, at the instance of one of the trustees, transferred his bid to the vendee: *Held*, no title passed by such sale, because the land conveyed was held as security for debt. *Ib.*

18. Where the mortgagee has no power of sale granted to him, a sale made by him is not effectual to pass the legal title to the mortgagor. *Ib.*

19. A plaintiff, under a vendee under such sale, must bring an action to foreclose, and cannot recover possession of the land in an action simply for that purpose. *Ib.*

ADMINISTRATION.

1. Where it appeared that the defendant was executrix of her husband's will, and tenant for life, or during widowhood, of all his property, real, personal, and mixed; that the testator made sundry devises and

ADMINISTRATION—*Continued.*

bequests, to take effect upon her death or widowhood; that she did marry again, and took possession and wasted and lavishly used said property; that she was insolvent and had filed no account of the property, as required by law, except one inventory: *Held*, that there was no error in giving judgment directing the executrix to account and give bond for the security of the property, and, in default thereof, that a receiver be appointed. *Godwin v. Watford*, 168.

2. The court had jurisdiction to grant the relief given. *Ib.*

3. It is not necessary to wait for the lapse of two years next after qualification before bringing an action to compel an executor to account. *Ib.*

4. Where a final account of an administrator was examined and the vouchers passed upon by the deputy in the presence of the clerk of the Superior Court, who, immediately afterwards and without special examination, signed a general approval: *Held*, that such return was competent as *prima facie* evidence against the plaintiff. *Allen v. Royster*, 278.

5. Where an action is brought within two years after qualification of administrator by the next of kin, to enforce account and distribution of the estate, and the defendant plead that he had fully administered and settled the estate: *Held*, it was not necessary to allege, to maintain such action, that two years had elapsed next after the qualification of administrator. *Ib.*

6. The administrator might consent to account sooner, and if there was no such consent or any reasons why there should be delay, he could set them up as defense to the action. *Ib.*

7. It was not essential for the complaint to allege that there is "no necessity for retaining the funds," under section 1512 of The Code. *Ib.*

8. An administrator is not entitled to be allowed counsel fees for defending an action by next of kin to compel him to final settlement, when he unreasonably, willfully and dishonestly delays to account with them. *Ib.*

9. An administrator is not entitled to commissions on such sums as he ought to have accounted for and failed so to do. *Ib.*

10. An administrator petitioned to sell the lands of his intestate to pay a certain debt against the estate. The land was set apart to the intestate in his lifetime as a homestead, and then conveyed to one B., who reconveyed to the intestate's wife and children. It did not appear that either conveyance was in fraud of creditors: *Held*, (1) the lands were not subject to be sold for the debts against the estate; (2) the presumption of a resulting trust in favor of the intestate is met by the counterpresumption of advancement in favor of the wife and children; (3) the intestate having no legal or equitable interest, the clerk had no jurisdiction to sell. *Egerton v. Jones*, 284.

11. An agreement to arbitrate, and the award, under section 1426 of The Code, is competent evidence to prove the indebtedness of an estate. *Lassiter v. Upchurch*, 411.

ADMINISTRATION—*Continued.*

12. An agreement to arbitrate, and an award, under section 1426 of The Code, between the claimant and the administrator, where there is no fraud or collusion, is binding upon the heirs at law, even though they were not parties to the proceedings. *Ib.*

13. In a proceeding by an administrator to make assets to pay the debts of estate, heard upon issue raised and appeal from the clerk of the Superior Court, the defendant's heirs at law offered to show that a claim adjudged to be a debt against the estate by the arbitrators to whom the matter had been referred under section 1426 of The Code, was not in fact a valid debt: *Held*, (1) that the finding of the arbitrators was binding upon the heirs, though they were not parties to the proceedings; (2) it is equivalent to a judgment; (3) such proceedings could only be impeached for fraud or collusion. *Ib.*

14. The admission of this agreement and award in evidence, and making them conclusive upon the heirs, does not deprive them of their right of trial by jury. They exercised that right in this action, and this decision relates merely to the force and effect of the evidence introduced to establish and disprove it. *Ib.*

15. Actions upon claims in *favor* of an estate of a decedent must be brought within one year of his death, without regard to when administrator is appointed. *Coppersmith v. Wilson*, 31.

16. Actions upon claims *against* the estate of a decedent must be brought in one year after administration. *Ib.*

17. Time is counted from the death of the decedent, in respect, to claims in favor of the estate, because the law does not encourage remissness in those entitled to administration. *Ib.*

18. An engine, cotton-gin and condenser were attached to a mill by the *tenant by the curtesy* after his term commenced, not solely for the better enjoyment of the land, but for the mixed purpose of trade and agriculture: *Held*, they belonged to the executor of the life-tenant as against the remainderman. *Overman v. Sasser*, 432.

19. The executor may remove such fixtures within a reasonable time after the death of the life-tenant. *Ib.*

20. Between the executor and the heirs, whatever is affixed to the freehold becomes a part of it and passes with it. *Ib.*

21. Between the executor of tenant for life and in tail and the remainderman, the right of removing fixtures is more in favor of the executor. *Ib.*

22. In an action by the next of kin against the administrator *d. b. n.* of the decedent and his sureties for his failure to collect or account for the proceeds from sales of certain slaves made by a former administrator: *Held*, that the liability of the administrator *d. b. n.* depends on the liability of the former administrator as such. *Roper v. Burton*, 526.

ADMINISTRATION—*Continued.*

23. Where it appeared, in an action against the administrator *d. b. n.* of a decedent, that the former administrator, under an order of court in an old action brought by the next of kin, sold and hired out "for the legatees" certain slaves which had been set apart to them in partition had between them and the widow of such decedent, and took notes payable to himself "as administrator," and collected and invested the proceeds of some of them, and the cash for slaves sold at once "as administrator"; but it further also appeared of record that the administrator sold the slaves for division: *Held*, (1) that there was sufficient evidence to sustain the finding of the referee that the old action was for *division* among the next of kin, and was not for *distribution* by the administrator; (2) the administrator did not act in his administrative capacity in investing the cash and proceeds of sale; (3) he and his sureties are not liable for his neglect to collect or account for the proceeds of sale; (4) the administrator *d. b. n.* and his sureties are not liable for failure to collect such notes and investments which came into his hands from the former administrator; (5) the administrator *d. b. n.* and his sureties are liable for such amounts as he collected by virtue of his office, and this without regard to the liability of the former administrator; (6) and it appearing further that the administrator *d. b. n.* did not use the money he did collect as such, and that he could not distribute it because the next of kin could not be ascertained, he was not chargeable with interest. *Ib.*

24. An executor under a will held certain funds as trustee for A for life, and in remainder for B, etc., and he filed a final account, showing a balance in his hands due the estate, but made no reference to the trust fund: *Held*, (1) that the trust did not devolve upon his administrator, and that the latter, not finding any fund designated as a trust fund, and not having recognized the trust or set apart any particular assets to meet its requirements, was not a trustee of an unclosed trust, and that A, B and C were, as to such administrator, creditors only, and should have presented their claims as such creditors; (2) that the remainderman, as well as the life-tenant, had a right to sue for the fund and have another trustee appointed to hold it for the purpose of the trust; that their right of action accrued within a reasonable time after the granting of letters of administration, and these having been granted prior to 1 July, 1869, the former law as to the settlement of estates was applicable; (3) the administrator, having filed his final account in August, 1869, and paid over the balance to the distributees without taking refunding bonds, would not have been protected by the two years' statute of limitation prescribed in the Revised Code, but as this provision of the Revised Code requiring refunding bonds was repealed in 1868-69, and the settlement was made after such repeal and before the act of 1870 declaring the act of 1868-69 prospective only, but validating all *bona fide* settlements made under its provisions: *Held*, that, as the plaintiffs never presented their claims or sued for the same until 1889, they were barred by the statute of limitations; and (4) they would also have been barred by the seven years' statute, which does not require refunding bonds. *Bobbitt v. Jones*, 658.

ADMINISTRATION—*Continued.*

25. Where a personal representative files a petition to sell land for assets, it is essential that it should appear, by a direct allegation, or by implication, that the personal property has been exhausted without paying the indebtedness, or is insufficient to pay it. *Clement v. Cozart*, 695.

26. An administrator *de bonis non* must proceed against the estate or bond of a former personal representative, or show that he would recover nothing and would only incur costs by prosecuting such suit, before license will be granted to him to sell real estate to make assets. *Ib.*

27. The exhaustion or insufficiency of the personalty must be shown in the same way, where the personal representative seeks to set aside a fraudulent conveyance by the decedent and subject the land to sale for assets, and a creditor, or creditors, proceeding under section 1448 of The Code, or under the general equity jurisdiction of the court, are required also to make and prove (if not admitted) the same allegations. *Ib.*

Action of administrator against surviving partner, 156.

Action by executor to obtain construction of will, 486.

ADVERSE POSSESSION.

1. Possession essential to establish color of title must be open, notorious, adverse and continuous for seven years. *Cox v. Ward*, 507.

2. When both parties claim under the same owner, it is not necessary to show title out of the State. *Ib.*

AFFRAY.

When one engages in a fight willingly, he is guilty of an affray, and it is immaterial that he fought under a reasonable apprehension that his adversary had formed a purpose to make a violent assault upon him; nor is it any defense that during the encounter he fired a shot at his enemy under the belief that he was in danger of great bodily harm. *S. v. Harrell*, 944.

AGENCY.

Actual knowledge to the agent is constructive knowledge to the company; hence, the latter is deemed to have waived all objection to deafness as a bodily infirmity. *Follette v. Accident Asso.*, 240.

Authority of agent to warrant, 726.

For sale of liquor, 796.

APPEAL.

1. The Code, sec. 550, as amended by chapter 161, Laws of 1889, extends the time for serving case on appeal from five to ten days. *McGee v. Fox*, 766.

2. A motion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by chapter 121, Laws 1887. *Ib.*

APPEAL—*Continued.*

3. Where a person who has been convicted of an offense appeals from the judgment, and escapes, the appellate court may, in its discretion, proceed with the hearing of the exceptions, dismiss the appeal, or direct the cause to be continued to await the recapture of the fugitive, and any judgment it may pronounce thereon will not be invalid because of the fact that the defendant was not actually or constructively in custody, or not represented by counsel. *S. v. Jacobs*, 772.

4. The rule enunciated in *S. v. McMillan*, 94 N. C., 945, has been altered by the provisions of chapters 191 and 192, Laws 1887. *Ib.*

5. It is well settled that the question of severance is submitted to the discretion of the trial judge, and the exercise of that discretion, except in case of gross abuse, is not reviewable by the appellate courts. *S. v. Oxendine*, 783.

6. To entitle a convicted person to an appeal without giving an undertaking to secure costs, under section 1235 of The Code, it is essential that the required affidavit should state (1) that the defendant is wholly unable to give the security; (2) that he is advised by counsel that he has reasonable ground for appeal, and (3) that the application is made in good faith. These essential averments cannot be waived. *S. v. Duncan*, 818.

7. It appearing that the case upon appeal, and the exceptions thereto, were delivered to the judge, who died before it could be settled; that the papers have been lost, and that the defendant has been guilty of no *laches*, a new trial is awarded. *S. v. Parks*, 821.

8. When the appellant's case on appeal is served in time, and no exception or countercase is served, it becomes the "case on appeal." *S. v. Carlton*, 956.

9. When there is a discrepancy between the case on appeal and the record, the latter controls. *McCanless v. Flinchum*, 98 N. C., 358. *Ib.*

10. When the judge below finds that the prosecution is not required by the public interest, or that there was not reasonable ground therefor, the prosecutor is properly taxed with the costs. Code, sec. 737. *Comrs. v. Merrimon*, 106 N. C., 369, modified and typographical error corrected. *Ib.*

11. When the case on appeal is signed only by the appellant's counsel, and there is nothing to show that it was served on appellee in the time prescribed, it will not be considered in this Court. *Peebles v. Braswell*, 68.

12. When it appears that the appellant has been guilty of *laches*, and there is no affidavit to negative it, the application for *certiorari* to the judge to settle the case will be denied. *Ib.*

13. When there is error apparent on the face of the record, the absence of the case on appeal does not, of itself, entitle the appellee to have the appeal dismissed. *Ib.*

14. When a case was regularly constituted in court, complaint and answer filed, verdict and judgment thereon regular in all respects, and the

APPEAL—*Continued.*

summons, complaint and answer are lost, so that copies are not sent up with the record to this Court, and there is no averment of any effort to have the papers supplied in the court below, though seven months have elapsed since the appeal was taken, and there is no suggestion of any error which would thereby be made to appear: *Held*, that the appellant is not entitled to a *certiorari* for these papers. *Ib.*

15. When an exception to evidence is so vague as not to point out the nature of the error complained of, it will not be considered. *Everett v. Williamson*, 204.

16. An exception for "misdirection in the charge," without specifying any particulars, is too general. *McKinnon v. Morrison*, 104 N. C., 354, cited and approved. *Ib.*

17. When there is a motion for a new trial below for a refusal to give instructions asked, this is sufficient assignment of error. *Taylor v. Plummer*, 105 N. C., 56, cited and distinguished. *Ib.*

18. A prayer for instruction need not be given in the very words asked, if charged in substance. *Ib.*

19. Under The Code, section 273, the court, in its discretion, may allow the motion of one of several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting the motion, is not reviewable. If the judge refuses the motion, on the ground of a want of power, an appeal lies. *Jarrett v. Gibbs*, 303.

20. Where the facts, upon appeal to this Court, appear only from the statement of the case, and there is no transcript of the record, and it does not appear that a court was held at the time and place appointed by law, the appeal will be dismissed in this Court. *Sneeden v. Harris*, 311.

21. Generally, an appeal at once does not lie from an interlocutory order. The appellant should have assigned error of record and appealed from the final judgment. *Ib.*

22. Refusal of the Superior Court to allow a nonsuit after verdict and judgment will not be reviewed in this Court. *Brown v. King*, 313.

23. Where an appeal, taken at the November Term, 1889, of the Superior Court was not docketed in this Court until 17 October, 1890, and no part of the record has been printed (no leave to appeal *in forma pauperis* having been obtained), the appeal must be dismissed for either cause stated. *In re Berry*, 326.

24. In an action to foreclose a mortgage, it appeared that the plaintiffs had a lien upon the land specified, and the court made an order directing that an account be taken to ascertain the balance of the debt yet unpaid, and retaining the cause for further action: *Held*, that the order was interlocutory, and appeal would not lie from it. *Williams v. Walker*, 334.

APPEAL—*Continued.*

25. Where only the appellant's case on appeal is sent up, but it is further made to appear that it was served within the time allowed by law, and no exception thereto, was taken, or countercase served, it must be taken as the "case on appeal." *Booth v. Ratcliffe*, 6.

26. When both parties appeal, a transcript of the record must be sent up for each. This rule cannot be waived by consent of counsel. *Jones v. Hoggard*, 349.

27. The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held, and that it had obtained jurisdiction of the parties by service or waiver of process. *Ib.*

28. When the judge sustains exceptions filed by appellee to appellant's statement of case on appeal, and directs the case thus modified to be sent up, it is the duty of the appellant to have the case redrafted and presented to the judge for signature. When he does not do this, but merely sends up his statement of case, together with appellee's exceptions and the order of the judge, there is no "case settled on appeal," and the court (if there are no errors on the face of the record proper) may, on motion of appellee, or *ex mero motu*, either affirm the judgment or remand the case. *Mitchell v. Tedder*, 358.

29. The consideration of this Court upon points arising out of the pleadings, verdict and judgment, will be confined to such exceptions as are shown by the record to have been taken. *Ferrell v. Thompson*, 420.

30. Notice of appeal, though in the record, is no more a part of it than the case upon appeal. *Ib.*

31. The necessity of the rule requiring the "case on appeal" to be printed has been often pointed out. Unless appellants observe this requirement, it will save them needless expenditure to refrain from sending up appeals which can only be dismissed at their costs. *Hunt v. R. R.*, 447.

32. Where this Court inadvertently appended to its opinion the words, "and a new trial must be had in the court below, and we so adjudge," and, at the next term, upon its attention to this being called, correction was made without formal notice to the appellee: *Held*, he was not entitled, as a matter of right, to such notice, and especially when his counsel knew that a motion to correct the record on this point would be made, and the opinion itself gave notice that the appended words were inadvertently added and not consistent therewith. *Summerlin v. Cowles*, 459.

33. The appellant served his case on appeal, and the appellee his countercase, both in proper time. The judge took the papers to settle the case, but died before it was done. The appellant moves in this Court for a new trial because the case has not been settled. The appellee asks to withdraw his case and leave the appellant's case to stand as the case on appeal: *Held*, the appellee's motion should be allowed. *Drake v. Connelly*, 463.

APPEAL—*Continued.*

34. When it appears, from inspection of the record, that the court below refused to put his charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by this Court. *Ib.*

35. When it appears that the prayer for instruction appeared in the wrong place in the record, and the clerk, instead of copying it in the right place, refers to it, and this reference is immediately followed by the words, "His Honor declined all special instructions, and declined to put his instructions in writing, as requested, and defendant excepted," and this was followed by the charge of the court, this Court will read the case as if the prayer had been written out in full at the place of reference. *Ib.*

36. No case lies to this Court from an order of the Superior Court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. *Bank v. Burns*, 465.

37. In proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient, and made the order demanded: *Held*, that an appeal lay *at once* to the judge, as a matter of right, and the clerk could not allow or disallow it. *Ib.*

38. In arrest-and-bail proceedings, a motion was made by the defendant to vacate the order of arrest. The court found that the facts were sufficient to sustain the order: *Held*, that the findings of fact by the court below are final, and will not be reviewed by this Court unless it be objected properly that there was no evidence to support them. *Travers v. Deaton*, 500.

39. The findings of fact by a referee, approved and affirmed by the judge in the court below, where there is any competent testimony to support them, cannot be reviewed by this Court. *Roper v. Burton*, 526.

40. Where it sufficiently appears by affidavits that the appellant caused to be printed in due time the copies of the record required by rule of this Court, and that, misunderstanding the instructions of his counsel and the clerk of the Superior Court, to whom he applied for information, he sent only one printed copy to this Court and mailed others to counsel on both sides: *Held*, that, upon due notice and motion, the cause will be reinstated. *Smith v. Summerfield*, 580.

41. Exceptions to all matters other than the charge must be taken at the time. *Lowe v. Elliott*, 718.

42. Exceptions to the charge, and for refusing to give special instructions, are in time if taken at or before the stating of the case on appeal, though the better practice is to assign all exceptions in making motion for new trial. *Ib.*

43. The appellant is entitled to have his assignments of error to the charge, and for refusing or granting special instructions, if set out by him in his statement of case on appeal, incorporated by the judge in the case settled. If they are omitted, *certiorari* will lie. *Ib.*

44. Appeals from the clerk may be heard at chambers at any place in the district. *Ib.*

APPEAL—*Continued.*

Right of appeal not lost by death of adverse party, 52.

From allotment of homestead, 236.

APT TIME.

For motion for removal of cause to another county, 623.

Objection to joinder of counts, 853.

ARBITRATION.

1. In an action by administrator of a deceased partner against the one surviving, it was ordered, with consent of all parties, that "all the partnership matters and all the issues arising out of the pleadings shall be referred to O. M., whose findings and decision on the same shall be final and conclusive between all the parties hereto." The arbitrator found for the plaintiff, and the court gave judgment accordingly. There were no exceptions filed and no demand for the jury trial: *Held*, that the judgment must be sustained. *Reizenstein v. Hahn*, 156.

2. The award of the arbitrator, when made a judgment of the court, is final and conclusive between the parties. *Ib.*

3. In an action on an insurance policy, the defense was settlement by arbitration, according to the terms of the policy. The court ruled that the agreement to submit and the award were not competent either to support the plea of arbitrament and award or as a binding agreement upon the parties thereto. *Herndon v. Ins. Co.*, 183.

4. This was decided in *Mfg. Co. v. Assurance Co.*, 106 N. C., 28. *Ib.*

5. An agreement to arbitrate, and the award, under section 1426 of The Code, is competent evidence to prove the indebtedness of an estate. *Lassiter v. Upchurch*, 411.

6. An agreement to arbitrate, and an award, under section 1426 of The Code, between the claimant and the administrator, where there is no fraud or collusion, is binding upon the heirs at law, even though they were not parties to the proceedings. *Ib.*

7. In a proceeding by an administrator to make assets to pay the debts of the estate, heard upon issue raised and appeal from the clerk of the Superior Court, the defendant's heirs at law offered to show that a claim adjudged to be a debt against the estate by the arbitrators to whom the matter had been referred under section 1426 of The Code, was not, in fact, a valid debt: *Held*, (1) that the finding of the arbitrators was binding upon the heirs, though they were not parties to the proceedings; (2) it is equivalent to a judgment; (3) such proceedings could only be impeached for fraud or collusion. *Ib.*

8. The admission of this agreement and award in evidence, and making them conclusive upon the heirs, does not deprive them of their right of trial by jury. They exercised that right in this action, and this decision relates merely to the force and effect of the evidence introduced to establish and disprove it. *Ib.*

INDEX

ARREST AND BAIL.

1. In arrest and bail proceedings, a motion was made by the defendant to vacate the order of arrest. The court found that the facts were sufficient to sustain the order: *Held*, that the findings of fact by the court below are final, and will not be reviewed by this Court unless it be objected properly that there was no evidence to support them. *Travers v. Deaton*, 500.

2. The Code, sec. 291, par. 2, referring to parties liable to arrest, is intended to embrace all cases where the relation of trust and confidence in respect of money received or personal property in possession by one party for the benefit of another is raised by contract. *Ib.*

3. Where the defendant agreed to receive and sell for plaintiff, for cash and on time, certain guano described, himself becoming liable and indebted for its value at an agreed price, accounting and turning over to plaintiff the guano unsold and the proceeds of all sales: *Held*, (1) this constituted a fiduciary relationship embraced by The Code, sec. 291, par. 2; (2) if the defendant has converted such funds to his own use, he is liable to arrest. *Ib.*

4. A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without a warrant, except when such offenses are being committed in his presence; nor can a justice of the peace confer such authority by a mere verbal order or command. *S. v. Campbell*, 948.

5. The authority given by section 1124 of The Code to private persons to make arrests without warrant only extends to the offense therein mentioned and committed under the conditions therein prescribed. *Ib.*

6. The power conferred upon officers by section 1125 of The Code to summons private persons to aid them in the execution of their duties is limited to the cases mentioned in that section, and while they are actually being perpetrated, or are imminent. It does not go to the extent of authorizing the persons thus summoned to make arrests, without warrant, where the offense has been accomplished and the offenders have dispersed. *Ib.*

7. The rule is otherwise as to felonies. In such cases, if the crime is committed in the presence of a private person, it is his duty to make the arrest without waiting for a warrant or summons of an officer, but if it has been committed not in his presence he may not arrest without warrant. *Ib.*

8. The deceased had been engaged, some hours previous in a dangerous affray, in which he had been severely wounded, and was on his way home, carrying a pistol in his hand. A justice of the peace commanded the prisoner to follow and arrest him. In attempting to do so, deceased resisted, displaying his pistol, when prisoner killed him: *Held*, that, as prisoner had no authority to make the arrest, he was not justified in the killing. *Ib.*

ASSAULT.

1. Where the defendant struck his wife a blow with a stick in a public road so near to an officer (a justice of the peace) that he could hear

ASSAULT—*Continued.*

the sound made by the blow and the cries of the woman, though on account of the darkness, he could not actually see the assault, it was such a breach of the peace in the presence of the officer as authorized him to arrest the assailant without warrant. *S. v. McAfee*, 812.

2. When the officer, who was known by the defendant to be such, attempted to make the arrest, the latter drew back the strick in a striking position and ordered the officer to stand back, in consequence of which he desisted and got out of the way: *Held*, that this constituted an assault upon the officer. *Ib.*

ASSETS, Sale of land for, 695.

ASSIGNMENT.

1. In an action brought to set aside a fraudulent assignment, the *cestuis que trustent* are not necessary parties, and they will, in the absence of bad faith on the part of the assignee or trustee, be bound by his acts. *Hancock v. Wooten*, 9.

2. The *cestuis que trustent*, however, may be made parties by the plaintiffs, or they may be permitted to come in and unite in the defense, or the court may, upon proper cause shown by the assignee or trustee, at his instance, require their presence, but in no case will the death of all or any of the *cestuis que trustent* be a legal cause of continuance, unless the assignee or trustee is not defending in good faith, or unless the court is of the opinion that the ends of justice will be better subserved by the presence of the representatives. *Ib.*

3. Such an action may be brought by a single creditor, or as many as he may choose to unite with him, and is in the nature of a judgment creditor's bill, and the plaintiff or plaintiffs in such action acquire a preference by way of equitable lien upon both the legal and equitable assets of the debtor from the commencement thereof. *Ib.*

4. The court cannot deprive them of this preference by the joinder of new parties or the consolidation of other actions or proceedings where it is necessary, in the interests of convenience and justice, to require such joinder, but the preferences or priorities of the various parties litigant will be preserved. *Ib.*

5. Such actions may be now maintained without precedent judgment and executions in all cases where they could, under the former practice, have been maintained after the obtaining of such judgments or the issuing of such executions. *Ib.*

6. Where several creditors united in setting aside a fraudulent assignment, and in the action obtained judgments for their claims, it was properly held that a preferred creditor, who did not participate in the fraud, but who failed to join the plaintiffs in their action and united with the assignee in defense of the fraudulent assignment, and who has never obtained a judgment, should not share *pro rata* with the plaintiffs, but that he should be postponed as to them. *Ib.*

7. This would, perhaps, be otherwise in the case of a general creditor's bill, where it is the duty of the court to take a fund or estate in its cus-

ASSIGNMENT—*Continued.*

tody and distribute it according to the respective interests of the persons entitled. In such cases it may be that a creditor who has endeavored to defeat the purposes of the action can, upon proper terms, be allowed to prove his claim and share equally with the others. *Ib.*

8. Such a practice has no application to a judgment creditor's bill, where each creditor is entitled to reap the reward of his diligence. *Ib.*

9. In an action for debt, and to have declared fraudulent and void a deed of assignment, brought by creditors against the assignor and assignee, the plaintiffs allege that the defendant assignor executed to them several promissory notes for goods sold, intending to make the debts fall due after his assignment, and thus, at all times, intending to defraud his creditors; that the property is insufficient to pay his debts specified in the trust; that the trustee is unfit to administer his trust; that there is connivance between the assignor and trustee, and other facts tending to show a fraudulent assignment: *Held*, that the complaint stated a sufficient cause of action, and this although it appeared that the notes were not yet due. *Roberts v. Lewald*, 305.

10. The trustee should be restrained from paying any part of the proceeds of sale coming into his hands until the controversy is determined. *Ib.*

11. The court has authority to secure *this fund. Ib.*

12. Where the maker of a deed of assignment to secure certain creditors was much embarrassed, financially, and owed debts other than those secured thereby, and the deed contained a clause providing that he should remain on the assigned premises for two years and retain the rents and profits for his own benefit, reserving also his homestead and personal property exemptions: *Held*, that such conveyance raised a strong presumption that it was in fraud of creditors, and, nothing to the contrary appearing, should be declared void by the court. *Booth v. Carstarphen*, 395.

13. The admission of the plaintiff that there was no *actual intent* to defraud some particular creditor does not prevent the deed from being fraudulent as to him. The facts and circumstances of the transaction determine its character and intent, without regard to the actual intent proved. *Ib.*

14. Where, instead of two years, the deed of assignment provided that the maker thereof should remain on the premises for twelve months, and was, in other material respects, the same as in *Booth v. Carstarphen, supra: Held*, such deed raised a strong presumption that it was in fraud of creditors, and, nothing to the contrary appearing, the court should have declared it void. *Booth v. Grant*, 405.

ASSISTANCE, WRIT OF.

1. A writ of assistance is never issued except upon notice to the person in possession, and upon proof of demand and refusal of possession. *Coor v. Smith*, 430.

ASSISTANCE, WRIT OF—*Continued.*

2. Presentation of a deed is usually necessary, but is dispensed with when the person in possession is aware of it already. *Ib.*

3. When, in a motion to set aside a writ of assistance for want of notice, it appears that the writ was granted in open court without objection from the counsel for the defendant in possession, who was present at the time: *Held*, that the motion should not be granted. *Ib.*

4. All parties are presumed to have notice of all motions and orders made while the action is pending. *Ib.*

ATTACHMENT.

1. When one voluntarily removes from this to another State, for the purpose of discharging the duties of his office, of indefinite duration, which required his continued presence there for an unlimited time, such a one is a nonresident of this State for the purposes of an attachment, and that notwithstanding he may occasionally visit this State, and may have the intent to return at some uncertain future time. *Carden v. Carden*, 214.

2. The prominent idea is, that the debtor must be a nonresident of the State where the attachment is sued out—not that he must be a resident elsewhere. *Ib.*

3. His property is attachable if his residence is not such as to subject him *personally* to the jurisdiction of the court and place him upon an equality with other residents in this respect. *Ib.*

BANK CHECKS.

1. The holder of a check upon a bank, drawn before, but presented after, the bank's assignment for the benefit of creditors, is not entitled to the amount thereof as against the assignee to the extent of the fund so held. *Hawes v. Blackwell*, 196.

2. A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank, and subject to assignment by the owners of the bank. *Ib.*

3. A check-holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of his check. *Ib.*

4. The payee or holder of a check has an *interest* in the deposit as against the drawer, subject to the bank's right to pay outstanding check before notice. *Ib.*

5. The plaintiff, as against the trustee of the bank, will be entitled to judgment for his *pro rata* share of the fund left after paying the preferred creditors. *Ib.*

6. As against the *drawer*, the plaintiff is entitled to have so much of the deposit as was devoted by him to the payment of the check set apart for that purpose. *Ib.*

BANKRUPTCY. Discharge in does not cancel charge of owelty of partition, 340.

BILLS, BONDS AND PROMISSORY NOTES.

1. While, at common law, a bond made payable to the obligor is void, and a promissory note made payable by the maker to himself creates no liability, for the reason that a person cannot contract with himself, yet, where such promissory note is made for the purpose of enabling the maker to raise money, and is endorsed by him for that purpose, the endorsee may recover upon it, not only against the payee and endorser, but against all others who may have signed it. *Bank v. Griffin*, 173.

2. When the plaintiff gave a note in settlement of money due, and found afterwards it was for too much, and then, in order to save harmless another person, he paid the full amount more than twelve months after its execution, and with full knowledge, or with ample means of obtaining such knowledge: *Held*, he was not entitled to recover it back. *Brummitt v. McGuire*, 351.

3. Endorsements in blank upon negotiable instruments are presumed to be made contemporaneous with the execution of such instrument. *Southerland v. Fremont*, 565.

4. Where an endorsee may be held to be also a guarantor, there is no question that, as between the parties, the *prima facie* contract of guaranty arising from such endorsement may be rebutted and the true relationship shown. *Ib.*

5. The agreement of a blank endorser of another's obligation, showing what liability he intended to assume, may, at least as between the parties and those holding with notice, be proved by parol. *Ib.*

6. Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two that they (the other two) "signed as cosureties" of the third: *Held*, that the character of suretyship in which all three signed was sufficiently established. *Ib.*

7. A was indebted to B, and gave his promissory note, which, at maturity, he failed to pay. In consideration of a further extension of the time for payment, C executed a writing, promising to guarantee the payment of the debt, provided B would hold a certain mortgage as collateral: *Held*, C was liable as a guarantor of *payment*, and not as a mere guarantor of *collection*. *Jenkins v. Wilkerson*, 707.

8. A guarantor of *payment* is liable upon an absolute promise to pay, upon the failure of the principal debtor. *Ib.*

9. A guarantor of *collection* is liable upon a promise to pay the debt, upon condition that the guarantor shall diligently prosecute the principal debtor without success. *Ib.*

BRIBERY.

1. Bribery consists in the offering or receiving of any unlawful present or reward to or by any person in order to influence his conduct in the exercise of any public duty. *S. v. Pritchard*, 921.

BRIBERY—*Continued.*

2. In indictments for both bribery and extortion, it is essential to allege, and, upon the trial, to prove, that the act charged was done with a willful and corrupt intent. *Ib.*

3. The statute (Code, sec. 1090) creates two offenses. In an indictment for either, it is necessary to allege, and, on the trial, to establish the fact that the accused officer was required to take an oath of office before entering upon his duties; and, for a violation of the latter clause, it is necessary to aver in the indictment, and prove upon the trial, a corrupt intent. *Ib.*

BURDEN OF PROOF.

In an indictment for fornication and adultery, 885.

BURGLARY.

1. Under chapter 434, Laws 1889, creating two degrees of burglary, to support a charge of burglary in the first degree it is essential that the indictment should contain an averment, and, upon the trial, the proof should establish the fact that the house was, at the time of the commission of the alleged cirme, in the actual occupation of some person. *S. v. Fleming*, 905.

2. But one charged with burglary in an indictment drawn under the common law may be convicted of burglary in the second degree. *Ib.*

3. And one charged with burglary in the first degree may be convicted of the second degree if the proofs, upon the trial, are sufficient to establish that grade of the crime. *Ib.*

4. One charged with burglary may be convicted of larceny, or of the crime designated in section 996 of The Code. *Ib.*

5. Upon the trial of an indictment for burglary, the proof tended to show that the felonious entry was made either through a window, the blinds of which were closed, but not fastened, or through a door which had been bolted, and the court charged the jury that, "In order to constitute a breaking, . . . it is necessary that the inmates of the house should have resorted to locks and bolts. If the blinds and door were held in their position by their own weight, and in that position, relied upon by the inmates as a security against intrusion, it is sufficient fastening": *Held*, to be correct. *Ib.*

CANCELLATION OF DEED, When not required, 273.

CARRIERS.

1. In an action to recover damages for injuries alleged to have been received because of the negligence of a railway company to provide suitable means by which passengers might have access to trains, there was evidence tending to show that a shallow ditch, not more than two feet wide, ran parallel with defendant's track at the point where passengers get on and off the cars; that a bridge, or platform, fifteen feet wide, was erected over it; that it was in good condition, except that one plank was slightly shorter than the others; that the plaintiff, in the day-time, in attempting to get on the train, stepped into a

CARRIERS—*Continued.*

hole caused by the short plank, and was injured: *Held*, the defendant was entitled to an instruction that, if the jury found the bridge to be as testified to, it was sufficient as a crossing-place for passengers, and the defendant was not chargeable with negligence. *Stokes v. R. R.*, 178.

CARTWAYS.

1. Upon petition to grant a cartway, the jury found it was "necessary, reasonable and just." The plaintiff owned two tracts connected by a narrow strip, but otherwise entirely separated by the lands of defendant. The narrow strip was wholly unfit for a cartway, by reason of ditches and inundations. The defendant asked the court to charge, that if the plaintiff can pass from all parts of his own land to the public road without going over defendant's land, the issue will be found for defendant. The court instructed the jury, that if plaintiff could have a practicable cartway on his own land (to the public road) they should find for the defendant: *Held*, there was no error in this instruction. *Mayo v. Thigpen*, 63.

2. Where one's lands are connected with the public road, but by an impassable tract, he is entitled to a cartway over the lands of another. *Ib.*

CERTIORARI.

1. When it appears that the appellant has been guilty of *laches*, and there is no affidavit to negative it, the application for *certiorari* to the judge to settle the case will be denied. *Peebles v. Braswell*, 68.

2. When a case was regularly constituted in court, complaint and answer filed, verdict and judgment thereon regular in all respects, and the summons, complaint and answer are lost, so that copies are not sent up with the record to this Court, and there is no averment of any effort to have the papers supplied in the court below, though seven months have elapsed since the appeal was taken, and there is no suggestion of any error which would thereby be made to appear: *Held*, that the appellant is not entitled to a *certiorari* for these papers. *Ib.*

3. When the case on appeal and exceptions were sent to the address of the judge who tried the case, but, owing to his being off on his circuit, reached him so late that he could not, from memory, settle the case, and his notes and *memoranda* filed with the clerk at the termination of the trial could not be found, after diligent search, and the appellant lost his appeal through no default of his: *Held*, he was entitled to a new trial. *Clemmons v. Archbell*, 653.

4. The appellant is entitled to have his assignments of error to the charge, and for refusing or granting special instructions, if set out by him in his statement of case on appeal, incorporated by the judge in the case settled. If they are omitted, *certiorari* will lie. *Lowe v. Elliott*, 718.

5. Upon a petition of *habeas corpus*, the judge who hears the writ judges, in his sound discretion, what amount of testimony is proper to be

CERTIORARI—*Continued.*

heard, and whether the petitioner should be admitted to bail, and his action in that regard is not subject to review; but when he declines to hear any testimony, or to investigate the case upon the return of the writ, on the ground that it appeared that a true bill for a capital offense has been found by a grand jury against the petitioner, this is a ruling of law which the petitioner is entitled to have reviewed and reversed. *S. v. Herndon*, 934.

6. As the statute gives no appeal in such cases, the Court will exercise its constitutional power of supervision of the lower courts by a writ of *certiorari*. Const., Art. IV, sec. 8. *Ib.*

7. If, upon such *certiorari*, the Court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no *procedendo* issues to any particular judge, but the petitioner can exercise his statutory right to apply, *de novo*, to any judge authorized to grant the writ of *habeas corpus*. *Ib.*

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CONSPIRACY.

1. The acts of the different parties alleged to be conspirators can be given in evidence to prove the conspiracy. *S. v. Anderson*, 92 N. C., 732, approved. *S. v. Bray*, 822.

2. When evidence is offered that the defendants "salted" a gold mine, with a view of proving the conspiracy to cheat and defraud, it is not requisite to show, first, that the defendants knew how to "salt" a mine. *Ib.*

3. The declaration of a party, after the consummation of a conspiracy, is evidence only against the defendant who makes it. *Ib.*

4. Declarations and acts of a party charged with conspiracy are competent against the other defendants who entered into the conspiracy, when made prior to its completion. *Ib.*

CONSTITUTION.

1. A fine or penalty imposed by a municipal ordinance is treated as a debt, and, under Article I, section 16, of the Constitution, a person from whom it is attempted to be collected is exempt from arrest, but he may be indicted and punished for the criminal offense of violation of the ordinance for which it is imposed, under the statute (The Code, sec. 3820). *S. v. Earnhardt*, 789.

2. Where a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined $25 upon conviction thereof": *Held*, that so much of the ordinance as provided for the arrest was in violation of the Constitution, but the other provisions were valid. *Ib.*

3. A grand jury had a well-understood meaning at the adoption of our Declaration of Rights, and one of its most essential features was, that the concurrence of twelve of its members was necessary to the finding of a presentment or indictment. *S. v. Barker*, 913.

4. An act of the Legislature making the concurrence of nine sufficient is not authorized by the Constitution of North Carolina. *Ib.*

5. Upon the death of one of the judges of the Superior Courts, the Governor has the authority, under Article IV, section 11, of the Constitution, to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. *S. v. Lewis*, 967.

6. The proper interpretation of Article IV, section 11, of the Constitution, is, that while the Governor is taking a reasonable time for deliberation and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which the successor of the deceased judge will be assigned by the general law immediately upon such successor's qualification. *Ib.*

CONSTITUTION—*Continued.*

7. An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without injury, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement or condition, such as taking an oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such. *Ib.*

8. Where the Governor issues a commission to one of the judges of the Superior Courts, authorizing him to hold certain terms of the Superior Courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned, a *de facto judge*, so long as he assumes to act in that capacity; and this is so, although the commission was issued without authority of law. *Ib.*

9. Where the Constitution has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that in fact the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could for any reason have lawfully issued it. *Ib.*

10. It is the duty of the Supreme Court to resolve all doubts in favor of the constitutionality of a statute passed by the Legislature, or of an official act of the chief executive officer of the State. *Ib.*

Favors homestead interest, 468.

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CONTRACT.

1. The defendant resisted an action of his employee for wages, on the ground that he abandoned his service before the expiration of the contract. The contract was that plaintiff should work for defendant a year for a fixed sum, and be furnished a house. Nothing was said about when the money was to be paid at the time of contract, but afterwards defendant said he would pay from time to time during the year as he had it and as plaintiff might need it; that if either party became dissatisfied during the year, work was to stop. Defendant paid $1 in February; he promised more in March, but did not pay it. Defendant did not furnish a sufficient house: *Held*, (1) that the charge of the court, that, upon the plaintiff's own showing, he was not entitled to recover, was error; (2) the plaintiff quit for good legal cause; (3) the contract amounted to an undertaking, which either party could put an end to at any time. *Booth v. Ratcliffe*, 6.

2. The plaintiff brought an action against the defendant steamboat company for failure to safely convey to him certain goods which were destroyed by fire in defendant's warehouse, where they had been stopped on the route. There was a contract on the bill of lading that defendant was not to be liable for any loss or damage arising from fire, etc.: *Held*, that questions tending to show defendant had negligently allowed an accumulation of freight in its warehouse were improperly excluded. *Hornthal v. Steamboat Co.*, 76.

3. The contract on the bill of lading discharged the defendant from its liability as an insurer, if ordinary care was exercised in protecting the goods while in its warehouse. *Ib.*

4. A mere executory agreement, without consideration, where the *status* of the parties remains the same, may be revoked. *Sugg v. Farrar*, 123.

5. A thing of value, as a lien, may be given up, but a contract to give it up, in order to be enforced, must be based upon a consideration. *Ib.*

6. The rule that a new contract giving time to the principal releases the surety is of no avail to discharge a surety who seeks to hold to the benefits of the old contract. *Hinton v. Ferebee*, 154.

7. While, at common law, a bond made payable to the obligor is void, and a promissory note made payable by the maker to himself creates no liability, for the reason that a person cannot contract with himself, yet where such promissory note is made for the purpose of enabling the maker to raise money, and is endorsed by him for that purpose, the endorsee may recover upon it, not only against the payee and endorser, but against all others who may have signed it. *Bank v. Griffin*, 173.

8. If a *feme sole* employs a servant for a definite period, and marries before the expiration of such period, compensation for the whole time can be recovered in a justice's jurisdiction, if under $200; but if there was an express or implied agreement for services for an indefinite time, compensation for services rendered after marriage can only be recovered against the wife when charged expressly or by necessary implication on her separate estate, and only then by an action in the Superior Court. *Bevill v. Cox*, 175.

CONTRACT—*Continued.*

9. The plaintiff, in an action for damages for not making repairs according to contract, *alleged* that he leased a mill for one year, with privilege of five. On trial he *proved* that he leased for five years, without other qualification as to time: *Held*, he was not entitled to recover. *Browning v. Berry*, 231.

10. When the defendant declares upon a verbal contract, void under the statute of frauds, and the defendant either denies the contract or sets up another, or admits oral agreement and pleads specially the statute, testimony offered to prove the parol contract is incompetent and should be excluded on objection. *Ib.*

11. An absolute denial in the answer to the allegation in the complaint, which embodies the agreement sued on, draws in question and puts in issue not only its validity, but its legal existence. *Ib.*

12. The contention of plaintiff's counsel that the parol contract, proved without objection, is binding, cannot be sustained. There is a variation between the allegation and the proof. *Ib.*

13. The plaintiff is not entitled to the consideration of the view that he is a tenant holding over after the first year, and therefore entitled to the benefit of mutual stipulations for repairs, because, among other reasons, he made no such allegation in his complaint. *Ib.*

14. An amendment allowed that plaintiff entered under a void verbal lease could not avail if the defendants allowed their denial of the old contract to stand, or if they chose not to deny it, and plead the statute. *Ib.*

15. Everybody is presumed to contract with a view to the power of the Legislature to alter and amend laws providing remedies. *Leak v. Gay*, 468.

16. In an action to enforce a contract to convey, specific performance will not be decreed where there is failure of title as to a part of the land. The contract must be so modified as that there may be an equitable adjustment between the parties. *Ray v. Wilcoxon*, 514.

17. Where a father conveyed to his daughter a tract of land by deed, and she promised, before marriage and without consideration, to reconvey and redeliver the deed thereto: *Held*, such promise cannot be enforced. *Ib.*

18. Where, after marriage, in pursuance of such promise, she executed a deed reconveying to her father, and also surrendered to him his deed, and this was also without consideration, and there was no joinder of the husband, nor privy examination of the wife: *Held*, no title was conveyed. *Ib.*

19. One D. made a bond to convey W. a tract of land upon his paying a sum of money at a time in the future agreed upon, with interest at 6 per cent per annum. W. further agreed to maintain and clothe D. for his natural life, and feed and take care of a horse for him. The contract contained this further stipulation: "Now, upon complying with the above contract on the part of W., said D. shall cause to be made a

CONTRACT—*Continued.*

good deed to W. and his heirs and assigns to the above-described premises, and to pay W. $138 per year, it being the total amount agreed to, in lieu of the maintenance of said D.": *Held*, the proper construction of this instrument is, that W. was to have the land charged with the $138 per annum (the annual interest on the purchase-money), and that he be credited with this sum as the measure of the value of his services. *Ib.*

20. In an action for damages for breach of a contract for sale of certain timber trees standing on defendant's land, the plaintiff set up a writing, under seal, containing an offer to sell within sixty days. There was no consideration paid. Within the sixty days the plaintiff offered to go on the land and mark and pay for the trees, according to the terms of the writing. The defendant refused: *Held*, (1) there was a binding contract of sale; (2) the plaintiff's offer was a valid acceptance of the contract; (3) the ruling of the court below that it was void for want of consideration was error. *Paddock v. Davenport*, 710.

21. There being no consideration paid, the defendant's offer might have been withdrawn at any time during the sixty days before it was accepted by the plaintiff. *Ib.*

22. In an action for specific performance of a contract for the sale of timber trees standing on the defendant's land, it appeared that they were to be severed and converted into personal property; that they had no peculiar value, except the price had risen since the contract, and these trees were becoming scarce; that there was a watercourse for convenience of transportation, and that plaintiff had purchased other trees near by: *Held*, the plaintiff was not entitled to such relief. *Ib.*

23. Specific performance will be granted where there is a peculiar value attached to the subject of the contract which is compensable in damages and when the damages at law are so uncertain and unascertainable, owing to the nature of the property or circumstances of the case, that specific performance is indispensable to justice. *Ib.*

CORPORATIONS.

1. A judgment, whether just or unjust, conscionable or unconscionable, if regularly taken in a court of competent jurisdiction, may be enforced by execution or proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. *Heggie v. Building and Loan Asso.*, 581.

2. The corporation represents the shareholders in defending actions involving their rights and obligations, and a judgment against it, in the absence of fraud, binds them. *Ib.*

3. The action of the plaintiff, a judgment creditor, is not barred in three years after the corporation has ceased to do its regular business. *Ib.*

4. The Code, sec. 667, relates to corporations whose charter shall expire by limitation, or be annulled by forfeiture, or otherwise. *Ib.*

CORPORATIONS—*Continued.*

5. The defendant corporation could not settle with its members by the application of assets to the retirement or redemption of the stock of the shareholders until it had first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. *Ib.*

6. Where there is a valid judgment against the defendant corporation, from which no appeal was ever perfected, this Court will not consider whether the plaintiff is confined in his remedy to particular assets, such as certain equities in land held by it. The judgment affects all the assets until it is impeached for fraud or collusion. *Ib.*

7. Where the defense of usury was not set up by the defendant corporation to resist an action by the plaintiff, its creditor: *Held*, that the assignee, a shareholder, interested in the administration of the assets and in preventing an attempted priority given to the plaintiff, is estopped to impeach or to show such judgment was void on such ground. *Ib.*

8. The orders drawn in favor of the shareholders after the defendant had ceased to do its regular business as a corporation are not an equitable assignment, or equitable execution, or supplemental proceedings, to subject the stock so drawn upon to the payment of the debt thereby created, nor do such orders so drawn constitute the owner of them a *bona fide* creditor. *Ib.*

9. The right to buy in and cancel its own stock may sometimes be exercised by a corporation, but not in derogation of the rights of *bona fide* creditors. *Ib.*

10. The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. *Ib.*

CORPORATIONS, MUNICIPAL.

1. A township has corporate existence, and the Legislature may invest it with pertinent corporate powers, as to subscribe for the capital stock of a railroad company. *Jones v. Comrs.*, 248.

2. The collection of the debts of a municipal corporation cannot be allowed to cripple its capacity to discharge its public functions. *Hughes v. Comrs.*, 598.

3. The General Assembly may confer upon a municipal corporation the authority to forbid the exposure for sale of produce or other merchandise on any sidewalk, or the space in front of a building used as a sidewalk, in such manner as may incommode passengers, notwithstanding the municipality may not have acquired an easement or title to the soil in the area within which the prohibition is intended to operate. *S. v. Summerfield*, 890.

4. A municipal corporation can exercise only such powers as (1) those which are granted in express words; (2) those necessarily or fairly implied from the charter, and (3) those essential to the declared objects and purposes of the corporation—not such as are simply convenient, but those which are indispensable. *S. v. Webber*, 962.

CORPORATIONS, MUNICIPAL—*Continued.*

5. Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate or prevent nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. *Ib.*

6. Nor has such municipal corporation the power to establish rules of evidence. *Ib.*

7. If a part of an ordinance is void, all other clauses with which the invalid part is necessarily connected or which are dependent on it are also void. *Ib.*

8. Under a general power in a charter to suppress houses of ill fame, a city may pass an ordinance forbidding owners to rent houses for the purpose of being used as bawdy houses, or with a knowledge that they will be so used by the lessee, but its authorities are not thereby empowered to define what is a house of ill fame, or declare a given house to be a bawdy house. *Ib.*

CORRECTING RECORDS.

Where this Court inadvertently appended to its opinion the words, "and a new trial must be had in the court below, and we so adjudge," and, at the next term, upon its attention to this being called, correction was made without formal notice to the appellee: *Held*, he was not entitled, as a matter of right, to such notice, and especially when his counsel knew that a motion to correct the record on this point would be made, and the opinion itself gave him notice that the appended words were inadvertently added and not consistent therewith. *Summerlin v. Cowles*, 459.

COSTS.

The court has no power to tax a prosecutor with costs when the indictment has been ignored by the grand jury. *S. v. Gates*, 832.

When prosecutor taxed with, 956.

COUNTIES.

1. The county of Vance was created by act of Assembly, passed 5 March, 1881, but it was expressly provided that the citizens and property taken from the counties of Granville and Franklin, for such purpose, should not be released from their proportions of the outstanding public debt of said counties contracted before the passage of the act, the proportions to be determined by the county commissioners of the three counties. In an action by the commissioners of Granville against the commissioners of Vance, it appeared that the former had, and the latter had not, appointed any commissioner or taken other steps to arrange a settlement, and the relief provided by statute was sought in court. The defendants denied that the outstanding debt was as large as alleged, and claimed that the proceeds of some real estate sold, after the passage of the act, by order of the county of Granville, ought to be applied in discharge of the debt: *Held*, (1) that these

COUNTIES—*Continued.*

facts constitute a sufficient cause of action; (2) that the commissioners of Franklin were not necessary parties in an action to adjust the matters of difference between Granville and Vance; (3) the citizens of the new county created were, for the purpose of the collection of the said outstanding debt, citizens, respectively, of their old counties. *Comrs. v. Comrs.*, 291.

2. The outstanding debt should be reduced by the amount of taxes collected in 1880 (but paid after 5 March, 1881) above what was necessary for current county expenses, and also by the amount of such taxes as were a balance in the hands of the county treasurer on 1 September, 1881. *Ib.*

3. The taxes of the year 1880, collected for current county expenses and applied to that purpose between 5 March and 1 September, 1881, should not have been applied in reduction of the outstanding indebtedness. *Ib.*

4. *Quaere:* As to whether the proceeds of land not necessary for county purposes, sold *prior* to the creation of the new county, could be applied in discharge of the debt outstanding before division. *Ib.*

5. In an action for debt of a county contracted in 1886 against the board of county commissioners, it appeared that the county owned a considerable amount of valuable railroad stock, and the complaint alleged that it was not necessary, used or useful in the discharge of its corporate functions. It further appeared that the county was largely in debt, and had no property other than that mentioned, except what was necessary for its public functions. The plaintiff asked for judgment condemning a sufficient amount of said stock to satisfy the judgment. the plaintiff omitted in his complaint to refer the court to the *private* law which permits the county to subscribe to the capital stock of said railroad: *Held*, that the complaint did not state a sufficient cause of action. *Hughes v. Comrs.*, 598.

6. Under the act of 1868, ch. 20 [Code, sec. 707 (5 and 7)], a county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual. *Ib.*

7. Ordinarily, the only remedy of a judgment creditor against a county is a writ of *mandamus* to compel its commissioners to levy a tax to pay the debt. *Ib.*

8. A writ of *mandamus* will be granted only where one demanding it shows that he has a specific legal right, and has no other specific legal remedy adequate to enforce it. *Ib.*

9. An action may be maintained against the county commissioners establishing a debt against the county without asking for a writ of *mandamus*, where it appears that the county has property subject to trusts, or such as can be reached only by proceedings supplemental to execution. *Ib.*

COUNTIES—*Continued.*

10. Where it appears that a *mandamus* has been answered by the county commissioners and proven unavailable, because the constitutional limit of taxation has been exhausted to meet the current expenses; and it further appears that the county holds real estate, or other property not used or needful for its public functions, and, for any reason, such property could not have been subjected, except by an equitable *fi. fa.: It seems* that such property can be subjected for the discharge of the debt of a judgment creditor against the county, though it cannot be levied on and sold under execution. *Ib.*

11. Under the act of 1868, ch. 20 [Code, sec. 707 (5 and 7)], a county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual. *Ib.*

CREDITOR'S BILL.

1. Where an action in the nature of a judgment creditor's bill is pending, it is error to dismiss proceedings supplementary to execution instituted in behalf of another creditor against the same debtor. *Monroe v. Lewald*, 655.

2. Where several of such proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. *Ib.*

3. Plaintiffs in action in nature of creditor's bill acquire preference by way of equitable lien upon both the legal and equitable assets, 99.

See, also, 468.

CURATIVE ACTS.

The curative statute (Laws 1889, ch. 252) is constitutional and valid if rights of third parties have not accrued, but it would not divest the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. *Gordon v. Collett*, 362.

DAMAGES.

1. The plaintiff, in an action for damages for not making repairs according to contract, *alleged* that he leased a mill for one year, with privilege of five. On trial, he *proved* that he leased for five years, without other qualifications as to time: *Held*, he was not entitled to recover. *Browning v. Berry*, 231.

2. To entitle a passenger to exemplary damages for his wrongful expulsion from a train, there must be evidence of undue force, unnecessary rudeness, or insult, malice, or some willful wrong accompanying his ejection. *Tomlinson v. R. R.*, 327.

3. In an action against a sheriff, or his official bond, for a failure to levy an execution placed in his hands for collection, and to collect from a

DAMAGES—*Continued.*

defendant in execution a debt, the jury found for the relator, but failed to assess damages in response to an issue respecting them. The court gave judgment for the amount of the execution: *Held*, there was error. The judgment should have been for nominal damages. *Brunhild v. Potter*, 415.

4. The court should have submitted to the jury the question, whether any substantial damages had been sustained, and required them, under proper instructions, to respond to the same. *Ib.*

5. The Code, sec. 1888, applies to executions from a court of a justice of the peace, and not those issuing out of the Superior Court. *Ib.*

6. To entitle the relator to substantial damages, the jury must have found that he had lost his debt, or some part of it, by the negligence of the sheriff. *Ib.*

7. The question of negligence being settled by the verdict of the jury, the question of substantial damages may now be submitted by the court. *Ib.*

8. Mental suffering, caused by negligence and delay in delivery of a telegram not of a pecuniary nature, may be ground of damages, though no physical pain or pecuniary loss is suffered. *Young v. Tel. Co.*, 370; *Thompson v. Tel. Co.*, 449.

9. Where a telegram is sent by a wife about to be confined to summon her husband, and, by reason of negligent delay in the delivery of twenty-four hours, he did not arrive, whereby, the complaint alleges, she suffered more physical pain, mental anxiety and alarm on account of her condition, and sustained permanent and incurable physical injury for want of his presence and services: *Held*, such damages are not remote. *Ib.*

10. Where the jury gave substantial damages, which are affirmed on appeal, it is unnecessary to consider the charge given as to nominal damages. *Ib.*

11. Where a telegraph office had the sign of the defendant company over the door, and the operator at that point testified that he paid over all receipts to the treasurer of said company, the office was *prima facie* an office of the defendant. *Ib.*

12. In an action brought by the reversioners for waste against the tenant in dower, the jury rendered a verdict for the plaintiffs: *Held*, that they were entitled to treble damages under The Code, sec. 629, in the discretion of the court. *Sherrill v. Connor*, 543.

13. The Code, sec. 629, says the court *may* give judgment for treble damages and the place wasted, and this Court will not make such discretionary power obligatory. *Ib.*

14. When it appeared in an action against a railroad company for damages for injury sustained by the plaintiff, a passenger, from a fall between the defendant's cars and a platform along by the side of them, that she was attempting to get a seat before the cars were lighted, and

DAMAGES—*Continued.*

some time before it was the usual time to light them and to give the signals of warning and preparation generally given, the first fifteen, and the second five, minutes before starting; and without invitation from defendant's agents the plaintiff attempted to get her seat in the dark, and was hurt while stepping from the platform to the cars, it was not made to appear that there was any defective construction: *Held*, (1) the plaintiff was not entitled to recover; (2) her injury resulted wholly from her own negligence. *Hodges v. Transit Co.*, 576.

15. The plaintiff was employed by the defendant and another to sell some horses for him, among which was a mare which he swapped off. Afterwards he paid, without authority of defendant, damages for the unsoundness of the mare in compromise of a suit against him for a breach of warranty. He had no authority to warrant him for a breach of warranty, nor did it appear that he did warrant the mare to be sound: *Held*, that the plaintiff, in an action against the defendant for the money so paid in compromise of the suit for damages, was not entitled to recover. *Osborne v. McCoy*, 726.

Statutory proceedings for damages against railroad, 72.

Issues in action to recover damages, 185.

Failure of telegraph company to deliver telegram liable to actual and punitive damages, 370.

For waste, 630.

Jurisdiction in action for damages, 721.

For ponding water, 766.

DECEASED PERSON, TRANSACTIONS WITH.

Evidence of the statements of a deceased witness made during a trial is not inhibited, under section 590 of The Code, as transactions with deceased persons. *Costen v. McDowell*, 546.

Testimony excluded under section 590 of The Code, 552.

DEED.

1. Where the contents of a deed are admitted, without objection, the deed itself is competent. At most, it works no harm of which the adverse party can complain. *Blake v. Broughton*, 220.

2. When a mortgage debt has been discharged, the mortgage is no longer operative, though not marked "satisfied of record." *Ib.*

3. A defendant who has made conveyance of land to her codefendants before suit commenced, with warranty of title and covenants of seizin, and against incumbrances, has a right to defend in an action to foreclose a mortgage embracing the land brought against such codefendant. *Ib.*

4. A deed of separation between husband and wife will be canceled by a Court of Equity when it is made to appear that the parties, since its execution, have cohabited together as man and wife. *Smith v. King*, 273.

DEED—*Continued.*

5. When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. *Ib.*

6. The law of North Carolina, while it may allow, does not look with favor upon deeds of separation. *Ib.*

7. A deed absolute on its face will not be corrected and converted into a mortgage, where it is not shown that a defeasance clause was contemplated by the parties and omitted by reason of ignorance, fraud, mistake or undue influence. *Egerton v. Jones*, 274.

8. The fact that a deed was drawn by one not familiar with legal forms does not meet the indispensable requirements of a Court of Equity for granting such relief. *Ib.*

9. Where a father conveyed to his daughter a tract of land by deed, and she promised, before marriage and without consideration, to reconvey and redeliver the deed thereto: *Held*, such promise cannot be enforced. *Ray v. Wilcoxon*, 514.

10. Where, after marriage, in pursuance of such promise, she executed a deed reconveying to her father, and also surrendered to him his deed, and this was also without consideration, and there was no joinder of the husband, nor privy examination of the wife: *Held*, no title was conveyed. *Ib.*

11. An unrecorded deed confers such an estate as may be conveyed or sold under execution. *Ib.*

12. One D. made a bond to convey W. a tract of land upon his paying a sum of money at a time in the future agreed upon, with interest at six per cent per annum. W. further agreed to maintain and clothe D. for his natural life, and to feed and take care of a horse for him. The contract contained this further stipulation: "Now, upon complying with the above contract on the part of W., said D. shall cause to be made a good deed to W. and his heirs and assigns to the above-described premises, and to pay W. $138 per year, it being the total amount agreed to, in lieu of the maintenance of said D.": *Held*, the proper construction of this instrument is, that W. was to have the land charged with the $138 per annum (the annual interest on the purchase-money), and that he be credited with this sum as the measure of the value of his services. *Ib.*

13. Where the court, pursuant to a verdict of the jury, set aside a deed for constructive fraud and undue influence in procuring its execution: *Held*, that the land was properly charged with the supplies and advancements made to the plaintiff's ancestor by the defendant, vendee, as a consideration for the conveyance. *Costen v. McDowell*, 546.

DIVORCE.

When the wife commits adultery, and is not living with the husband at the time of his death, she is barred of the right to "year's provision." Code, sec. 2116. *Leonard v. Leonard*, 171.

DURESS.

What facts amount to technical duress, 58.

EJECTMENT.

In an action of ejectment, and the modern substitute for it—an action for the possession of land—the plaintiff must allege and show that defendant held adverse possession at the time of action brought, and that he is entitled to the immediate possession. *Brown v. King*, 313.

ELECTION.

Homesteaders, 482.

ENDORSEMENT IN BLANK.

1. Endorsements in blank upon negotiable instruments are presumed to be made contemporaneous with the execution of such instrument. *Southerland v. Fremont*, 565.

2. Where an endorsee may be held to be also a guarantor, there is no question that, as between the parties, the *prima facie* contract of guaranty arising from such endorsement may be rebutted and the true relationship shown. *Ib.*

3. The agreement of a blank endorser of another's obligation showing what liability he intended to assume, may, at least as between the parties and those holding with notice, be proved by parol. *Ib.*

ENTRY AND GRANT.

1. All vacant and unappropriated lands belonging to the State are subject to entry, except lands covered by navigable streams. *Bond v. Wool*, 139.

2. By making entry under the laws of the State, such riparian owners of lands on navigable waters may acquire an absolute, instead of qualified, property in the land covered by water up to deep water. *Ib.*

3. In an action to declare the defendants trustees for plaintiff's benefit, as to certain lands, the "entry" to which he had purchased from one of the defendants, he introduced in evidence a memorandum made at the time of paying part of the purchase-money, signed by this defendant and showing a balance of forty dollars due "on a certain land warrant trade, 28 November, 1888": *Held, parol* evidence of what "trade" this paper referred to, and its terms, was admissible. *Bryan v. Hodges*, 492.

4. Entry upon lands and obtaining a warrant for survey confers upon the person entering no estate or interest therein, but simply the right to be preferred when the money is paid. *Ib.*

5. Such "inchoate equity," or "preëmption right," may be assigned by parol. *Ib.*

6. Purchases of such an interest for value are affected with notice of all the facts respecting the rights of the vendor who made the entry within their knowledge, or which inquiry, after notice, would have disclosed. *Ib.*

ENTRY AND GRANT—*Continued.*

7. Where the defendants, purchasers, were expressly informed by their vendor that the plaintiff was to get the grant out of the office of the entry-taker, and knew that plaintiff had the warrant in his possession, and that, in order to obtain it, he must be paid for it: *Held*, that there was no error in the charge of the court that if the jury believed these facts such defendants were charged with notice of everything affecting the plaintiff's claim which they might have discovered by inquiry. *Ib.*

8. A grant to G. and E., conveying certain lands by definite metes and bounds, contained also these words: "Containing, in whole, 35,280 acres, 5,000 acres of which, being previously entered by citizens, is hereby reserved." Entry had been so previously made, definitely locating such reservation, and a grant thereon was subsequently made: *Held*, that the words, "hereby reserved," have the effect of excepting the 5,000 acres from the grant, and mean that such land should be left to be granted to the citizens who had entered it. *Brown v. Richard*, 639.

9. In an action for the recovery of the possession of such lands, a part of which was known and designated as the "Stevely lands," the plaintiff claimed title under a deed from the sheriff to land sold under execution against the "Estate Company." This corporation claimed under two deeds, each containing the following clause, describing the land conveyed to it: "The undivided shares of all the land remaining unsold and contained within the boundaries of the 30,080-acre tract granted by the State to G. and E.," etc. The *boundaries* in the grant referred to embraced 4,071 acres (the "Stevely lands") of the 5,000-acre exception—the *locus in quo: Held*, the exception in the grant applying to the boundaries as well as to the land itself, no part of the "Stevely lands" are conveyed in the deeds to the "Estate Company," and the plaintiffs acquired no interest in such lands by their purchase under execution. *Ib.*

10. Where a plaintiff offered a grant issued in 1847 upon an entry dated in 1801, and the defendant introduced a grant, covering the same land, issued in 1842, on an entry made in 1801: *Held*, that the former grant was void upon its face, because it was issued contrary to law after the entry had lapsed, and could be collaterally impeached upon the trial of the usual issues in an action for the possession of land. *Gilchrist v. Middleton*, 663.

11. Where a grant appears upon its face to have been executed regularly and in proper form, it is competent to attack it in any action involving title by showing that in fact it covered land not subject to entry, or was issued contrary to a positive prohibition contained in a statute; but for fraud in its issue, a grant can be impeached only by a direct proceeding. *Ib.*

12. Though a grant offered by a plaintiff be void, he may avail himself of another introduced by the defendant to show title out of the State, and establish his own title by proving possession under color for seven years subsequent to the date of the later grant. *Ib.*

EMINENT DOMAIN.

The authorities of the town of S., in the exercise of their powers and duties to keep in proper condition the streets in the town, caused a waterway to be constructed through the lands of the defendant, resulting, on several occasions, in the flooding of his premises. There had been no condemnation of the land or other acquisition of the right to the easement. The defendant placed an obstruction in the waterway, but on his own land, by which a street was flooded and made insecure: *Held*, that whatever civil remedy the defendant might have against the municipality for damages resulting from the appropriation and injury of his lands, he had no right to obstruct the waterway and thereby imperil the safety and convenience of the public, and that he was properly convicted for the violation of an ordinance prohibiting such obstruction. *S. v. Wilson*, 865.

EQUITY.

1. The mortgagee of land conveyed to secure a preëxisting debt is a purchaser for value, under the Statutes of 13 and 27 Elizabeth, but he takes subject to any equity that attached to the property in the hands of the debtor. *Southerland v. Fremont*, 565.

2. The implied promise (if any, or if enforceable) of the mortgagee, where the mortgage was made to secure preëxisting indebtedness, that she would postpone until default all other remedies, cannot be allowed to avail to defeat prior equities. *Ib.*

3. When, without notice of an equity, one enters into an indemnifying conveyance to secure an irrevocable liability, such conveyance will prevail over the equity. *Ib.*

Equity of judgment creditors and mortgagees, 236.

ESCAPE.

1. An escape is defined to be when one who is arrested gains his liberty before he is delivered in due course of law. *S. v. Ritchie*, 857.

2. An indictment lies, at common law, independent of the statute (The Code, sec. 1022), against an officer who permits the escape of one arrested upon a bastardy warrant. *Ib.*

Of prisoner, pending appeal, 772.

EVIDENCE.

1. The plaintiff brought an action against the defendant steamboat company for failure to safely convey to him certain goods which were destroyed by fire in defendant's warehouse, where they had been stopped on the route. There was a contract on the bill of lading that defendant was not to be liable for any loss or damage arising from fire, etc.: *Held*, that questions tending to show defendant had negligently allowed an accumulation of freight in its warehouse were improperly excluded. *Hornthal v. Steamboat Co.*, 76.

2. Conversations, before and at the time of the transaction between plaintiff and defendant, tending to show plaintiff's knowledge of his trust, are clearly admissible as evidence. *Hinton v. Pritchard*, 128.

EVIDENCE—*Continued.*

3. Plaintiff's admissions to third persons, subsequent to the transaction, tending to establish the trust, are admissible as evidence. *Ib.*

4. By demurring, the defendant admits the truth of the testimony in the aspect most favorable to the plaintiff. *Bond v. Wool*, 139.

5. Conversation between a witness and defendant—the plaintiff not being present—is competent as affecting the credibility or accuracy of the witness. *Blake v. Broughton*, 220.

6. Objection should be made to the *question*—not to the *answer*—of a witness. *Ib.*

7. A mortgagor, whose bond and mortgage (made to secure it) was transferred by the mortgagor to other persons, testified that he never assented to the transfer and did not know anything about it. The court charged that the mortgagor's assent to the transfer was not necessary, as he had parted with his interest: *Held*, that evidence, if incompetent, was harmless under such charge. *Ib.*

8. In an action to foreclose two mortgages, brought by the assignee of the mortgagee, both being executed by the same mortgagors, the defendants, who claimed title under conveyance from the mortgagors, allege as defense that the mortgages had been satisfied. In support of this, they offered evidence of conversations between one of the defendants and one of the mortgagors, the plaintiffs not being present. There was evidence of an agreement between the plaintiffs and the agent of one of the defendants, who was also purchaser of the interest of the mortgagors, to pay off the mortgages. There was a conflict of testimony between the plaintiffs and one of the defendants as to whether the mortgages were paid off, and as to their conversations on this subject: *Held*, (1) that the evidence offered was competent in corroboration; (2) the objection to the *answer*, and not to the *question*, even if valid, came too late, there being no motion to withdraw it from the jury. *Ib.*

9. Where the contents of a deed are admitted, without objection, the deed itself is competent. At most, it works no harm of which the adverse party can complain. *Ib.*

10. When the defendant declares upon a verbal contract, void under the statute of frauds, and the defendant either denies the contract or sets up another, or admits oral agreement and pleads specially the statute, testimony offered to prove the parol contract is incompetent and should be excluded on objection. *Browning v. Berry*, 231.

11. In an action upon an accident insurance policy, the defense was that the plaintiff had suppressed the fact of his deafness: *Held*, that evidence that the defendant's agent, who took the application of plaintiff, knew of this defect, was competent, although in his application the plaintiff stated he was free from any bodily infirmity. *Follette v. Accident Association*, 240.

12. The Code, sec. 589, abolishes the common-law incompetency of witnesses on account of interest (with the restrictions contained in section 590), except in the special cases provided for by sections 580 and 588. *Bunn v. Todd*, 266.

EVIDENCE—*Continued.*

13. An interest in the thing in controversy does not disqualify a witness to testify as to a communication with one deceased. The disqualifying interest is an interest in the event of the action. *Mull v. Martin*, 85 N. C., 406, approved. *Ib.*

14. Where a final account of an administrator was examined, and the vouchers passed upon by the deputy in the presence of the clerk of the Superior Court, who, immediately afterwards, and without special examination, signed a general approval: *Held*, that such return was competent as *prima facie* evidence against the plaintiff. *Allen v. Royster*, 278.

15. The original papers in a case lately pending in the Superior Court are admissible as primary evidence, if properly identified. *Darden v. Steamboat Co.*, 437.

16. What the custodian of such papers said to another witness identifying them is hearsay. *Ib.*

17. In an action to declare the defendants trustees for plaintiff's benefit as to certain lands, the "entry" to which he had purchased from one of the defendants, he introduced in evidence a memorandum made at the time of paying part of the purchase-money, signed by this defendant and showing a balance of $40 due "on a certain land-warrant trade, 28 November, 1888": *Held, parol* evidence of what "trade" this paper referred to, and its terms, was admissible. *Bryan v. Hodges*, 492.

18. When a deed is offered in evidence, the court can ordinarily entertain no objection to its introduction, except upon the ground that it has not been properly registered. It is usual to pass upon its relevancy and effect when all the testimony is before the court. *Cox v. Ward*, 507.

19. Parol proof of purchase of land, and of parol agreement to allot a share thereof, are not admissible to establish title to land when the same is disputed and objection to such evidence is made. *Ib.*

20. The handwriting of the person who signed the vouchers need only be proved when relied on, under section 1401 of The Code, as presumptive evidence of disbursement. *Costen v. McDowell*, 546.

21. Before the passage of this statute, the receipts of persons living were not strictly legal evidence to show a full administration. The statute makes them presumptive, not primary, evidence. *Ib.*

22. Evidence of the statements of a deceased witness, made during a trial, is not inhibited, under section 590 of The Code, as transactions with deceased persons. *Ib.*

23. Where the surname of a subscribing witness to a deed was omitted in the clerk's certificate of proof by such witness, such deed will not be rejected in evidence when the *fact* of the execution and probate are not disputed. *Simpson v. Simpson*, 552.

24. A plaintiff in an action to recover land, who claims under a deceased mortgagor, is not competent to prove, in his own interest, payments on the mortgage note made by such mortgagor. *Ib.*

EVIDENCE—*Continued.*

25. In evidence of her chain of title the *feme* plaintiff introduced a mortgage given to indemnify the mortgagors, under whom she claimed, against loss by reason of their suretyship to the mortgagee in the sum of money due by note which they had endorsed. She offered to show further by her coplaintiff, to whom the note was endorsed payable, and in their own interest, that $50 was paid on the note before judgment: *Held*, the maker of the note and the mortgagor being dead, such testimony should be excluded, under section 590 of The Code, as being a transaction with deceased persons. *Ib.*

26. Unless, in the discretion of the court, at the close of the State's evidence, the State is restricted to one of the transactions shown by it and tending to prove the offense charged, the solicitor, on cross-examination of defendant's witnesses, can bring out any other transaction within the statute of limitations tending to prove the charge. This rule is not varied when the defendant is a witness in his own behalf. *S. v. Parish*, 104 N. C., 679; *S. v. Thomas*, 98 N. C., 599, cited and approved. *S. v. Allen*, 805.

27. The answer of a witness to a question in reference to a collateral matter, put to him with a purpose to attack his credibility, is conclusive. *S. v. Hawn*, 810.

28. Nor can the character of a witness be attacked by evidence that there was a general report that he was guilty of a particular offense. *Ib.*

29. Whether or not a witness is an expert is a question of fact for the court, and its finding is not reviewable. *S. v. Cole*, 94 N. C., 958, approved. *S. v. Brady*, 822.

30. The testimony of a witness as to a collateral matter cannot be contradicted in order merely to impeach him by showing its untruth. *Ib.*

31. The acts of the different parties alleged to be conspirators can be given in evidence to prove the conspiracy. *S. v. Anderson*, 92 N. C., 732, approved. *Ib.*

32. Declarations and acts of a party charged with conspiracy are competent against the other defendants who entered into the conspiracy, when made prior to its completion. *Ib.*

33. The declaration of a party, after the consummation of a conspiracy, is evidence only against the defendant who makes it. *Ib.*

34. When evidence is offered that the defendants "salted" a gold mine with a view of proving the conspiracy to cheat and defraud, it is not requisite to show, first, that the defendants knew how to "salt" a mine. *Ib.*

35. The paramount and essential ingredient of the crime of seduction, under chapter 248, Laws 1885, is the fact of sexual intercourse *induced by a promise of marriage*, and no conviction can be sustained upon the testimony of the woman unless she is supported upon this essential point. *S. v. Ferguson*, 841.

EVIDENCE—*Continued.*

36. The supporting testimony required by the statute is something more than corroborative evidence—it must be such independent facts and circumstances as will tend to establish her credibility. *Ib.*

37. Upon the trial of an indictment for seduction, for the purpose of attacking the character of the prosecutrix the defendant offered to prove, by parol, the contents of a note she had written appointing an assignation with another party: *Held*, that such evidence was competent, the paper not being of the class which must be produced before its contents could be proved. *Ib.*

38. A witness having stated upon cross-examination that the relations between her and the defendant were unfriendly, it was not error to refuse to permit the further inquiry whether there was not a bitter feud between her family and that of the defendant, to be made. *S. v. Berrier*, 856.

39. A witness whose credibility has been assailed by the cross-examination may be corroborated by evidence of prior consistent declarations and events. *S. v. Jacobs*, 873.

40. On an indictment for fornication and adultery the husband of the *feme* defendant is a competent witness against her to prove her marriage to him. The Code, sec. 588. *S. v. McDuffie*, 885.

41. Where the tendency of the cross-examination of a witness is to attack his credibility, or his relation to the facts about which he testifies is such as casts suspicion upon his statements, evidence of other circumstances connected with those deposed to by him, and of his prior consistent declarations, is admissible as corroborative testimony. *S. v. Morton*, 890.

42. Upon a trial for murder a witness for the State testified that he was present at the time of the killing, and identified the prisoner as the perpetrator of the act. Soon after, a number of persons assembled at the place and, in the presence of the witness, accused persons, other than the prisoner, of the crime, to which witness made no response: *Held*, that his silence, under such circumstances, was a fact going to his discredit, and it was error to exclude the evidence of it from the jury. *Ib.*

EXCEPTIONS.

1. When an exception to evidence is so vague as not to point out the nature of the error complained of, it will not be considered. *Allred v. Burns*, 106 N. C., 247, approved. *Everett v. Williamson*, 204.

2. An exception for "misdirection in the charge," without specifying any particulars, is too general. *McKinnon v. Morrison*, 104 N. C., 354, cited and approved. *Ib.*

3. Exceptions to all matters other than the charge must be taken at the time. *Lowe v. Elliott*, 718.

4. Exceptions to the charge, and for refusing to give special instructions, are in time if taken at or before the stating of the case on appeal, though the better practice is to assign all exceptions in making motion for new trial. *Ib.*

EXONERATION.

1. It is true, as a general proposition, that land charged with debt is entitled to exoneration by the personal estate; but where the aid of this principle has not been invoked by the plaintiff, but, on the contrary, she has asked for the sale of the land for the discharge of the lien, the decree of the court ordering the sale will not be disturbed. *Costen v. McDowell*, 546.

Judgment debtor's right to, not affected by restoration of the lien of a judgment under the act of 1885, 482.

EXTORTION.

1. Extortion consists in the unlawful taking of money or other thing of value by an officer, under color of his office, when there is nothing due, or more than is due, or before it is due. *S. v. Pritchard*, 921.

2. It is also necessary, in an indictment for extortion, to charge and, upon the trial, to prove that the unlawful fees were demanded "under color of office." *Ib.*

FINDINGS OF FACT.

1. If the judge find the facts, and there be no objection, it must be presumed it was with consent of all parties. *White v. Morris*, 92.

2. The finding of the referee that certain payments had been made by the defendant to the plaintiff's ancestor, deceased, upon his own oral evidence, which was not objected to by plaintiff, will not now be disturbed by this Court. *Costen v. McDowell*, 546.

Findings of, when conclusive, 317, 500.

Findings of, by referee, 526.

FIXTURES.

1. An engine, cotton gin and condenser were attached to a mill by the tenant by the curtesy after his term commenced, not solely for the better enjoyment of the land, but for the mixed purpose of trade and agriculture: *Held*, they belonged to the executor of the life tenant as against the remainderman. *Overman v. Sasser*, 432.

2. The executor may remove such fixtures within a reasonable time after the death of the life tenant. *Ib.*

3. The doctrine of fixtures depends for its application upon the relations of the parties. *Ib.*

4. Between the executor and heirs, whatever is affixed to the freehold becomes a part of it and passes with it. *Ib.*

5. Between the executor of tenant for life and in tail and the remainderman, the right of removing fixtures is more in favor of the executor. *Ib.*

6. Between landlord and tenant, fixtures for the better enjoyment of trade are removable by the tenant, but fixtures for agricultural purposes pass with the land. *Ib.*

FORNICATION AND ADULTERY.

1. On an *indictment* for fornication and adultery the husband of the *feme* defendant is a competent witness against her to prove her marriage to him. The Code, sec. 588. *S. v. McDuffie*, 885.

2. The single state being presumed to exist till the contrary is shown, the prosecution is not called on to prove the defendants are not married. Marriage being peculiarly within the knowledge of the defendants, the burden is on them to show it. *Ib.*

FRAUD.

1. Where the court, pursuant to a verdict of the jury, set aside a deed for constructive fraud and undue influence in procuring its execution: *Held*, that the land was properly charged with the supplies and advancements made to the plaintiff's ancestor by the defendant, vendee, as a consideration for the conveyance. *Costen v. McDowell*, 546.

2. A plaintiff cannot with good grace seek redress for fraud while she, or her ancestor under whom she claims, holds the price of such fraud. *Ib.*

3. A verdict that a deed was obtained by fraud and undue influence is not inconsistent with the idea that it is constructive fraud only. *Ib.*

In obtaining wife's signature to mortgage, 58.

Presumption of, in deed of assignment, 395, 405.

GENERATION.

Construction of the word "generation," as used by the statute, 609.

GOVERNOR.

May appoint judge to hold special term in district assigned to deceased judge, 967.

GUARDIAN AND WARD.

Competent for guardian *ad litem* to waive jury trial, 92.

GUARANTY.

1. A was indebted to B, and gave his promissory note, which, at maturity, he failed to pay. In consideration of a further extension of the time for payment, C executed a writing, promising to guarantee the payment of the debt, provided B would hold a certain mortgage as collateral: *Held*, C was liable as a guarantor of *payment*, and not as a mere guarantor of *collection*. *Jenkins v. Wilkerson*, 707.

2. A guarantor of *payment* is liable upon an absolute promise to pay, upon the failure of the principal debtor. *Ib.*

3. A guarantor of *collection* is liable upon a promise to pay the debt upon condition that the guarantor shall diligently prosecute the principal debtor without success. *Ib.*

HABEAS CORPUS.

1. Upon a petition of *habeas corpus*, the judge who hears the writ judges in his sound discretion what amount of testimony is proper to be heard, and whether the petitioner should be admitted to bail, and his action in that regard is not subject to review; but when he declines to hear any testimony or to investigate the case upon the return of the writ, on the ground that it appeared that a true bill for a capital offense has been found by a grand jury against the petitioner, this is a ruling of law which the petitioner is entitled to have reviewed and reversed. *S. v. Herndon*, 934.

2. As the statute gives no appeal in such cases, the court will exercise its constitutional power of supervision of the lower courts by a writ of *certiorari*. Const., Art. IV, sec. 8. *Ib.*

3. If upon such *certiorari* the court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no *procedendo* issues to any particular judge, but the petitioner can exercise his statutory right to apply, *de novo*, to any judge authorized to grant the writ of *habeas corpus*. *Ib.*

4. The court, in its judgment, may direct an opinion certified down in advance of the statutory time. *Ib.*

HANDWRITING.

The handwriting of the person who signed the vouchers need only be proved. When relied on, under section 1401 of The Code, as presumptive evidence of disbursement. *Costen v. McDowell*, 546.

HOMESTEAD.

1. The homestead of a person against whom there was a docketed judgment and several subsequent mortgages of record, and a bond for title covering the homestead allotment and the excess above it levied on, was allotted to him by appraisers on 25 February, 1889, and exceptions thereto were filed on 19 March following. There were no exceptions that raised the question of the *value* of the homestead, whether or not it was worth more than $1,000: *Held*, (1) the exception was in apt time; (2) there was no issue presented which it was the duty of the court to pass upon in this proceeding. *Aiken v. Gardner*, 236.

2. The equities between the parties having liens on the lands cannot be passed upon in an appeal from the appraisers. Their duties extended no further than the valuation and allotment of the homestead. *Ib.*

3. Where a homestead has been allotted, the return of appraisers registered, and time for filing objections passed, a second allotment, though under a judgment docketed since the first allotment, will be treated as void. *Thornton v. Vanstory*, 331.

4. No valid issue as to the value of the homestead at the time of the second allotment can be raised by exceptions of creditors thereto. *Ib.*

5. The homestead interest is favored by the Constitution, and a mortgagor has a right to have his homestead exonerated by applying the proceeds of the excess above it to the payment of a prior mortgage debt in preference to other liens upon the homestead or upon his other lands. *Leak v. Gay*, 468.

HOMESTEAD—*Continued.*

6. No matter when the debts of the judgment creditors have been created, the debtor has a right to demand that the junior mortgages shall be satisfied out of the proceeds arising from sale of the excess above the homestead in exoneration thereof. *Ib.*

7. Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, $1,000 of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead. *Ib.*

8. Where judgments are a lien upon a mortgagor's homestead in the residue left after sale, he has, as against the judgment creditors, a right to secure their ultimate payment as the court may direct, the interest in the residue fund set apart as his homestead to be paid to him till his estate determines; or he has the option to take the present value of the homestead out of such residue, and this though it is less than $1,000. The fund so taken for the present value belongs to the homesteader absolutely, and the balance left is subject to immediate division among the creditors according to priorities. *Ib.*

9. The act of 1885, amendatory of the homestead law and repealing the clause exempting homesteads from the lien of judgments, does not impair the obligations of a contract or interfere with vested rights by being allowed to operate retrospectively, so as to include judgments upon debts contracted before it became a law and while The Code, sec. 501 (4) was in operation. *Ib.*

10. So much of section 501 (4) of The Code as precedes the *proviso* must be considered as having been enacted with a view to the rule of construction contained in section 3766 of The Code. *Ib.*

11. The Code, sec. 3766, provides that when a part of the statute is amended the new *proviso* is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of The Code, is subject to this rule of construction. *Ib.*

12. The restoration of the lien of a judgment, under the act of 1885, does not affect the judgment debtor's right to exoneration or his power to encumber his homestead by a conveyance executed in compliance with section 8, Article X of the Constitution. *Leak v. Gay*, 482.

13. Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. *Ib.*

Advantage of, may be taken, when not specially pleaded, 181.

HOMICIDE.

1. It is well settled that the question of severance is submitted to the discretion of the trial judge, and the exercise of that discretion, except in case of gross abuse, is not reviewable by the appellate courts. *S. v. Oxendine*, 783.

2. Upon a joint trial of three persons for murder, the State offered evidence of the declarations of one of the prisoners to show his guilt, but they were not made in the presence or knowledge of the others: *Held*, that

HOMICIDE—*Continued.*

it was the duty of the judge, in his charge to the jury, especially when he had been so requested, to particularly direct the attention of the jury to this aspect of the evidence, and to instruct them specifically as to its nature and the extent of its competency, and to caution them against giving it any weight when determining the guilt or innocence of the prisoners who were not bound by it, and that a general charge that the jury should not consider any admission or declaration of one prisoner against the others, unless they were present when made, was not a sufficient compliance with the law. *Ib.*

3. The deceased, a woman, was found dead just outside of her house, which was about one-half mile from the town of Marion and one-fourth of a mile from a public road, about 11 o'clock a. m. on 30 April. The body bore evidence of a most brutal murder and an attempt to burn. The prisoner, who was a laborer on a railroad near by, had been seen frequently, previous to the murder, going in the direction of deceased's house, and, on the afternoon of the day preceding the finding of the body, was seen talking with a person who resided near deceased, after which he went in the direction of her house. Shortly after, he was seen in the town, drinking. He spoke of going to see his "old gal," and of having sexual intercourse with some woman. He was further heard to say, "I expect to kill some d—d woman, and have got money enough to carry me wherever I want to go." A witness said he saw a person he believed to be the prisoner, on the same afternoon, going as if from the house of deceased, across a field, not in any pathway, and he was walking briskly—"almost in a trot"—and, once or twice, without stopping, looked back toward the deceased's house. After his arrest, the prisoner's clothing was examined, and splotches which had the appearance of blood were found upon it; but the tracks near the place of the homicide did not correspond with prisoner's foot. The prisoner made no attempt to fly: *Held*, that while these facts established a strong suspicion against the prisoner, they were not sufficient to warrant his conviction of murder, and the jury should have been so instructed. *S. v. Goodson*, 798.

4. The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under chapter 58, Acts 1887. *S. v. Kirkman*, 104 N. C., 911, and *S. v. Harris*, 106 N. C., 682, cited and approved. *S. v. Arnold*, 861.

5. Forms of indictment for murder and manslaughter approved. *Ib.*

In making arrests, 948.

HUSBAND AND WIFE.

1. In an action to foreclose a mortgage executed by a husband and wife they set up the defense of *duress* exercised upon the *feme* defendant, in that while she was in her sick-bed her husband threatened, if she did not sign the deed, he would abandon her and her two children, dependent upon him for support, which threat she believed; that one of the plaintiffs also threatened to sell the chattels of her husband, upon which they held a mortgage, and to put him in jail for failing to convey certain real estate he had agreed in writing to convey, and

HUSBAND AND WIFE—*Continued.*

that she was induced by such threats to execute the deed of mortgage: *Held*, that these facts, taken together, amounted to duress. *Edwards v. Bowden*, 58.

2. Neither the threat to imprison, nor to foreclose, nor the threat of abandonment, taken singly, would ordinarily be sufficient ground for relief. There must be something more than a mere threat. *Ib.*

3. All the combined circumstances of a case, though they do not in themselves amount to technical duress, are still admissible in evidence to make out a case of fraud and extortion in obtaining the instrument. *Ib.*

4. A bond and mortgage was executed by a husband and his wife as his surety, and afterwards a renewal thereof, and, to keep the debt alive, another bond and mortgage was executed by the same parties: *Held*, that such new bond and mortgage was not a discharge of the old mortgage, and the wife is bound thereby, even though the new mortgage is invalid as such for want of privy examination. *Hinton v. Ferrebee*, 154.

5. When the wife commits adultery and is not living with the husband at the time of his death, she is barred of the right to "year's provision." The Code, sec. 2116. *Leonard v. Leonard*, 171.

6. If a *feme sole* employs a servant for a definite period, and marries before the expiration of such period, compensation for the whole time can be recovered in a justice's jurisdiction, if under $200; but if there was an express or implied agreement for services for an indefinite time, compensation for services rendered after marriage can only be recovered against the wife when charged expressly or by necessary implication on her separate estate, and only then by an action in the Superior Court. *Bevill v. Cox*, 175.

7. A deed of separation between husband and wife will be canceled by a Court of Equity when it is made to appear that the parties, since its execution, have cohabited together as man and wife. *Smith v. King*, 273.

8. The law of North Carolina, while it may allow, does not look with favor upon deeds of separation. *Ib.*

9. In an action against a commissioner by a *feme* plaintiff and her husband for the proceeds of the sale of certain slaves sold by him, it appeared that the sale was made in 1863; that the coplaintiffs were married in 1855, and that the action was brought in 1888: *Held*, that the proceeds of sale belonged to the husband, and judgment in favor of the wife, instead of him, was error. *Ferrell v. Thompson*, 420.

10. The property vested in the husband *jure mariti*, and no act of the wife was necessary for this purpose or could have prevented it. *Ib.*

11. Where it appeared that the husband refused to receive the proceeds of sale, and said, at the time, he wanted his wife to have it, but this was not set up in the complaint, and the answer denied any interest

HUSBAND AND WIFE—*Continued.*

in the wife, averring ownership in the husband, which averment was uncontradicted: *Held*, that the contention that the husband had thereby waived his right to the proceeds could not be allowed. *Ib.*

12. It is not necessary that a married woman should be privily examined as to the execution by her of a lease for land as executrix under the will of a former husband and when she was a *feme sole*. *Darden v. Steamboat Co.*, 437.

IMPROVEMENTS.

Permanent improvements as setoff to damages for waste, 630.

INDIANS.

Separate schools for, 609.

INDICTMENT.

1. Where a tenant contracts that, in addition to payment of the stipulated rent, he will work for the landlord whenever he can leave his own crop and is needed by the landlord, this does not constitute the relation of master and servant, and a person employing the tenant is not guilty of enticing a servant, under The Code, sec. 3120. *S. v. Hoover*, 795.

2. In an indictment for a conspiracy to cheat and defraud, the means to be used need not be charged. *S. v. Brady*, 822.

3. When there is a general verdict upon an indictment containing two or more counts, if either count is valid it will support the verdict. *S. v. Toole*, 106 N. C., 736, approved. *Ib.*

4. When an indictment, otherwise valid, does not convey sufficient information to enable the defendant to prepare his trial, he can apply for a bill of particulars. The rule governing applications for a bill of particulars stated. *Ib.*

5. A prosecutor in a criminal action is not disqualified for that reason as a juror. *Ib.*

6. Though a challenge for the defendant is erroneously disallowed, yet if it appear that no juror objectionable to such defendant sat on the jury, it is no ground of exception, and it makes no difference whether a juror objectionable to such defendant is stood aside by reason of his having other challenges unexhausted, or is rejected on the challenge of a codefendant. *Ib.*

7. On an indictment for a conspiracy to cheat and defraud, the court refused to charge that if the defendants honestly believed the representations to be true, or if the representations were merely matter of opinion, or if defendant got cheated by his fear that some one else would get ahead of him, the defendants would not be guilty: *Held*, no error, for the conspiracy, and not the execution of it, is the issue on which the guilt or innocence of the defendants depended. *Ib.*

8. It is not material, in an indictment for conspiracy, that the unlawful purpose should be accomplished. *Ib.*

INDICTMENT—*Continued.*

9. The court has no power to tax a prosecutor with costs when the indictment has been ignored by the grand jury. *S. v. Gates*, 832.

10. The form of indictment for perjury, under the recent act (chapter 83, Laws 1889), approved. *Ib.*

11. An indictment contained two counts—the first (under section 1, chapter 51, Laws 1889) against P. for obstructing an officer in the discharge of his duty, and the second (under section 2 of said act) against three other persons for refusing to aid the officer. There was a verdict of "not guilty" upon the first count, but "guilty" on the second. The defendants moved in arrest of judgment because of misjoinder in the counts: *Held*, that if the objection had been made in apt time it might have been good, unless the State had entered a *nol. pros.* as to one count, but it came too late after verdict. *S. v. Perdue*, 853.

12. It is necessary to charge, in an indictment for a violation of section 2, chapter 41, Laws 1889, and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. *S. v. Bagwell*, 859.

13. The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under chapter 58, Laws 1887. *S. v. Kirkman*, 104 N. C., 911, and *S. v. Harris*, 106 N. C., 682, cited and approved. *S. v. Arnold*, 861.

14. Forms of indictment for murder and manslaughter approved. *Ib.*

15. The fact that one person charged in the same bill has been convicted of the crime alleged is no bar to the conviction of the other parties indicted. *S. v. Jacobs*, 873.

16. The form of indictment for perjury prescribed by chapter 83, Acts 1889, is sufficient and legal. *S. v. Peters*, 876.

17. The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are unnecessary in an indictment for any offense whatever, but are mere surplusage. *S. v. Kirkman*, 104 N. C., 911, approved. *Ib.*

18. When time is not of the essence of an offense, as in perjury, the omission to charge any time in the indictment is not ground to arrest the judgment. The Code, sec. 1189. *Ib.*

19. Where the indictment for perjury alleges it to have been committed in an action wherein "the State was plaintiff and A. B. defendant," it is no variance if the warrant was entitled "State and City of G. v. A. B." *Ib.*

20. When the indictment alleges the perjury to have been committed in the "trial of an action between the State and A. B.," it is immaterial whether the court, if it had jurisdiction of the subject-matter, erroneously or correctly assumed or refused to assume final jurisdiction, or whether it acquitted, convicted or bound over the defendant in such action. A preliminary trial is a trial of an action within the statute. *Ib.*

INDICTMENT—*Continued.*

21. The statute has merely simplified the form of indictment for perjury. The constituent elements of the offense remain unchanged and require the same proof as heretofore. *Ib.*

22. When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. *Ib.*

23. To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. *Ib.*

24. An indictment for injury to personal property, under section 1082 of The Code, amended by chapter 53, Laws 1885, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been *unlawfully* perpetrated. *S. v. Martin*, 904.

25. Under chapter 434, Laws 1889, creating two degrees of burglary, to support a charge of burglary in the first degree it is essential that the indictment should contain an averment, and, upon the trial, the proof should establish the fact that the house was, at the time of the commission of the alleged crime, in the actual occupation of some person. *S. v. Fleming*, 905.

26. But one charged with burglary in an indictment drawn under the common law may be convicted of burglary in the second degree. *Ib.*

27. And one charged with burglary in the first degree may be convicted of the second degree if the proofs, upon the trial, are sufficient to establish that grade of the crime. *Ib.*

28. One charged with burglary may be convicted of larceny or of the crime designated in section 996 of The Code. *Ib.*

29. In indictments for both bribery and extortion it is essential to allege, and, upon the trial, to prove that the act charged was done with a willful and corrupt intent. *S. v. Pritchard*, 921.

30. It is also necessary, in an indictment for extortion, to charge, and, upon the trial, to prove that the unlawful fees were demanded "under color of office." *Ib.*

31. The statute (The Code, sec. 1090) creates two offenses. In an indictment for either it is necessary to allege and, on the trial, to establish the fact that the accused officer was required to take an oath of office before entering upon his duties; and for a violation of the latter clause it is necessary to aver in the indictment, and prove upon the trial, a corrupt intent. *Ib.*

Indictment lies at common law against officer for permitting escape, 857.

INJUNCTION.

1. Where it appeared that the defendant, who was preparing to erect a fish-house and landing, which, when erected, would obstruct plaintiff's egress to deep water on one side, though not immediately in front, threatened to tear down plaintiff's wharf erected on plaintiff's own water front: *Held*, that defendant was not subject to injunction, it appearing that he was solvent and that the trespass was not continuous in its nature. *Bond v. Wool*, 139.

2. Where, in a motion for injunction, the court below finds the facts, this Court will review such findings when the evidence is sent up. *Roberts v. Lewald*, 305.

INSURANCE.

1. An assignment of plaintiff's "right, title and interest" in his father's estate does not embrace the insurance money or the property allowed in part payment for its advancement. *Burwell v. Snow*, 82.

2. The insurance money was no part of the estate of the decedent. *Ib.*

3. Such insurance for the benefit of wife and children belongs to them, and is expressly allowed by the Constitution. *Ib.*

4. In an action on an insurance policy the defense was settlement by arbitration, according to the terms of the policy. The court ruled that the agreement to submit, and the award, were not competent, either to support the plea of arbitrament and award or as a binding agreement upon the parties thereto. This was decided in *Mfg. Co. v. Assurance Co.*, 106 N. C., 28. *Herndon v. Ins. Co.*, 183.

5. In an action upon an accident insurance policy the defense was that the plaintiff had suppressed the fact of his deafness: *Held*, that evidence that the defendant's agent, who took the application of plaintiff, knew of this defect, was competent, although in his application the plaintiff stated he was free from any bodily infirmity. *Follette v. Accident Association*, 240.

6. Actual knowledge to the agent is constructive knowledge to the company; hence the latter is deemed to have waived all objections to deafness as a bodily infirmity. *Ib.*

Contract of insurance of goods *in transitu*, 76.

INTENT.

In unlawful sale of liquor to minor, 959.

INTERLOCUTORY ORDERS.

In an action to foreclose a mortgage it appeared that the plaintiffs had a lien upon the land specified, and the court made an order directing that an account be taken to ascertain the balance of the debt yet unpaid, and retaining the cause for further action: *Held*, that the order was interlocutory, and appeal would not lie from it. *Williams v. Walker*, 334.

ISSUES.

1. In an action against a railroad for damages the defendant tendered the issues: (1) Were plaintiff's injuries caused by the negligent running

ISSUES—*Continued.*

of defendant's engine? (2) Was there contributory negligence on the part of plaintiff? (3) What damages is the plaintiff entitled to recover? The court declined to submit these, and substituted instead a single issue—What damages, if any, is the plaintiff entitled to recover? *Held* to be error. The question of the *quantum* of damages is a mere incidental one, depending upon the real issues of fact raised by the pleadings. *Denmark v. R. R.*, 185.

2. Where the court below assumes the responsibility of settling the issues on trial, this Court, construing the statute, has laid down three rules: (1) Only issues of fact raised by the pleadings must be submitted. (2) The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment. (3) Of the issues raised by the pleadings, the judge may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon. *Ib.*

3. The statute (The Code, secs. 395, 401) requiring issues of fact raised by the pleadings to be submitted to the jury, is mandatory. *Ib.*

4. The better practice is to submit an issue upon the question of contributory negligence. *Ib.*

5. The frame of the issues is largely left to the discretion of the presiding judge if they are such as arise upon the pleadings. *Emery v. R. R.*, 102 N. C., 209. *Everett v. Williamson*, 204.

6. No valid issue as to the value of homestead at the time of second allotment can be raised by exceptions of creditors thereto. *Thornton v. Vanstory*, 331.

7. Only issues arising naturally upon the pleadings should be submitted, but where they are subdivided this is not a ground for new trial, unless it appear that they were thereby confusing, complicated or prejudicial. *Bean v. R. R.*, 731.

8. Where the complaint does not allege fraud, in terms, but does set forth facts which, being denied by the defendant, raise issues as to unfairness, surprise and undue advantage, by means of which an instrument was obtained, the court will not let the defendant take advantage of it. *Ib.*

9. Contradictory issues under the different aspects of the pleadings are not objectionable under The Code system. *Ib.*

10. Where there was an allegation and evidence that the defendant, a railroad company, left a ledge of rock in such a position as that the jar of the passing train would probably cause it to fall on its track, and it did so fall, and plaintiff was thereby injured: *Held*, the issue of negligence was properly submitted to the jury. *Ib.*

JOINDER.

Of counts in indictment, 853.

JUDGES.

Appointed to hold special terms, 967.

JUDGE'S CHARGE.

1. In an action involving the issue of abandonment of the wife by the husband, a witness testified, without objection, that the wife left the husband because he would not give her anything to eat. The court charged, if he made her leave, or so failed to provide for her support that she was compelled to leave in order to provide for herself and family, it would amount to abandonment, and the jury should so find: *Held*, there was no error. *High v. Bailey*, 70.

2. This Court will only disturb the finding when there is no testimony to sustain it. *Ib.*

3. The plaintiff plead a docketed judgment, which was a valid and subsisting lien upon whatever interest defendant had in the lands: *Held*, that the court erred in directing an account of this judgment and refusing to direct the payment of the same. *Hinton v. Pritchard*, 128.

4. In an action to recover damages for injuries alleged to have been received because of the negligence of a railway company to provide suitable means by which passengers might have access to trains, there was evidence tending to show that a shallow ditch, not more than 2 feet wide, ran parallel with defendant's track at the point where passengers got on and off the cars; that a bridge or platform 15 feet wide was erected over it; that it was in good condition, except that one plank was slightly shorter than the others; that the plaintiff, in the daytime, in attempting to get on the train, stepped into a hole caused by the short plank, and was injured: *Held*, the defendant was entitled to an instruction that if the jury found the bridge to be such as testified to, it was sufficient as a crossing place for passengers, and the defendant was not chargeable with negligence. *Stokes v. R. R.*, 178.

5. Where the plaintiff failed to connect himself with the former owners of a tract of land, and failed to show color of title or adverse and continuous possession for twenty-one years: *Held*, that the court properly instructed the jury to return a verdict for the defendants. *Brown v. King*, 313.

6. When a party asks a prayer for instruction, to which he is entitled, it must appear that it was given either as asked or was substantially given in the charge, if the appellant excepted to the refusal. *McFarland v. Improvement Co.*, 368.

7. If a prayer for instruction is given substantially in the charge, though not in the very words asked, it is sufficient. *Thompson v. Tel. Co.*, 449.

8. A general exception "to the charge as given," without specifying any particulars, will be disregarded. *Ib.*

9. When an erroneous prayer asked by appellant is given, he cannot be heard to complain. *Ib.*

JUDGE'S CHARGE—*Continued.*

10. Where the jury gave substantial damages, which are affirmed on appeal, it is unnecessary to consider the charge given as to nominal damages. *Ib.*

11. An omission to charge on a particular aspect of the case is not error, unless an instruction was asked and refused. *Ib.*

12. Where the defendants, purchasers, were expressly informed by their vendor that the plaintiff was to get the grant out of the office of the entry-taker, and knew that plaintiff had the warrant in his possession, and that, in order to obtain it, he must be paid for it: *Held*, that there was no error in the charge of the court, that, if the jury believed these facts, such defendants were charged with notice of everything affecting the plaintiff's claim which they might have discovered by inquiry. *Bryan v. Hodges*, 492.

13. Where it was admitted that the plaintiff, whose children were excluded from school, was a slave before 1865, the charge of the court below that he was presumed to be a negro is correct. *McMillan v. School Committee*, 609.

14. The fact that it was the duty of a track-walker, a fellow-servant of plaintiff, to examine the condition of the track just before the passage of the train, cannot excuse the defendant of negligence. This was not an ordinary hazard, and, in the absence of evidence to show that plaintiff knew of the dangerous condition of the ledge, the court rightly refused to instruct the jury that there was contributory negligence on his part. *Bean v. R. R.*, 731.

15. In an action for damages for ponding water back on plaintiff's land, he asked for instructions to the jury that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby. The court so charged, but added that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage: *Held*, there was no error. *McGee v. Fox*, 766.

16. In such action, a motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court. *Ib.*

17. Upon a joint trial of three persons for murder, the State offered evidence of the declarations of one of the prisoners to show his guilt, but they were not made in the presence or knowledge of the others: *Held*, that it was the duty of the judge, in his charge to the jury, especially when he had been so requested, to particularly direct the attention of the jury to this aspect of the evidence, and to instruct them specifically as to its nature and the extent of its competency, and to caution them against giving it any weight when determining the guilt or innocence of the prisoners who were not bound by it, and that a general charge that the jury should not consider any admis-

JUDGE'S CHARGE—*Continued.*

sion or declaration of one prisoner against the others, unless they were present when made, was not a sufficient compliance with the law. *S. v. Oxendine,* 783.

18. The Code, sec. 413, only requires the judge to "explain the law arising upon the evidence." The misconception as to this founded upon *S. v. Boyle,* 104 N. C., 800, corrected. *S. v. Brady,* 822.

19. It is not error to refuse a prayer for instructions, however correct, when there is no evidence to support it. *Ib.*

20. An exception "to the charge as given" is too general. *S. v. McDuffie,* 885.

21. Upon the trial of an indictment for burglary, the proof tended to show that the felonious entry was made either through a window, the blinds of which were closed, but not fastened, or through a door which had been bolted, and the court charged the jury that, "In order to constitute a breaking, . . . it is not necessary that the inmates of the house should have resorted to locks and bolts. If the blinds and door were held in their position by their own weight, and in that position, relied upon by the inmates as a security against intrusion, it is sufficient fastening": *Held,* to be correct. *S. v. Fleming,* 905.

In action of employee for wages, 6.

In action by landlord to recover crop, 88.

In action for damages for injury by railroad, 185.

In action against sheriff's bond for failure to levy an execution, 415.

In action to recover land, 663.

JUDGMENT.

1. A judgment in favor of a dead man is not void, and not, on that account, irregular. *Wood v. Watson,* 52.

2. A judgment *against* a party to a suit rendered after his death is voidable, even if the fact of death was unknown. *Ib.*

3. When either party to a suit dies before judgment, it is the duty of the adverse party to suggest the death to the court. *Ib.*

4. Judgments, unless when impeached for fraud, will not be set aside for mere informalities or omissions which do not defeat the ends of justice, especially after the lapse of years. *White v. Morris,* 92.

5. An irregular or erroneous judgment against an infant stands in full force until reversed. *Ib.*

6. A judgment may be set aside when the irregularity has not been waived or cured, and may yet work injury to the complaining party. *Ib.*

7. Where it appears that the infant heirs of the alleged bargainor, in an action to set up a lost deed, were not served with summons, nor was

JUDGMENT—*Continued.*

their guardian *ad litem*, that they had not general or testamentary guardian, that the summons was endorsed served on a day which was shown to be Sunday, that the date of such endorsement was nearly a month before it was issued; and it further appeared that summons was served upon the grandfather of the infants, with whom they lived, and that their guardian *ad litem* entered an appearance in court and filed answer for them, that attorneys were employed for them: *Held*, that these facts, taken together, did not disclose such irregularity as entitled the infants to have the judgment set aside. *Ib.*

8. The Code, sec. 274, allowing the court to relieve a party against a judgment on account of mistake, excusable neglect, etc., refers to mistakes of fact, not of law. *Skinner v. Terry*, 103.

9. So, where a defendant, whom the court had refused to allow to file answer after overruling a frivolous demurrer, neglected his appeal and allowed judgment to be entered against him, because he was surprised by the action of the court and misunderstood the effect of the judgment: *Held*, there was no error in denying his petition to set the judgment aside on that account. *Ib.*

10. Where it appeared, upon inspection of the record, that the amount of the final judgment so rendered on default of answer could not be ascertained by computation or be fixed by the terms of the contract sued on, such judgment was irregular and should have been set aside by the court, even though the demand for it was not based on that ground. The overruling of the frivolous demurrers is of no avail to the plaintiffs, but leaves the parties just as if it had not been filed. *Ib.*

11. The date of a judgment will be taken as the date of the debt upon which it was rendered, unless the contrary appear of record. *Mebane v. Layton*, 89 N. C., 396, approved. *Buie v. Scott*, 181.

12. In an action against a commissioner by a *feme* plaintiff and her husband, for the proceeds of the sale of certain slaves sold by him, it appeared that the sale was made in 1863; that the coplaintiffs were married in 1885, and that the action was brought in 1888: *Held*, that the proceeds of sale belonged to the husband and judgment in favor of the wife instead of him was error. *Ferrell v. Thompson*, 420.

13. The restoration of the lien of a judgment, under Acts of 1885, does not affect the judgment debtor's right to exoneration, or his power to encumber his homestead by a conveyance executed in compliance with section 8, Article X, of the Constitution. *Leak v. Gay*, 482.

14. Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. *Ib.*

15. A judgment, whether just or unjust, conscionable or unconscionable, if regularly taken in a court of competent jurisdiction, may be enforced by execution or proceedings supplementary thereo, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. *Heggie v. Building and Loan Asso.*, 581.

JUDGMENT—*Continued.*

16. The corporation represents the shareholders in defending actions involving their rights and obligations, and a judgment against it, in the absence of fraud, binds them. *Ib.*

17. Where there is a valid judgment against the defendant corporation, from which no appeal was ever perfected, this Court will not consider whether the plaintiff is confined in his remedy to particular assets, such as certain equities in land held by it. The judgment affects all the assets until it is impeached for fraud or collusion. *Ib.*

18. Where the defense of usury was not set up by the defendant corporation to resist an action by the plaintiff, its creditor: *Held*, that the assignee, a shareholder, interested in the administration of the assets and in preventing an attempted priority given to the plaintiff, is estopped to impeach or to show such judgment was void on such ground. *Ib.*

19. The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. *Ib.*

Of arbitrator in action by administrator against surviving partner, 156.

Lien upon mortgagor's homestead, 468.

In proceedings for partition, 646.

Judgment creditor, 705.

JURISDICTION.

1. Where the damages alleged amount to more than fifty dollars, the Superior Court has jurisdiction. *Bowers v. R. R.*, 721.

2. A mere demand of judgment for amount of damages greater than are alleged in the complaint will not avail to give the Superior Court jurisdiction. *Ib.*

3. It appearing from the record that a trial for a misdemeanor—the defendants being on bail—was commenced on Saturday of the first week of the criminal court of Buncombe County, but the jury did not return a verdict until the following morning; and it further appearing that the court continued in session the second week, it will be presumed that such condition of the docket existed as authorized the prolongation of the term under the statute creating the court (Laws 1889, ch. 493, sec. 15). *S. v. Penley*, 808.

4. When such term is continued until the second week, its jurisdiction is not limited to those cases where the defendants are charged with crimes punishable capitally, or by imprisonment in the penitentiary, or are in jail waiting trial, but it may then try any cause within its jurisdiction. *Ib.*

5. Perjury cannot be committed when the court has no jurisdiction of the matter about which the alleged false oath was made. *S. v. Gates*, 832.

Chancery jurisdiction to enforce collection of judgment, 36.

Of court requiring executrix to give bond and account, 168.

JURISDICTION—*Continued.*

Of justice of the peace, 175.

Of United States Courts, 191, 194.

JURY.

Constitutional construction of "grand jury," 913.

JURY TRIAL.

It is competent for the attorney and guardian *ad litem* to waive a jury trial for infants, even where they have not been regularly served with summons. *White v. Morris*, 92.

Heirs at law not deprived of, by agreement to arbitrate, 411.

JUSTICE OF THE PEACE.

Jurisdiction of, 175.

LADING, BILL OF.

When contract on bill of lading discharges from liability as insurer, 76.

LANDLORD AND TENANT.

1. Between landlord and tenant, fixtures for the better enjoyment of trade are removable by the tenant, but fixtures for agricultural purposes pass with the land. *Overman v. Sasser*, 432.

2. The prosecutor, claiming under a deed from an admitted former owner, placed a tenant in possession of the premises, who, before surrendering to his landlord, went out, and, taking a lease from another claimant, went back as his tenant, but did not continue to occupy the house; thereupon the prosecutor fastened up the house, leaving some personal property in it, and went away. The defendant, in prosecutor's absence, and with knowledge of the circumstances, broke open the building and otherwise injured and defaced it, and refused to leave when ordered. He was indicted for willful injury to the building. Code, sec. 1062: *Held*, (1) that the tenant could not divest the possession of his landlord by his attempted attornment to the defendant, and that the prosecutor had the legal possession when defendant entered; (2) that the defendant's action was unlawful and willful, and he could not justify it by proof that he entered in good faith and under claim. *S. v. Howell*, 835.

3. In an action by a landlord for the value of rents and advancements made to his tenant against the tenant's vendee of the crops, who had also made supplies to him for cultivating them, it appeared from the findings of the referee that the plaintiff advanced certain cotton seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to *retain* parts of the *undivided* cotton seed and crops by way of advancement: *Held*, (1) that plaintiff had a landlord's lien on such seed and crops; (2) that it took priority over defendant's supply lien; (3) that division of the crop and delivery back to the tenant was not necessary to constitute a valid advancement. *Thigpen v. Maget*, 39.

LANDLORD AND TENANT—*Continued.*

4. In claim and delivery ancillary to an action by landlord to recover of his tenant the crops on which there was a lien for rents and advancements, it appeared that the crop was not all gathered, and had been consumed. It did not appear that the defendant had removed any of it without the consent of plaintiff, nor that any time had been fixed when the rents and advances should be due. The court directed the jury to find that the plaintiff is not the owner and entitled to the immediate possession of the crops, and rendered judgment for the return of the property to the defendant, if it could be had, and if not, then for its value: *Held*, such instruction and judgment was *error*. *Smith v. Tindall*, 88.

5. The crop in question was vested in the possession of the landlord until his lien for rents and advancements was discharged. *Ib.*

6. In the absence of agreement as to time when the lien for rents and advancements should be enforced—*i. e.*, when the crop should be divided—it should be as soon as it can reasonably be done. *Ib.*

7. The plaintiff was entitled to have his crop—*i. e.*, enough for rents and advancements—gathered at the time he demanded it, nor was he obliged to wait for division until the whole crop was gathered. *Ib.*

8. The proper course, ordinarily, between landlord and tenant, is to have the crops divided as they are gathered, subject to the convenience and the interest of the parties. *Ib.*

9. A note secured by a lien and chattel mortgage, duly recorded 24 April, 1889, was assigned for value without notice of any equities and before due, to the plaintiff. Previous to this assignment, and on 12 March, 1889, the tenant of the maker of plaintiff's note had executed to defendant a lien for supplies and advancements upon the crops cultivated by him, and his landlord (the maker of said note) executed to defendant a release of the landlord's lien for rent. This release was never recorded. The plaintiff's assignor, the payee of the note, had notice, and plaintiff did not have notice, of defendant's liens. The crop raised by the tenant was two bales of cotton, worth $92.53, which was taken and converted by the defendant: *Held*, that the plaintiff was entitled to recover the landlord's share—one-half the value of the cotton. *Lawrence v. Weeks*, 119.

10. The agreement between the landlord and the defendant could have no greater force than an unrecorded mortgage to affect the rights of subsequent innocent creditors for value. *Ib.*

11. Where B. was to furnish land, farming implements, feed and team, and W. was to do the work, and the crops were to be equally divided: *Held*, that there was not an agricultural partnership, and the release of B., showed the relation of landlord and tenant. *Ib.*

12. In an action for the value of certain cotton, it appeared that the plaintiff, who had a landlord's lien thereon, had directed one of the defendants (who were the purchasers thereof from the plaintiff's tenants) to pay over the purchase-money to the tenants, and then, the next day, and before the money was actually paid, the plaintiff re-

LANDLORD AND TENANT—*Continued.*

voked the order. There was no consideration for the order, and there was no change of the *status* of the parties. The defendant, three days thereafter, paid the money—the price of the cotton—to the plaintiff's tenants, who knew nothing of the order: *Held*, the plaintiffs were entitled to recover. *Sugg v. Farrar*, 123.

Legal and equitable defenses, 731.

LEGITIMACY.

Where there was evidence that the wife, continuously for three years prior to the birth of the child, lived in open adultery with a white man; that the child, by its color, must have been the child of a white man, and not of the husband, who was a negro; that the mother declared it was not his child, and the husband, though living on the same farm, was not allowed at the house where the wife lived, much of which was contradicted by other evidence: *Held*, that, though there was not impossibility of access, the question of access or non-access became a question of fact for the jury, and the treatment of the child by the paramour was competent as a circumstance tending to corroborate the evidence of non-access. *Woodward v. Blue*, 407.

LESSOR AND LESSEE.

When the surrender of a lease, before its expiration, is unconditionally accepted by the lessor, without any reservation, he has no claim against the lessee for damages by reason of the diminished rent paid thereafter by the new lessee. *Everett v. Williamson*, 204.

Contract for making repairs, 231.

LETTER.

It is necessary to charge, in an indictment for a violation of section 2, chapter 41, Laws 1889, and to prove upon the trial that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. *S. v. Bagwell*, 859.

LIABILITY OF LIFE TENANT FOR PERMISSIVE WASTE, 630.

LICENSE, LIQUOR. See Liquor, Sale of.

LIEN.

1. The vendor's lien is not waived, in the absence of an express agreement to that effect, by taking a note or other personal security for the purchase-money. *Bristol v. Pearson*, 562.

2. The intention to discharge such lien in this way must, it seems, be alleged in the complaint. *Ib.*

Of creditors in action in nature of creditors' bill to set aside fraudulent assignment, 9.

Priority of landlord's lien, 39.

Landlord's lien for rent and advancements, 88, 119, 123.

Parties to an action to enforce a lien, 115.

LIMITATIONS, STATUTE OF.

1. The defendant, a railroad corporation, entered upon the lands of the petitioner and constructed its road without adopting any of the means provided in its charter for acquiring title. No time is prescribed in the charter within which the owner is to be barred of his right of entry or compensation: *Held*, that the possession of the defendant being protected by its charter from any action of trespass, or other character, the plaintiff is confined to his remedy of having his damages assessed, as allowed by the charter. *Land v. R. R.*, 72.

2. The three years statute of limitation, Code, sec. 155, subdivisions 2 and 3, is no bar to such proceedings. *Ib.*

3. It seems that there is no statute of limitations provided for such proceedings. *Ib.*

4. There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held to ascertain the will of the majority of the qualified voters in a township relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Comrs.*, 248.

5. The Code, sec. 138, requires the statute of limitations to be specially pleaded, and no distinction is made between legal and equitable causes of action in this respect. *Guthrie v. Bacon*, 337.

6. When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so the cause of action is barred in three years. Code, sec. 155 (4). *Board of Education v. Board of Education*, 366.

7. The action of the plaintiff, a judgment creditor, is not barred in three years after the corporation has ceased to do its regular business. *Heggie v. Building and Loan Asso.*, 581.

8. An action for slander is barred in six months. *Hester v. Mullen*, 724.

9. Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations: *Held*, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. *Ib.*

In action upon claims in favor of and against an estate of a decedent, 31.

When not applicable as a bar, 340.

In action for damages for waste, 630.

In action by legatees against executor, 658.

LIQUOR SELLING.

1. Chapter 183, Private Laws 1889, amending the charter of the town of Marion, did not, either by the provisions contained in the body of

LIQUOR SELLING—*Continued.*

the act, or by the repealing clause thereof, repeal that portion of the act of 1879, ch. 232, prohibiting the sale of liquors within two miles of the courthouse in McDowell County. *S. v. Witter*, 792.

2. Under the provisions of the Revenue Act of 1887 (ch. 135, sec. 31), a person could lawfully sell spirituous liquors—the product of his own farm—in quantities less than a quart, at any place where the sales of liquors were not prohibited, without paying the tax or procuring the license otherwise required by said act. The act of 1887 has, however, been changed by chapter 216, Laws 1889. *S. v. Hart*, 796.

3. One who, in good faith, sells liquors for another who has the right to do so without license, is entitled to the same defenses as his principal. *Ib.*

4. The sale of liquors in quantities not less than a quart does not constitute the seller a "retailer," under the laws of this State. *S. v. Newcomb*, 900.

5. The Commissioners of Guilford County have the authority to grant licenses to sell liquors in the city of Greensboro by measure, not less than a quart, without the permission of the board of aldermen of that city. *Ib.*

6. The present Revenue Act does not dispense with the necessity on the part of those who desire to *retail* liquors of obtaining a license. It simply, in that respect, imposes the same tax upon selling by the quart, and up to the five gallons, as is imposed on the seller by measure less than a quart. *Ib.*

7. Upon the trial of an indictment for a violation of the statute (Code, sec. 1077) forbidding the selling or giving liquors to minors, it will be presumed that the seller had knowledge of the fact that the person to whom the liquors were furnished was a minor. *S. v. Scoggins*, 959.

8. Several persons may be charged in the same indictment and convicted for a single unlawful sale of liquors. *Ib.*

9. Where there was evidence that the person to whom the liquors were charged to have been sold was eighteen years old; that his appearance clearly indicated he was a minor; that he repeatedly within two years went into defendants' bar-room with an adult acquaintance, to whom he had given the money to purchase liquors before entering the bar; that the adult would call for the drinks and pay for them, and the defendants would pour out the drinks and hand them to the minor and adult: *Held*, the defendants were guilty of a violation of the statute, no matter what may have been their actual intent. *Ib.*

10. When county commissioners refuse to grant license to retail liquor, on the ground that the applicant is not a fit person, a *mandamus* will not lie to compel the commissioners to grant it. *Comrs. v. Comrs.*, 335.

LIVESTOCK.

Injury to by railroad and liability therefor, 748.

MANDAMUS.

1. When county commissioners refuse to grant a license to retail liquor, on the ground that the applicant is not a fit person, a *mandamus* will not lie to compel the commissioners to grant it. *Comrs. v. Comrs.*, 335.

2. Ordinarily, the only remedy of a judgment creditor against a county is a writ of *mandamus* to compel its commissioners to levy a tax to pay the debt. *Hughes v. Comrs.*, 598.

3. A writ of *mandamus* will be granted only where one demanding it shows that he has a specific legal right, and has no other specific legal remedy adequate to enforce it. *Ib.*

4. An action may be maintained against the county commissioners establishing a debt against the county without asking for a writ of *mandamus*, where it appears that the county has property subject to trusts, or such as can be reached only by proceedings supplemental to execution. *Ib.*

5. Where it appears that a *mandamus* has been answered by the county commissioners and proven unavailable, because the constitutional limit of taxation has been exhausted to meet the current expenses; and it further appears that the county holds real estate, or other property not used or needful for its public functions, and, for any reasons, such property could not have been subjected, except by an equitable *fi. fa.: It seems* that such property can be subjected for the discharge of the debt of a judgment-creditor against the county, though it cannot be levied on and sold under execution. *Ib.*

6. Where the plaintiff, by *mandamus*, attempted to compel the admission of his children into a public school established for the Croatan Indians, there was evidence that plaintiff's father was a white man, and his wife, the mother of the children, was a Croatan Indian, and that the plaintiff was a slave before 1865. The plaintiff asked the court to charge, in effect, that if the jury believed the evidence, their answer should be that the plaintiff's children were not negroes. The court refused, but charged that, if the plaintiff was a slave, there was a presumption that he was a negro: *Held*, no error. *McMillan v. School Committee*, 609.

MASTER AND SERVANT.

1. A railroad company is not liable for injury to its servants resulting from the negligence of a fellow-servant. This case is governed by *Hagins v. R. R.*, 106 N. C., 537. *Hobbs v. R. R.*, 1.

2. The relation between a fireman and locomotive engineer is that of fellow-servants. *Ib.*

3. The fact that a servant is a foreman over other hands, or is of superior authority, whose orders other servants are bound to obey, does not necessarily render the company liable for his negligence resulting in injury to them. *Ib.*

4. In order to render the company liable to an employee for injuries caused by the negligence of a fellow-servant, it must appear that it

MASTER AND SERVANT—*Continued.*

exposed the servant to unnecessary risks, or retained the negligent or incompetent servant in their employment, knowing him to be such. *Ib.*

See also, 795, 931.

MORTGAGE.

1. Where the disposition by the mortgagor of any property embraced in a chattel mortgage necessarily results in hindering, delaying or defrauding the mortgagee, it will be presumed that the intent to produce such result existed, and an instruction to the jury that every one is conclusively presumed to intend the consequences of his act would be correct; but where such result would not naturally or necessarily follow from the act alleged—*e. g.*, that sufficient property remained, subject to the mortgagee, to pay the debt—the intent with which the disposition was made is a question of fact to be passed upon by the jury, under section 1089 of The Code. *S. v. Manning*, 910.

2. In an action to foreclose a mortgage executed by a husband and wife, they set up the defense of *duress* exercised upon the *feme* defendant, in that while she was in her sick-bed her husband threatened if she did not sign the deed he would abandon her and her two children, dependent upon him for support, which threat she believed; that one of the plaintiffs also threatened to sell the chattels of her husband, upon which they held a mortgage, and to put him in jail for failing to convey certain real estate he had agreed in writing to convey, and that she was induced by such threats to execute the deed of mortgage: *Held*, that these facts, taken together, amounted to duress. *Edwards v. Bowden*, 58.

3. Neither the threat to imprison, nor to foreclose, nor the threat of abandonment, taken singly, would, ordinarily, be sufficient ground for relief. There must be something more than a mere threat. *Ib.*

4. All the combined circumstances of a case, though they do not in themselves amount to technical duress, are still admissible in evidence to make out a case of fraud and extortion in obtaining the instrument. *Ib.*

5. A bond and mortgage was executed by a husband and his wife as his surety, and afterwards a renewal thereof; and, to keep the debt alive, another bond and mortgage was executed by the same parties: *Held*, that such new bond and mortgage was not a discharge of the old mortgage, and the wife is bound thereby, even though the new mortgage is invalid as such for want of privy examination. *Hinton v. Ferrebee*, 154.

6. When a mortgage debt has been discharged, the mortgage is no longer operative, though not marked "satisfied of record." *Blake v. Broughton*, 220.

7. A defendant who has made conveyance of land to her codefendants before suit commenced, with warranty of title and covenants of seizin, and against incumbrances, has a right to defend in an action to foreclose a mortgage embracing the land brought against such codefendants. *Ib.*

MORTGAGE—*Continued.*

8. A mortgagor, whose bond and mortgage (made to secure it) was transferred by the mortgagor to other persons, testified that he never assented to the transfer, and did not know anything about it. The court charged that the mortgagor's assent to the transfer was not necessary, as he had parted with his interest: *Held,* that evidence, if incompetent, was harmless under such charge. *Ib.*

9. In an action to foreclose two mortgages, brought by the assignee of the mortgagee, both being executed by the same mortgagors, the defendants, who claimed title under conveyance from the mortgagors, allege as defense that the mortgages had been satisfied. In support of this, they offered evidence of conversations between one of the defendants and one of the mortgagors, the plaintiffs not being present. There was evidence of an agreement between the plaintiffs and the agent of one of the defendants, who was also purchaser of the interest of the mortgagors, to pay off the mortgages. There was a conflict of testimony between the plaintiffs and one of the defendants as to whether the mortgages were paid off, and as to their conversations on this subject: *Held,* (1) that the evidence offered was competent in corroboration; (2) the objection to the *answer,* and not to the *question,* even if valid, came too late, there being no motion to withdraw it from the jury. *Ib.*

10. A deed absolute on its face will not be corrected and converted into a mortgage, where it is not shown that a defeasance clause was contemplated by the parties and omitted by reason of ignorance, fraud, mistake or undue influence. *Egerton v. Jones,* 284.

11. The fact that a deed was drawn by one not familiar with legal forms does not meet the indispensable requirements of a Court of Equity for granting such relief. *Ib.*

12. A mortgage upon crops to be raised other than those of the year current is invalid. This limitation is based upon grounds of public policy, and upon analogy to the agricultural lien law. *Loftin v. Hines,* 360.

13. The homestead interest is favored by the Constitution, and a mortgagor has a right to have his homestead exonerated by applying the proceeds of the excess above it to the payment of a prior mortgage debt in preference to other liens upon the homestead or upon his other lands. *Leak v. Gay,* 468.

14. No matter when the debts of the judgment creditors have been created, the debtor has a right to demand that the junior mortgages shall be satisfied out of the proceeds arising from sale of the excess above the homestead in exoneration thereof. *Ib.*

15. Where judgments are a lien upon a mortgagor's homestead in the residue left after sale, he has, as against the judgment creditors, a right to secure their ultimate payment as the court may direct, the interest in the residue fund set apart as his homestead to be paid to him till his estate determines; or he has the option to take the present value of the homestead out of such residue, and this though it is less than one thousand dollars. The fund so taken for the present value

MORTGAGE—*Continued.*

belongs to the homesteader absolutely, and the balance left is subject to immediate division among the creditors according to priorities. *Ib.*

16. Where it appeared from the testimony that the land in dispute was bid off at the sale under mortgage at a small price (which was not shown to have been paid), pursuant to a previous agreement between the trustees conducting the sale and the bidder, who, at the instance of one of the trustees, transferred his bid to the vendee: *Held*, no title passed by such sale, because the land conveyed was held as security for debt. *Simpson v. Simpson*, 552.

17. Where the mortgagee has no power of sale granted to him, a sale made by him is not effectual to pass the legal title to the mortgagor. *Ib.*

18. A plaintiff, under a vendee under such sale, must bring an action to foreclose, and cannot recover possession of the land in an action simply for that purpose. *Ib.*

19. The conveyances by the mortgagees and their vendee do not pass a naked legal title, and such conveyances cannot operate as a foreclosure. *Ib.*

20. Where the trustee of a mortgage made to indemnify him and another (his cosurety) against loss by a third, executed to the maker a deed of release, without the knowledge of his cosurety, to the lands conveyed in the indemnifying mortgage: *Held*, the action to enforce the mortgage was not postponed until the deed could be set aside in an independent action. *Southerland v. Fremont*, 565.

21. The unlawful release or discharge could be avoided either by amendment or by replication. *Ib.*

22. The mortgagee of land conveyed to secure a preëxisting debt is a purchaser for value, under the statutes of 13 and 27 Elizabeth, but he takes subject to any equity that attached to the property in the hands of the debtor. *Ib.*

23. The implied promise (if any, or if enforcible) of the mortgagee, where the mortgage was made to secure preëxisting indebtedness, that she would postpone until default all other remedies, cannot be allowed to avail to defeat prior equities. *Ib.*

24. When, without notice of an equity, one enters into an indemnifying conveyance to secure an irrevocable liability, such conveyance will prevail over the equity. *Ib.*

By donee of power of appointment by will, 392.

NEGLIGENCE.

1. A railroad company is not liable for injury to its servants resulting from the negligence of a fellow-servant. This case is governed by *Hagins v. R. R.*, 106 N. C., 537; *Hobbs v. R. R.*, 1.

2. The relation between a fireman and locomotive engineer is that of fellow-servants. *Ib.*

NEGLIGENCE—*Continued.*

3. The fact that a servant is a foreman over other hands, or is of superior authority, whose orders other servants are bound to obey, does not necessarily render the company liable for his negligence resulting in injury to them. *Ib.*

4. In order to render the company liable to an employee for injuries caused by the negligence of a fellow-servant, it must appear that it exposed the servant to unnecessary risks, or retained the negligent or incompetent servant in their employment, knowing him to be such. *Ib.*

5. Where a telegraph company received for transmission the following message: "Come in haste; your wife is at the point of death," and failed to deliver the same for eight days, though the receiver's place of business was well known and within a short distance of the office of the company in the town in which the receiver resided, whereby he was prevented from being present at his wife's death or attending her funeral: *Held,* (1) there was gross negligence, and the receiver was entitled to maintain an action for the tort; (2) the plaintiff is entitled, in addition to nominal damages, to recover compensation for the mental anguish inflicted on him by the negligence of the defendant. *Young v. Tel. Co.,* 370.

6. When it appeared in an action against a railroad company for damages for injury sustained by the plaintiff, a passenger, from a fall between the defendant's cars and a platform along by the side of them, that she was attempting to get a seat before the cars were lighted, and some time before it was the usual time to light them and to give the signals of warning and preparation generally given, the first fifteen, and the second five, minutes before starting; and without invitation from defendant's agents the plaintiff attempted to get her seat in the dark, and was hurt while stepping from the platform to the cars, it was not made to appear that there was any defective construction: *Held,* (1) the plaintiff was not entitled to recover; (2) her injury resulted wholly from her own negligence. *Hodges v. Transit Co.,* 576.

7. Where a witness standing upon the side of the track, three-fourths of a mile from the plaintiff's intestate, testified that he saw him lying, apparently helpless, as he thought, along the ends of the cross-ties, beyond the rails, when the engine that ran over and killed him passed the witness, running at twenty miles an hour: *Held,* that the judge should have allowed the jury to determine whether the engineer could, by ordinary care, have discovered, from his elevated position on the engine, that intestate was lying helpless on the track, in time, by prompt and strenuous effort, to have saved the life of the latter without putting his passengers in jeopardy. *Deans v. R. R.,* 686.

8. If the engineer discover, or, by reasonable watchfulness, may discover, a person lying on the track asleep, or drunk, or see a human being who is known to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it. *Ib.*

NEGLIGENCE—*Continued.*

9. In such a case, the jury were at liberty to exercise their own common sense, and use the knowledge acquired by their observation and experience, without direct testimony from expert witnesses, in determining how many feet or yards of the track the engine must have traversed before the engineer could have put a complete stop to its movement without danger to those who were on the train. *Ib.*

10. Though the facts may be undisputed, yet, if two reasonable and fair-minded persons might draw inferences from them so different that, according to the conclusion of fact reached by one, there would be negligence, while that deduced by another would show the exercise of ordinary care, then the issue should be submitted to the jury. *Ib.*

11. The doctrine laid down in *Gunter v. Wicker*, 85 N. C., 310, and followed in a line of cases since, is in conflict with the principle enunciated in *Herring v. R. R.*, 10 Ired., 402, and the latter case is overruled. *Ib.*

12. The fact that it was the duty of a track-walker, a fellow-servant of plaintiff, to examine the condition of the track just before the passage of the train, cannot excuse the defendant of negligence. *Bean v. R. R.*, 731.

13. This was not an ordinary hazard, and, in the absence of evidence to show that plaintiff knew of the dangerous condition of the ledge, the court rightly refused to instruct the jury that there was contributory negligence on his part. *Ib.*

14. Where it is proven or admitted that cattle had been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing (under section 2326 of The Code), where the animal is hitched to wagon or cart, as well as where it is straying at large when killed. *Randall v. R. R.*, 748.

Evidence of, 76, 178.

NEGROES.

One who was a slave prior to 1865 is presumed to be a negro, 609.

NEW ACTION PENDING FORMER PROCEEDINGS.

Where all the matters in controversy can be determined in proceedings already pending, a second action commenced for this purpose should be dismissed. *Wilson v. Chichester*, 386.

NEW TRIAL.

1. When there is a motion for a new trial below for a refusal to give instructions asked, this is sufficient assignment of error. *Taylor v. Plummer*, 105 N. C., 56, cited and distinguished. *Everett v. Williamson*, 204.

2. When it appears, from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by this Court. *Drake v. Connelly*, 463.

NEW TRIAL—*Continued.*

3. Where the case on appeal and exceptions were sent to the address of the judge who tried the case, but, owing to his being off on his circuit, reached him so late that he could not, from memory, settle the case, and his notes and memoranda filed with the clerk at the termination of the trial could not be found, after diligent search, and the appellant lost his appeal through no fault of his: *Held*, he was entitled to a new trial. *Clemmons v. Archbell*, 653.

When new trial will be awarded, 821.

NONRESIDENT.

1. When one voluntarily moves from this to another State, for the purpose of discharging the duties of his office, of indefinite duration, which required his continued presence there for an unlimited time, such a one is a nonresident of this State for the purposes of an attachment, and that notwithstanding he may occasionally visit this State, and may have the intent to return at some uncertain future time. *Carden v. Carden*, 214.

2. The prominent idea is, that the debtor must be a nonresident of the State where the attachment is sued out—not that he must be a resident elsewhere. *Ib.*

3. His property is attachable if his residence is not such as to subject him *personally* to the jurisdiction of the court and place him upon an equality with other residents in this respect. *Ib.*

4. Nonresidents can sue in the courts of this State. *Thompson v. Tel. Co.*, 449.

NONSUIT.

Refusal of the Superior Court to allow a nonsuit after verdict and judgment will not be reviewed in this Court. *Brown v. King*, 313.

NOTICE.

Writ of assistance is never issued except upon notice to person in possession, 430.

Purchasers of preëmption right affected with notice of rights of vendor, 492.

ORDINANCE, MUNICIPAL.

1. A municipal ordinance which forbids the use of "abusive or indecent language, cursing, swearing, or any loud or boisterous talking, or other disorderly conduct," within the corporate limits, is valid. *S. v. Earnhardt*, 789.

2. A fine or penalty imposed by a municipal ordinance is treated as a debt, and, under Article I, section 16, of the Constitution, a person from whom it is attempted to be collected is exempt from arrest, but he may be indicted and punished for the criminal offense of violation of the ordinance for which it is imposed, under the statute (Code, sec. 3820). *Ib.*

3. Where a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined twenty-five

ORDINANCE, MUNICIPAL—*Continued.*

dollars upon conviction thereof": *Held*, that so much of the ordinance as provided for the arrest was in violation of the Constitution, but the other provisions were valid. *Ib.*

4. The authorities of the town of S., in the exercise of their powers and duties to keep in proper condition the streets in the town, caused a waterway to be constructed through the lands of the defendant, resulting, on several occasions, in the flooding of his premises. There had been no condemnation of the land or other acquisition of the right to the easement. The defendant placed an obstruction in the waterway, but on his own land, by which a street was flooded and made insecure: *Held*, that whatever civil remedy the defendant might have against the municipality for damages resulting from the appropriation and injury of his lands, he had no right to obstruct the waterway and thereby imperil the safety and convenience of the public, and that he was properly convicted for the violation of an ordinance prohibiting such obstruction. *S. v. Wilson*, 865.

5. The General Assembly may confer upon a municipal corporation the authority to forbid the exposure for sale of produce or other merchandise on any sidewalk, or the space in front of a building used as a sidewalk, in such manner as may incommode passengers, notwithstanding the municipality may have acquired an easement of title to the soil in the area within which the prohibition is intended to operate. *S. v. Summerfield*, 895.

6. A municipal corporation can exercise only such powers as (1) those which are granted in express words; (2) those necessarily or fairly implied from the charter, and (3) those essential to the declared objects and purposes of the corporation—not such as are simply convenient, but those which are indispensable. *S. v. Webber*, 962.

7. Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate or prevent nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. *Ib.*

8. Nor has such municipal corporation the power to establish rules of evidence. *Ib.*

9. If a part of an ordinance is void, all other clauses with which the invalid part is necessarily connected or which are dependent on it are also void. *Ib.*

10. Under a general power in a charter to suppress houses of ill fame, a city may pass an ordinance forbidding owners to rent houses for the purpose of being used as bawdy houses, or with a knowledge that they will be so used by the lessee, but its authorities are not thereby empowered to define what is a house of ill fame, or declare a given house to be a bawdy house. *Ib.*

OFFICER.

1. An officer cannot break open the door of a house and enter therein, without the consent of the owner, for the purpose of executing civil process,

OFFICER—*Continued.*

except when acting under a requisition in claim and delivery, where the property has been concealed, in which case special provision has been made by statute (The Code, sec. 329). *S. v. Whitaker*, 802.

2. An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement or condition, such as taking an oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such. *S. v. Lewis*, 967.

3. Where the Governor issues a commission to one of the judges of the Superior Courts authorizing him to hold certain terms of the Superior Courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned, a *de facto* judge so long as he assumes to act in that capacity; and this is so, although the commission was issued without authority of law. *Ib.*

4. Where the Constitution has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that in fact the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could for any reason have lawfully issued it. *Ib.*

Assault upon, 812.

Power of, to arrest and to summon assistance, 948.

OYSTER LAW.

The defendants were indicted for unlawfully taking oysters, in violation of sections 3376 and 3379 of The Code. It was proved that they were, at the time of the commission of the acts charged, residents of the State of Virginia, but were in the employment of one W., who was a resident of North Carolina: *Held*, that the defendants were not guilty if they in good faith were acting as the servants of W. in the commission of the alleged unlawful acts. *S. v. Conner*, 931.

PARTITION.

1. A motion in the cause for execution is the proper proceeding to subject land charged with owelty of partition to the payment thereof. *Meyers v. Rice*, 24.

PARTITION—*Continued.*

2. Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. *Ib.*

3. The purchaser takes with notice of the liens in favor of the other shares. *Ib.*

4. Land was partitioned in 1881 among several tenants in common, and one share, more valuable than the others, was charged with certain sums in their favor. In 1888, sale of the lot so charged was made under executions to discharge the liens in favor of some of the shares and not in favor of others, and the whole of the purchase-money was so paid, against the protest of the latter shareholders, who also knew of the sale. The share so sold was purchased by one of the shareholders, in whose favor execution issued, and he made a mortgage to a third person: *Held*, that the shareholders who received none of the proceeds of sale were entitled to have the land resold to discharge the liens in favor of their shares. *Ib.*

5. The lien of such shareholders was prior to that of the mortgagee—he took with notice of such lien. *Ib.*

6. A discharge in bankruptcy does not cancel the charge of owelty of partition against the land of the bankrupt. *In re Walker*, 340.

7. Where the decree creating the charge was entered in 1867, there is no statute of limitations applicable as a bar. *Ib.*

8. The statute (Rev. Code, ch. 65, sec. 18) which declares judgments, decrees, etc., shall be *presumed* to be satisfied within ten years, is not conclusive. The court found as a fact that the charge had not been satisfied. *Ib.*

9. The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge, until the same shall be satisfied. *Ib.*

10. In a proceeding for partition, the commissioner should allot to any tenant the part he has improved, without taking the improvements into account. *Cox v. Ward*, 507.

11. A decree in proceedings for partition, had in 1861, adjudging owelty of partition against certain shares of the land divided, is subject to the statute of presumptions (Rev. Code, ch. 65, sec. 18), providing that "the presumption of payment, satisfaction of all judgments, decrees," etc., . . . "shall arise within ten years after the right of action shall have accrued." *Herman v. Watts*, 646.

12. The proper remedy to enforce such charges is by writ of *venditioni exponas*, granted upon motion or petition in the original proceedings, and a new action begun should be dismissed, unless in possible cases involving complicated litigation. *Ib.*

13. The Code, sec. 944, gives "any party interested" the right to have proceedings lately pending in the Courts of Equity and Pleas and Quarter Sessions, and not *determined* by final judgment, transferred to the Superior Court. *Ib.*

PARTITION—*Continued.*

14. The judgment or decree was final, but the proceedings had not been determined because the judgment had never been enforced. *Ib.*

PARTNERS AND PARTNERSHIP.

1. In an action by administrator of a deceased partner against the one surviving, it was ordered, with consent of all parties, that "all the partnership matters and all the issues arising out of the pleadings shall be referred to O. M., whose findings and decision on the same shall be final and conclusive between all the parties hereto." The arbitrator found for the plaintiff, and the court gave judgment accordingly. There were no exceptions filed and no demand for jury trial: *Held*, that the judgment must be sustained. *Reizenstein v. Hahn*, 156.

2. The award of the arbitrator, when made a judgment of the court, is final and conclusive between the parties. *Ib.*

PARTIES.

1. The plaintiff furnished the defendant materials for fitting a steamboat, in 1883, and they were used for this purpose, and, shortly thereafter, in the same year, duly filed notice of lien: *Held*, in an action to enforce this lien, a subsequent mortgagee was not a necessary party, and still less where the court was ready to proceed to judgment when the motion was made. *Kornegay v. Steamboat Co.*, 115.

2. Where there is a defect of parties, and this appears from the complaint, objection should be taken by demurrer; otherwise, in the answer. *Ib.*

To action to set aside fraudulent assignments, 9.

PAYMENT.

1. A plaintiff who pays money voluntarily, although there is no debt, with full knowledge of all the facts, cannot recover it back upon the ground that it was paid by mistake. *Brummitt v. McGuire*, 351.

2. Nor, if the payment be made in ignorance or mistake of fact, can it be recovered back when the means of knowledge or information is in reach of the party paying and he is negligent in obtaining it. *Ib.*

3. When the plaintiff gave a note in settlement of money due, and found afterwards it was for too much, and then, in order to save harmless another person, he paid the full amount more than twelve months after its execution, and with full knowledge, or with ample means of obtaining such knowledge: *Held*, he was not entitled to recover it back. *Ib.*

Guarantor of payment and collection, 707.

PERJURY.

1. Perjury cannot be committed when the court has no jurisdiction of the matter about which the alleged false oath was made. *S. v. Gates*, 832.

2. The form of indictment for perjury, under the recent act (chapter 83, Laws 1889), approved. *Ib.*

PERJURY—*Continued.*

3. When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. *S. v. Peters*, 876.

4. To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. *Ib.*

5. The form of indictment for perjury prescribed by chapter 83, Acts 1889, is sufficient and legal. *Ib.*

6. The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are unnecessary in an indictment for any offense whatever, but are mere surplusage. *S. v. Kirkman*, 104 N. C., 911, approved. *Ib.*

7. When time is not of the essence of an offense, as in perjury, the omission to charge any time, in the indictment, is not ground to arrest the judgment. The Code, sec. 1189. *Ib.*

8. Where the indictment for perjury alleges it to have been committed in an action wherein "the State was plaintiff and A. B. defendant," it is no variance if the warrant was entitled "State and City of G. v. A. B." *Ib.*

9. When the indictment alleges the perjury to have been committed in the "trial of an action between the State and A. B.," it is immaterial whether the court, if it had jurisdiction of the subject-matter, erroneously or correctly assumed or refused to assume final jurisdiction, or whether it acquitted, convicted or bound over the defendant in such action. A preliminary trial is a trial of an action within the statute. *Ib.*

10. The statute has merely simplified the form of indictment for perjury. The constituent elements of the offense remain unchanged and require the same proof as heretofore. *Ib.*

PERSONAL PROPERTY.

1. Four years possession of a chattel does not give title in North Carolina. *Pate v. Hazell*, 189.

2. The legal owner of a sewing machine leased it to one A., who leased to the plaintiff, and he held it for four years, when it was discovered and taken: *Held*, that the legal owner was entitled to it. *Ib.*

3. Possession of a chattel is *prima facie* evidence of ownership, and, if adverse and long continued, may ripen into a good title. *Ib.*

4. An indictment for injury to personal property, under section 1082 of The Code, amended by chapter 53, Laws 1885, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been *unlawfully* perpetrated. *S. v. Martin*, 904.

PLEADING.

1. An absolute denial in the answer to the allegation in the complaint, which embodies the agreement sued on, draws in question and puts in issue not only its validity, but its legal existence. *Browning v. Berry*, 231.

2. The contention of plaintiff's counsel that the parol contract, proved without objection, is binding, cannot be sustained. There is a variance between the allegation and the proof. *Ib.*

3. The plaintiff is not entitled to the consideration of the view that he is a tenant, holding over after the first year, and, therefore, entitled to the benefit of mutual stipulations for repairs, because, among other reasons, he made no such allegation in his complaint. *Ib.*

4. An amendment allowed, that plaintiff entered under a void verbal lease, could not avail if the defendants allowed their denial of the old contract to stand, or if they chose not to deny it and plead the statute. *Ib.*

5. A defendant can take no benefit from the refusal of the court to dismiss plaintiff's action, upon motion, when he did not appeal from such refusal. *Allen v. Royster*, 278.

6. Where a pleading sets out that property was conveyed to one R., at his instance, for the purpose of defrauding his wife, and that the consideration of the conveyance was her land: *Held*, sufficient facts were set out to constitute a cause of action. *Randolph v. Randolph*, 506.

7. Under the former practice in equity, advantage could be taken of lapse of time without plea, where it appeared upon the face of the pleadings that the cause of action was barred; but now there must be a plea in all cases, whether of an equitable or legal nature. *Ib.*

8. In an action for debt of a county, contracted in 1886 against the board of county commissioners, it appeared that the county owned a considerable amount of valuable railroad stock, and the complaint alleged that it was not necessary, used or useful in the discharge of its corporate functions. It further appeared that the county was largely in debt and had no property other than that mentioned, except what was necessary for its public functions. The plaintiff asked for judgment condemning a sufficient amount of said stock to satisfy the judgment. The plaintiff omitted in his complaint to refer the court to the *private* law which permits the county to subscribe to the capital stock of said railroad: *Held*, that the complaint did not state a sufficient cause of action. *Hughes v. Comrs.*, 598.

9. Where a personal representative files a petition to sell land for assets, it is essential that it should appear, by a direct allegation or by implication, that the personal property has been exhausted without paying the indebtedness, or is insufficient to pay it. *Clement v. Cozart*, 695.

10. An administrator *de bonis non* must proceed against the estate or bond of a former personal representative, or show that he would recover nothing and would only incur costs by prosecuting such suit, before license will be granted to him to sell real estate to make assets. *Ib.*

PLEADING—*Continued.*

11. The exhaustion or insufficiency of the personalty must be shown in the same way, where the personal representative seeks to set aside a fraudulent conveyance by the decedent and subject the land to sale for assets; and a creditor, or creditors, proceeding under section 1448 of The Code, or under the general equity jurisdiction of the court, are required also to make and prove (if not admitted) the same allegations. *Ib.*

12. A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and "so negligently and carelessly conducted in regard to the same that it was greatly damaged," states facts sufficient to constitute a tort. *Bowers v. R. R.*, 721.

13. Under the present method of procedure, parties may allege their cause of action and their rights in and about the same, whether legal or equitable, in the same action. *Bean v. R. R.*, 731.

14. Where the defendant, a railroad company, as a defense to an action for damages, set up a release, it is proper to set up in reply matters which, if true, will avoid it, whether legal or equitable. *Ib.*

15. Only issues arising naturally upon the pleadings should be submitted, but where they are subdivided, this is not a ground for new trial, unless it appear that they were thereby confusing, complicated or prejudicial. *Ib.*

16. Where the complaint does not allege fraud, in terms, but does set forth facts which, being denied by the defendant, raise issues as to unfairness, surprise and undue advantage, by means of which an instrument was obtained, the court will not let the defendant take advantage of it. *Ib.*

17. Contradictory issues under the different aspects of the pleadings are not objectionable under The Code system. *Ib.*

18. Where there was an allegation and evidence that the defendant, a railroad company, left a ledge of rock in such a position as that the jar of the passing train would probably cause it to fall on its track, and it did so fall, and plaintiff was thereby injured: *Held*, the issue of negligence was properly submitted to the jury. *Ib.*

PONDING WATER.

Damages for, 766.

POSSESSION.

Of personal property, *prima facie* title of ownership, 189.

POWER OF APPOINTMENT.

1. A power of appointment in one who is a joint tenant for life with her husband does not confer upon her an absolute estate. *Reid v. Boushall*, 345.

POWER OF APPOINTMENT—*Continued.*

2. The conditions annexed to a power of appointment must be strictly complied with; and where, by the terms of a deed of settlement, power of appointment was given a wife "by her last will and testament," such power can only be exercised by such instrument. *Ib.*

3. A will is, by its nature, and whether or not in the execution of a power of appointment, *ambulatory* during the lifetime of the maker. *Ib.*

4. Where the donee of a power of appointment, by will, being also at the same time life-tenant with her husband of the land which was the subject thereof, had made a contract, he joining, to convey said land in fee: *Held*, that an instrument in the nature of a will, with covenants against revocation, executed by her jointly with her husband, was not sufficient execution of the power, and that the vendee, under the contract of purchase, could not be compelled to accept a title depending for its validity upon such instrument. *Ib.*

5. A will which, after providing for the testator's other children, devised property to his son in trust for such person or persons and use or uses as he, by deed or will, should appoint, and until and in default of such appointment in trust for the sale, and separate and exclusive use and benefit of the testator's daughter-in-law, the appointee's wife, confers upon the son a general power of appointment, under which he had a right to convey by mortgage or otherwise. *Hicks v. Ward*, 392.

6. The mortgage by the donee of the power, providing that surplus was to be paid over to him and his heirs, etc., was a complete revocation of the trusts declared in the will. *Ib.*

PRACTICE.

1. The law does not favor a multiplicity of motions when one will put an end to the controversy, and sufficient grounds appear of record to sustain it, though not relied on by the party seeking relief. *Skinner v. Terry*, 103.

2. Regularly, the motion should have been made in the county where the judgment was rendered; but, where it appears that the parties consented to have it heard in another, no objection can be taken on that account. *Ib.*

3. A defendant can take no benefit from the refusal of the court to dismiss plaintiff's action, upon motion, when he did not appeal from such refusal. *Allen v. Royster*, 278.

4. Under The Code, sec. 273, the court in its discretion, may allow the motion of one of several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting, the motion is not reviewable. *Jarrett v. Gibbs*, 303.

5. If the judge refuses the motion, on the ground of a want of power, an appeal lies. *Ib.*

6. The consideration of this Court upon points arising out of the pleadings, verdict and judgment, will be confined to such exceptions as are shown by the record to have been taken. *Ferrell v. Thompson*, 420.

PRACTICE—*Continued.*

7. Motions to set aside a verdict because against the weight of the testimony, or for newly-discovered testimony, address themselves solely to the discretion of the court below. *Ib.*

8. Notice of appeal, though in the record, is no more a part of it than the case upon appeal. *Ib.*

9. Under the former practice in equity, advantage could be taken of lapse of time without plea, where it appeared upon the face of the pleadings that the cause of action was barred; but now there must be a plea in all cases, whether of an equitable or legal nature. *Randolph v. Randolph*, 506.

10. An unlawful release or discharge can be avoided either by amendment or by replication. *Southerland v. Fremont*, 565.

11. Under the present method of procedure, parties may allege their cause of action, and their rights in and about the same, whether legal or equitable, in the same action. *Bean v. R. R.*, 731.

12. Where the defendant, a railroad company, as a defense to an action for damages, set up a release, it is proper to set up in reply matters which, if true, will avoid it, whether legal or equitable. *Ib.*

13. In the United States the principle has ever been universally recognized that persons charged with crime had the right to be present at their trial, to be informed of the accusation against them, to confront their accusers and to have the aid of counsel. It is distinctly guaranteed in the Constitution of North Carolina, but, except in capital felonies, it may be waived. *S. v. Jacobs*, 772.

14. But this right extends only to that tribunal which tries the facts, and where the accused is presumed, on account of his peculiar knowledge, to be able to conduct or assist in the conduct of his defense. It does not prevail in this Court, which has jurisdiction only to review alleged errors of law on the trial below. *Ib.*

15. Where a person who has been convicted of an offense appeals from the judgment, and escapes, the appellate court may, in its discretion, proceed with the hearing of the exceptions, dismiss the appeal, or direct the cause to be continued to await the recapture of the fugitive, and any judgment it may pronounce thereon will not be invalid because of the fact that the defendant was not actually or constructively in custody, or not represented by counsel. *Ib.*

16. The rule enunciated in *S. v. McMillan*, 94 N. C., 945, has been altered by the provisions of chapters 191 and 192, Laws 1887. *Ib.*

17. The offense is deemed and held to have been committed, if at all, in the county charged, unless the defendant pleads in abatement, under oath, and the cause is thereupon removed to another county. Code, sec. 1194. *S. v. Allen*, 805.

18. The fact that one person charged in the same bill has been convicted of the crime alleged is no bar to the conviction of the other parties indicted. *S. v. Jacobs*, 873.

PRAYERS FOR INSTRUCTIONS.

When a party asks a prayer for instruction, to which he is entitled, it must appear that it was given either as asked or was substantially given in the charge, if the appellant excepted to the refusal. *McFarland v. Improvement Co.*, 368.

PRISONER.

Presence of in person or by attorney at trial of cause, 772.

PROBATE AND REGISTRATION OF DEEDS.

1. The statute of 1889, ch. 252, validates probates of deeds and privy examinations taken before a deputy clerk prior to 1 January, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. *Gordon v. Collett*, 362.

2. In an action for some cotton, or the value thereof, by lessors, who were the executor and executrix of the deceased landowner, and residing in different counties, they offered in evidence a lease for lands located in another county, acknowledged by the executor before the clerk of the Superior Court of the county where he resided, and acknowledged again by him, and also by the executrix and lessee, after the bringing of this action, the executrix having become a *feme* covert since her execution of the lease, and her husband not becoming a party to any of the acknowledgments. There was no certificate of the clerk of the county where the executor resided, as required by section 1246 of The Code, subsection 2: *Held*, (1) there was a valid registration and the lease was rightly admitted in evidence; (2) the proof of instruments ordinarily prescribed for those executed by *married women* is not required for the registration of a lease executed before, but acknowledged after coverture; (3) it was not essential that the acknowledgments should have been taken respectively in all the counties where the grantors respectively resided. *Darden v. Steamboat Co.*, 437.

3. Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing, that it was in due form. *Ib.*

4. It is not essential to the validity of registration of an instrument proved in another county that the clerk of the county where the land lies should have adjudged that it had been duly acknowledged and proved in the same manner as if taken before him. *Ib.*

5. It is not necessary that a married woman should be privily examined as to the execution by her of a lease for land as executrix under the will of a former husband, and when she was a *feme sole*. *Ib.*

6. The power to take probate carries with it the power to order registration. *Ib.*

7. When an acknowledgment or proof of the execution of a deed or other instrument required or allowed to be registered, is taken by any other officer than the clerk of the Superior Court of the county where the land lies, it is not essential to the validity of registration that the latter should add an adjudication, or order of registration to the certificate and *fiat* of the officer taking the probate. *Ib.*

PROBATE AND REGISTRATION OF DEEDS—*Continued.*

8. The provisions contained in the last sentence of section 1246, subsection 2, that the clerk of the Superior Court of the county where the land lies shall pass upon the acknowledgments taken before other clerks and officers named therein, is not mandatory but directory. *Ib.*

9. The case of *Buggy Co. v. Pegram*, 102 N. C., 540, is decisive of this case, and this Court will not consider the questions involved therein a second time. *Maphis v. Pegram*, 505.

10. An unrecorded deed confers such an estate as may be conveyed or sold under execution. *Ray v. Wilcoxon*, 514.

11. Where the surname of a subscribing witness to a deed was omitted in the clerk's certificate of proof by such witness, such deed will not be rejected in evidence when the *fact* of the execution and probate are not disputed. *Simpson v. Simpson*, 552.

PROCEEDINGS, SUPPLEMENTARY.

1. In supplementary proceedings it was adjudged that the fund in question belonged to the judgment debtor, and order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund: *Held*, (1) that the action was improperly brought; (2) that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings; (3) that the action by the receiver was improperly brought, and should be dismissed, but without prejudice to any of the parties. *Wilson v. Chichester*, 386.

2. No appeal lies to this Court from an order of the Superior Court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. *Bank v. Burns*, 465.

3. In proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient, and made the order demanded: *Held*, that an appeal lay *at once* to the judge as a matter of right, and the clerk could not allow or disallow it. *Ib.*

4. Where an action in the nature of a judgment-creditor's bill is pending it is error to dismiss proceedings supplementary to execution instituted in behalf of another creditor against the same debtor. *Monroe v. Lewald*, 655.

5. Where several of such proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. *Ib.*

PROCESS.

Execution of civil, 802.

PUBLIC SCHOOLS.

1. The Legislature is not prohibited by the Constitution from providing separate schools for the Croatan Indians, and the act of 1885, ch. 51, and the act of 1889, amendatory thereof, providing such schools, are valid. *McMillan v. School Committee*, 609.

2. The Legislature has power, outside of the constitutional grant, to classify pupils according to race. *Ib.*

3. Where it was admitted that the plaintiff, whose children were excluded from school, was a slave before 1865, the charge of the court below that he was presumed to be a negro is correct. *Ib.*

4. "Generation," as used by the statute, means a single succession of living beings in natural descent; and if, by tracing back four successive generations, through father or mother, we reach a negro ancestor of the plaintiff's children, they are excluded from the Croatan schools by the act establishing them. *Ib.*

5. The order of the Board of Education that plaintiff's children be admitted into the Croatan school furnishes no warrant for such admission when contrary to law. *Ib.*

6. Where the plaintiff, by *mandamus*, attempted to compel the admission of his children into a public school established for the Croatan Indians, there was evidence that plaintiff's father was a white man, and his wife, the mother of the children, was a Croatan Indian, and that the plaintiff was a slave before 1865. The plaintiff asked the court to charge, in effect, that, if the jury believed the evidence, their answer should be that the plaintiff's children were not negroes. The court refused, but charged that, if the plaintiff was a slave, there was a presumption that he was a negro: *Held*, no error. *Ib.*

PURCHASER.

1. The purchaser at a sale made after the death of a judgment-debtor under an execution issued before his death acquires a good title. *Benners v. Rhinehart*, 705.

2. The fact that the purchaser is also the execution creditor does not render the sale void, and, if voidable, it must be set aside by a direct proceeding for that purpose, or upon answer setting forth facts sufficient to evoke the equitable interposition of the court. *Ib.*

RAILROADS.

1. The defendant, a railroad corporation, entered upon the lands of the petitioner and constructed its road without adopting any of the means provided in its charter for acquiring title. No time is prescribed in the charter within which the owner is to be barred of his right of entry or compensation: *Held*, that the possession of the defendant being protected by its charter from any action of trespass or other character, the plaintiff is confined to his remedy of having his damages assessed as allowed by the charter. *Land v. R. R.*, 72.

2. The three years statute of limitations (The Code, sec. 155, subdivisions 2 and 3) is no bar to such proceedings. *Ib.*

RAILROADS—*Continued.*

3. It seems that there is no statute of limitations provided for such proceedings. *Ib.*

4. To entitle a passenger to exemplary damages for his wrongful expulsion from a train, there must be evidence of undue force, unnecessary rudeness, or insult, malice, or some willful wrong accompanying his ejection. *Tomlinson v. R. R.*, 327.

Liability for injury to employee, 1.

Subscription to stock by townships, 248.

REFERENCE.

1. The findings of fact by referee, where there is evidence to support it, is conclusive. *Wadesboro v. Atkinson*, 317.

2. The findings of fact by a referee, approved and affirmed by the judge in the court below, where there is any competent testimony to support them, cannot be reviewed by this Court. *Roper v. Burton*, 526.

3. Where it appeared, in an action against the administrator *d. b. n.* of a decedent, that the former administrator, under an order of court in an old action brought by the next of kin, sold and hired out "for the legatees" certain slaves which had been set apart to them in partition had between them and the widow of such decedent, and took notes payable to himself "as administrator," and collected and invested the proceeds of some of them, and the cash for slaves sold at once "as administrator"; but it further also appeared of record that the administrator sold the slaves for division: *Held*, (1) that there was sufficient evidence to sustain the finding of the referee that the old action was for *division* among the next of kin, and was not for *distribution* by the administrator. *Ib.*

4. The finding of the referee that certain payments had been made by the defendant to the plaintiff's ancestor, deceased, upon his own oral evidence, which was not objected to by plaintiff, will not now be disturbed by this Court. *Costen v. McDowell*, 546.

5. B. and M. sold a machine to R. under contract, registered, by which the title was to remain in them until the balance of the purchase-money secured by two notes was paid. The vendors then executed the following receipt: "Received of R. $175 in full payment of machine, etc., payments made as follows: $58.33 and two notes of $58.33 each, payable in sixty and ninety days." The last note has never been paid: *Held*, the finding of the referee that the title passed to the vendee and the lien was discharged, as a conclusion of law, cannot be sustained. *Bristol v. Pearson*, 562.

REMOVAL OF CAUSES.

1. In an action for damages for false imprisonment, brought in the county of Rowan, against certain public officers of the county of Anson, the defendants moved to have the action removed to the latter county, on the grounds that defendants were public officers, acting in their official capacity; that there were a number of material witnesses who could

REMOVAL OF CAUSES—*Continued.*

not attend trial on account of the distance and their poverty, and defendants were unable to pay their expenses: *Held,* (1) that the defendants are entitled to the removal allowed under The Code, sec. 191, unless they have lost their rights by failure to comply therewith; (2) that the making of their motion for removal before the expiration of the time allowed to file answer, and before answer filed, was in apt time; (3) the defendants were allowed any defenses they might have had, had there been no extension of time. *Shaver v. Huntley,* 623.

2. *Quære:* Whether defendants could not have had their demands passed upon before the Fall Term, and whether or not it was the duty of the court to find how the fact was, and determine the question of removal upon the uncontroverted affidavit of defendants. *Ib.*

REMOVAL OF CAUSE TO UNITED STATES COURTS.

1. In order that the jurisdiction of the United States Circuit Court may attach to an action pending in a State court, if the jurisdiction depends on the diverse citizenship of the parties it must affirmatively and distinctly appear from the record or petition that the plaintiff and defendant therein were citizens respectively of different States at the time the action was commenced, as well as at the time application for removal was made. *Herndon v. Ins. Co.,* 191.

2. Diverse citizenship will not be inferred from the fact stated that the parties were *residents* of different States. *Ib.*

3. Residence does not imply citizenship for the purpose of giving such jurisdiction. *Ib.*

4. The fact that the coplaintiffs, *residents* of different States, have sued a foreign corporation, resident of Great Britain, does not render unnecessary the allegation of citizenship in different States in order to secure a removal to the United States Circuit Court. *Herndon v. Ins. Co.,* 194.

5. In order to give a party to an action commenced in the State courts a right of removal to the United States Circuit Court, it must distinctly appear by positive averments that the parties are *citizens* of different States and were at the commencement of the action. Such allegations as to *residence* are not sufficient. *Blackwell v. R. R.,* 217.

6. An allegation in the petition for such removal that the party making it believes that, from local prejudice, they will not be able to obtain justice in the State courts, has no pertinency or force in this application. *Ib.*

RES JUDICATA.

When a question has been decided on a former appeal to this Court in the same action, the matter is *res judicata* and not open for reconsideration by the courts below. *Gordon v. Collett,* 362.

RESIDENCE DOES NOT ALWAYS IMPLY CITIZENSHIP, 191, 194.

RETAILER OF LIQUOR.

Construction of term, 900.

REVENUE ACT.

In regard to liquor selling, 900.

RIPARIAN RIGHTS.

1. In the absence of specific legislation, riparian owners have a qualified property in their water fronts. *Bond v. Wool*, 139.

2. Their right to construct wharves on such water fronts is subject to legislative control and the regulation of an adjoining incorporated town. *Ib.*

3. Persons owning lands on navigable streams may erect wharves next to their lands up to deep water, and may make entry and obtain title as in other cases, subject to the regulation that they must not obstruct navigation and that they shall be confined to the straight lines from their water fronts. *Ib.*

4. So, where the plaintiff, owner of a tract of land on navigable water, and those under whom he claims, have occupied the shallow waters immediately fronting his land since 1802, by building fish-houses therein, no entry having been made under the statute: *Held*, (1) that he had only a qualified property therein; (2) that a defendant who, in order to gain access to deep water, erected on his own natural water front a pier which stood between the plaintiff's fish-houses and deep water on one side, was not a trespasser. The plaintiff was only entitled to access to deep water in his immediate water front. *Ib.*

SALE, CONDITIONAL.

1. The plaintiff bargained and delivered to the defendant a certain article of personal property, and, by contract, duly recorded, retained title in himself until the purchase-money should be paid; and before any part thereof was paid or due, the property was destroyed by fire while in the custody of the defendant, and without his default: *Held*, in an action for the purchase-money the plaintiff was entitled to recover. *Tufts v. Griffin*, 47.

2. The fact that the contract of purchase amounted to a conditional sale does not prevent such recovery. *Ib.*

3. There was a promise to pay and a consideration therefor. The defendant had the use and possession of the property, an interest therein, and a right, upon payment of the purchase-money, to make his title absolute. *Ib.*

4. Evidence that the plaintiff had not offered to replace the property, or that the defendant was willing to pay upon his so doing, was properly rejected. *Ib.*

SALE, JUDICIAL.

It is true, as a general proposition, that land charged with debt is entitled to exoneration by the personal estate; but where the aid of this principle has not been invoked by the plaintiff, but, on the contrary, she

SALE, JUDICIAL—*Continued.*

has asked for the sale of the land for the discharge of the lien, the decree of the court ordering the sale will not be disturbed. *Costen v. McDowell*, 546.

SALE, EXECUTION.

1. The purchaser at a sale made after the death of a judgment debtor under an execution issued before his death acquires a good title. *Benners v. Rhinehart*, 705.

2. The fact that the purchaser is also the execution creditor does not render the sale void, and, if voidable, it must be set aside by a direct proceeding for that purpose, or upon answer setting forth facts sufficient to evoke the equitable interposition of the court. *Ib.*

SALE, BY COMMISSIONER.

A commissioner appointed to make sale of lands under a decree of court will not be allowed any extra compensation for his attorney's fees, where it appears that his duties are simple and it is not made to appear that the services of counsel are necessary. *Gay v. Davis*, 269.

SEDUCTION.

1. The paramount and essential ingredient of the crime of seduction, under chapter 248, Laws 1885, is the fact of sexual intercourse, *induced by a promise of marriage*, and no conviction can be sustained upon the testimony of the woman unless she is supported upon this essential point. *S. v. Ferguson*, 841.

2. The supporting testimony required by the statute is something more than corroborative evidence—it must be such independent facts and circumstances as will tend to establish her credibility. *Ib.*

3. The woman must be shown to be not only "innocent" (as that term has been interpreted in the statutes relating to the slander of women), but "*virtuous.*" *Ib.*

4. Upon the trial of an indictment for seduction, for the purpose of attacking the character of the prosecutrix the defendant offered to prove, by parol, the contents of a note she had written appointing an assignation with another party: *Held*, that such evidence was competent, the paper not being of the class which must be produced before its contents could be proved. *Ib.*

SETOFF.

To damages in action for waste, 630.

And counterclaim for benefits received, 766.

SEVERANCE.

Is in discretion of trial judge, and not reviewable, except in case of gross abuse, 783.

SHERIFF.

1. In an action against a sheriff, or his official bond, for failure to levy an execution placed in his hands for collection, and to collect from a

SHERIFF—*Continued.*

defendant in execution a debt, the jury found for the relator, but failed to assess damages in response to an issue respecting them. The court gave judgment for the amount of the execution: *Held*, there was *error*. The judgment should have been for nominal damages. *Brunhild v. Potter*, 415.

2. The court should have submitted to the jury the question whether any substantial damages had been sustained, and required them, under proper instructions, to respond to the same. *Ib.*

3. The Code, sec. 1888, applies to executions from a court of a justice of the peace, and not those issuing out of the Superior Court. *Ib.*

4. To entitle the relator to substantial damages, the jury must have found that he had lost his debt, or some part of it, by the negligence of the sheriff. *Ib.*

5. The question of negligence being settled by the verdict of the jury, the question of substantial damages may now be submitted by the court. *Ib.*

Collection of taxes, 36.

SLANDER.

1. An action for slander is barred in six months. *Hester v. Mullen*, 724.

2. Where the plaintiff brought an action for slander more than six months after the case accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen months after the filing of the amended complaint, and the defendant pleaded the statute of limitations: *Held*, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. *Ib.*

STATUTES.

1. The act of 1885, amendatory of the homestead law, and repealing the clause exempting homesteads from the lien of judgments, does not impair the obligations of a contract or interfere with vested rights by being allowed to operate retrospectively, so as to include judgments upon debts contracted before it became a law and while The Code, sec. 501 (4), was in operation. *Leak v. Gay*, 468.

2. So much of section 501 (4) of The Code as precedes the proviso must be considered as having been enacted with a view to the rule of construction contained in section 3766 of The Code. *Ib.*

3. Everybody is presumed to contract with a view to the power of the Legislature to alter and amend laws providing remedies. *Ib.*

4. The Code, sec. 3766, provides that when a part of the statute is amended the new proviso is considered as having been enacted at the time of the amendment; and the act of 1885, amendatory of The Code, is subject to this rule of construction. *Ib.*

STATUTES—*Continued.*

5. The Legislature is not prohibited by the Constitution from providing separate schools for the Croatan Indians, and the act of 1885, chapter 51, and the act of 1889, amendatory thereof, providing such schools, are valid. *McMillan v. School Committee*, 609.

6. The Legislature has power, outside of the constitutional grant, to classify pupils according to race. *Ib.*

7. "Generation," as used by the statute, means a single succession of living beings in natural descent; and if, by tracing back four successive generations, through father or mother, we reach a negro ancestor of the plaintiff's children, they are excluded from the Croatan schools by the act establishing them. *Ib.*

8. Where the language of a statute is not ambiguous, the courts are not allowed to consider extraneous reasons, or to resort to the preamble of the act even, in order to give to its words any other than their technical meaning, if they have such signification, or their ordinary meaning if they have no legal signification; and where the language of the law is clear, it is judicial legislation to look beyond its obvious meaning to ascertain the motives of the legislators in order to interpret it. *Randall v. R. R.*, 748.

9. Where the language of the statute is doubtful, the argument of inconvenience may be considered; but where it is clear, and the legislative intent is manifest, the courts are not at liberty to be governed by considerations of inconvenience in interpreting its meaning. *Ib.*

Repeal of statutes, 792.

SUBROGATION.

Rights of creditors upon payment of debts of an estate, 82.

SUMMONS, SERVICE OF, 92.

SUPREME COURT.

Resolves all doubts in favor of constitutionality of statutes, and in favor of acts of chief executive officer, 967.

SURETY.

1. Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two, that they (the other two) "signed as cosureties" of the third: *Held*, that the character of suretyship in which all three signed was sufficiently established. *Southerland v. Fremont*, 565.

2. Where the trustee of a mortgage made to indemnify him and another (his cosurety) against loss by a third, executed to the maker a deed of release, without the knowledge of his cosurety, to the lands conveyed in the indemnifying mortgage: *Held*, the action to enforce the mortgage was not postponed until the deed could be set aside in an independent action. *Ib.*

TAXATION.

1. In an action against a landowner to enforce the collection of arrearages of taxes alleged to be still due and a lien upon his lands, it appeared that the county taxes due from 1881 to 1886 had never been paid to the *county;* that judgment therefor had never been obtained against the sheriff and his sureties, parts of which were still unpaid. It was not shown that such balance was uncollectible. Another sheriff, charged with the collection of these taxes against the defendant Murphy, desisted, upon his defense and affidavit that he had paid them to the former sheriff: *Held*, (1) that the land could not be so subjected, if at all, to the payment of such taxes; (2) there is no statute prescribing such remedy, and the remedies provided by statute should be exhausted before such action is attempted, if at all; (3) this is not one of the possible cases in which the chancery jurisdiction of the court can be invoked. *Comrs. v. Murphy*, 36.

2. The constitutional limitation of taxation for ordinary State and county purposes is 66⅔ cents on the $100 worth of property. *Board of Education v. Comrs.*, 110.

3. A levy beyond the limitation is void. *Ib.*

4. The taxes levied for the State are paramount to, and take precedence over, taxes levied for county purposes. *Ib.*

5. The tax of 12½ cents on the hundred dollars worth of property for school purposes, is a State tax, and placing it upon the levy as a county tax, by the county authorities, does not change its character—their levy is void. *Ib.*

6. The county authorities levied a tax of 41⅔ cents on the hundred dollars worth of property; the State, by statute, levied a tax of 41½ cents; 15½ cents, an amount equal to the school tax and the pension tax, was collected under the head of county taxes; the treasurer held in his hands an amount equal to the school fund: *Held*, in an action for this fund, by the county board of education against the county commissioners, that they were entitled to recover. *Ib.*

7. An action was commenced by certain taxpayers in behalf of themselves and others, among other purposes, to declare void an election held to allow certain townships to subscribe stock to a railroad company, on account of irregularities: *Held*, (1) the action could be brought, being equitable in its nature, even though no remedy was given by statute; (2) while no statute of limitations is applicable, still such action should be brought within reasonable time, and before the rights of innocent third parties have intervened. *Jones v. Comrs.*, 248.

8. The equation and limitation of taxation established by the Constitution (Art. V, sec. 1) applies only to taxes levied for ordinary purposes of the State and counties, and, as to levies of taxes for such purposes, it must be observed. *Ib.*

9. A county, when it contracts a debt, pledges its faith, or loans its credit, as allowed by Article VII, section 7, of the Constitution, must levy taxes necessary to raise revenue for such purposes upon all the property in the same, except such property as is exempted from taxation. *Ib.*

TAXATION—*Continued.*

10. A city, town, or other municipal corporation, "for the necessary expenses" thereof, must levy taxes upon all the property in the same, with the like exception. *Ib.*

11. A city, town, or other municipal corporation, when it contracts a debt, pledges its faith, or loans its credit, as allowed by Article VII, section 7, must levy taxes upon all property in the same, with the like exception. *Ib.*

12. The Constitution does not *require* that a capitation tax shall be levied, except when taxes are levied for ordinary State and county purposes. *Ib.*

13. Such ordinary purposes embrace the case when the county commissioners levy more than double the State tax "for a special purpose, with the approval of the General Assembly," as provided by Article V, section 6. *Ib.*

14. The county of Vance was created by act of Assembly, passed 5 March, 1881, but it was expressly provided that the citizens and property taken from the counties of Granville and Franklin, for such purpose, should not be released from their proportions of the outstanding public debt of said counties contracted before the passage of the act, the proportions to be determined by the county commissioners of the three counties. In an action by the commissioners of Granville against the commissioners of Vance, it appeared that the former had, and the latter had not, appointed any commissioner or taken other steps to arrange a settlement, and the relief provided by statute was sought in court. The defendants denied that the outstanding debt was as large as alleged, and claimed that the proceeds of some real estate sold, after the passage of the act, by order of the county of Granville, ought to be applied in discharge of the debt: *Held*, (1) that these facts constitute a sufficient cause of action; (2) that the commissioners of Franklin were not necessary parties in an action to adjust the matters of difference between Granville and Vance; (3) the citizens of the new county created were, for the purpose of the collection of the said outstanding debt, citizens, respectively, of their old counties. *Comrs. v. Comrs.*, 291.

15. The outstanding debt should be reduced by the amount of taxes collected in 1880 (but paid after 5 March, 1881) above what was necessary for current county expenses, and also by the amount of such taxes as were a balance in the hands of the county treasurer on 1 September, 1881. *Ib.*

16. The taxes of the year 1880, collected for current county expenses and applied to that purpose between 5 March and 1 September, 1881, should not have been applied in reduction of the outstanding indebtedness. *Ib.*

17. *Quære:* As to whether the proceeds of land not necessary for county purposes, sold *prior* to the creation of the new county, could be applied in discharge of the debt outstanding before division. *Ib.*

18. A town council levied a tax upon property and polls exceeding the amount allowed in the original charter. An act amendatory thereof

TAXATION—*Continued.*

gave the town all the privileges and rights allowed to the most favored towns in the State: *Held*, that this amendment would seem to allow the increased taxation, and if not, The Code, sec. 3800, conferring on towns and cities power to lay a tax on real and personal property within the corporation, certainly allows it. *Wadesboro v. Atkinson*, 317.

19. Where it appears that taxes were levied, and no insufficiency is shown, they will be presumed regular and sufficient, although no written order of collection is endorsed upon the levy. *Ib.*

20. The tax collector, having accepted and acted under such levy, cannot be now heard to impeach its sufficiency. *Ib.*

TELEGRAPH COMPANY.

1. Where a telegraph company received for transmission the following message: "Come in haste; your wife is at the point of death," and failed to deliver the same for eight days, though the receiver's place of business was well known and within a short distance of the office of the company in the town in which the receiver resided, whereby he was prevented from being present at his wife's death or attending her funeral: *Held*, (1) there was gross negligence, and the receiver was entitled to maintain an action for the tort; (2) the plaintiff is entitled, in addition to the nominal damages, to recover compensation for the mental anguish inflicted on him by the negligence of the defendant. *Young v. Tel. Co.*, 370.

2. Mental suffering, caused by negligence and delay in delivery of a telegram not of a pecuniary nature, may be ground of damages, though no physical pain or pecuniary loss is suffered. *Young v. Tel. Co.*, at this term; *Thompson v. Tel. Co.*, 449.

3. Where a telegram is sent by a wife about to be confined to summon her husband, and, by reason of negligent delay in the delivery of twenty-four hours, he did not arrive, whereby the complaint alleges, she suffered more physical pain, mental anxiety and alarm on account of her condition, and sustained permanent and incurable physical injury for want of his presence and services: *Held*, such damages are not too remote. *Ib.*

4. Where a telegraph office had the sign of the defendant company over the door, and the operator at that point testified that he paid over all receipts to the treasurer of said company, the office was *prima facie* an office of the defendant. *Ib.*

5. The stipulation on a telegraphic blank against liability for an unrepeated message does not protect the company when such message is negligently delayed in transmission. If such stipulation has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight. *Ib.*

TENANTS IN COMMON.

1. The sole reception of the profits by one tenant in common of land, or by his bargainee, under a deed purporting to convey the whole interest

TENANTS IN COMMON—*Continued.*

for any period less than twenty years, is not an ouster, nor is the verbal refusal to let his cotenant in, for a greater interest than such cotenant is entitled to hold, an ouster. *Gilchrist v. Middleton*, 663.

2. Where one tenant in common brings an action against his cotenant, claiming sole seizin in the land held in common, and the latter sets up in his answer a general denial of the title and right to immediate possession, as alleged, such denial is equivalent to a confession of ouster in ejectment, and precludes the defendant from afterwards setting up the cotenancy on the trial for the purpose of subjecting the plaintiff to the payment of costs. *Ib.*

3. In such cases, the excluded tenant in common should demand of his fellow who is in possession to be let into the extent of his true interest, and, on failure or refusal of the latter, within a reasonable time, to comply with such demand, the former may maintain an action for possession. *Ib.*

4. Where a plaintiff wrongfully claims in his complaint sole seizin in himself, his cotenant in possession may subject him to the payment of the costs by averring in his answer what the undivided interest of each of the cotenants really is, and avowing his willingness, if proper demand had been made, to have let the plaintiff in and accounted for rents received. *Ib.*

TITLE BY POSSESSION.

1. Four years possession of a chattel does not give title in North Carolina. *Pate v. Hazell*, 189.

2. The legal owner of a sewing-machine leased it to one A., who leased to the plaintiff, and held it for four years, when it was discovered and taken: *Held*, that the legal owner was entitled to it. *Ib.*

3. Possession of a chattel is *prima facie* evidence of ownership, and, if adverse and long continued, may ripen into a good title. *Ib.*

TORT.

Facts that constitute, 721.

TREES.

Contract for sale of timber trees, 710.

TRESPASS.

When officer may break open door of house, 802.

TRIAL BY JURY. See Jury Trial.

TRUSTS AND TRUSTEES.

1. In an action for the possession of certain lands, the defendant answered, alleging that the plaintiff, pursuant to previous understanding, purchased them for defendant, but took title, to be held in his own name until he could pay the purchase-money advanced, to which payment the rents were to be applied. Plaintiff went into possession and so continued for several years: *Held*, (1) that the defendant was

TRUSTS AND TRUSTEES—*Continued.*

entitled to have plaintiff declared a trustee to hold the lands for his benefit, to the extent of defendant's interest therein; (2) that the statute of limitations was no bar to defendant's action. *Hinton v. Pritchard*, 128.

2. The seventh section of 29th Charles II has never been adopted in this State, and declarations of trusts are governed by the rules of the common law, and may be made by parol. *Pittman v. Pittman*, 159.

3. At common law, where there was no consideration, the use would result to the feoffer, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. *Ib.*

4. Hence, it follows that a subsequent declaration in an unsealed writing, and without consideration, will not warrant the court in declaring a trust. *Ib.*

5. Such a writing, being upon its face insufficient, and it being necessary, in order to make out the plaintiff's case, to connect it with the transfer of the legal title, it is competent for the owner of the latter to show that the conveyance was made by the plaintiff grantor with intent to defraud his creditors, and thus bar him of equitable relief. *Ib.*

6. In an action for debt, and to have declared fraudulent and void a deed of assignment, brought by creditors against the assignor and assignee, the plaintiffs allege that the defendant assignor executed to them several promissory notes for goods sold, intending to make the debts fall due after his assignment, and thus, at all times, intending to defraud his creditors; that the property is insufficient to pay his debts specified in the trust; that the trustee is unfit to administer his trust; that there is connivance between the assignor and trustee, and other facts tending to show a fraudulent assignment: *Held*, that the complaint stated a sufficient cause of action, and this although it appeared that the notes were not yet due. *Roberts v. Lewald*, 305.

7. The trustee should be restrained from paying any part of the proceeds of sale coming into his hands until the controversy is determined. *Ib.*

8. The court has authority to secure this fund. *Ib.*

9. Where A purchased land and paid for it with his own money, but had the conveyance therefor executed to another, who was to hold upon a parol trust to recovery, and this transaction was in fraud of A's creditors: *Held*, (1) that A had no such interest in the land as could be asserted in a Court of Equity; (2) A's creditors had a right to follow the fund so converted into land; (3) the complaint, setting forth the above facts, states a sufficient cause of action; (4) the statute of limitations, not being pleaded, is no bar to the action. *Guthrie v. Bacon*, 337.

10. When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so the cause of action is barred in three years. Code, sec. 155 (4). *Board of Education v. Board of Education*, 366.

TRUSTS AND TRUSTEES—*Continued.*

11. The Code, sec. 291, par. 2, referring to parties liable to arrest, is intended to embrace all cases where the relation of trust and confidence in respect of money received or personal property in possession by one party for the benefit of another is raised by contract. *Travers v. Deaton*, 500.

12. Where the defendant agreed to receive and sell for plaintiff, for cash and on time, certain guano described, himself becoming liable and indebted for its value at an agreed price, accounting and turning over to plaintiff the guano unsold and the proceeds of all sales: *Held*, (1) this constituted a fiduciary relationship embraced by The Code, sec. 291, par. 2; (2) if the defendant has converted such funds to his own use, he is liable to arrest. *Ib.*

Trust funds in hands of executor, 658.

VENDITIONI EXPONAS.

To enforce remedy in proceedings for partition, 646.

VENDOR AND VENDEE.

1. B. and M. sold a machine to R. under contract registered, by which the title was to remain in them until the balance of the purchase-money secured by two notes was paid. The vendors then executed the following receipt: "Received of R. $175 in full payment of machine, etc., payments made as follows: $58.33 and two notes of $58.33 each, payable in sixty and ninety days." The last note has never been paid: *Held*, the finding of the referee that the title passed to the vendee and the lien was discharged, as a conclusion of law, cannot be sustained. *Bristol v. Pearson*, 562.

2. The vendor's lien is not waived, in the absence of an express agreement to that effect, by taking a note or other personal security for the purchase-money. *Ib.*

3. The intention to discharge such lien in this way must, it seems, be alleged in the complaint. *Ib.*

VENUE.

Change of, 623.

VERDICT.

1. Where a verdict is unintelligible, conflicting and inconsistent, it should be set aside and no judgment pronounced. *Puffer v. Lucas*, 322.

2. Section 412 of The Code does not embrace all the grounds upon which a verdict should be set aside and new trial granted. *Ib.*

3. Motions to set aside a verdict because against the weight of the testimony, or for newly discovered testimony, address themselves solely to the discretion of the court below. *Ferrell v. Thompson*, 420.

4. A verdict that a deed was obtained by fraud and undue influence is not inconsistent with the idea that it is constructive fraud only. *Costen v. McDowell*, 546.

VERDICT—*Continued.*

5. A special verdict which simply finds a certain state of facts, without a formal verdict of guilty or not guilty, in accordance with the opinion of the court given upon the facts found, is incomplete, and will not support a judgment. *S. v. Moore*, 770.

6. A special verdict which simply finds a certain state of facts, without a formal verdict of guilty or not guilty, in accordance with the opinion of the court given upon the facts found, is incomplete, and will not support a judgment. *S. v. Monger*, 771.

7. A verdict rendered on Sunday is not invalid. *S. v. Penley*, 808.

8. When the jury return a certain state of facts, and a verdict thereon, "guilty or not guilty, as the court may be of opinion as to the law," and the court assumes to pass judgment without directing a verdict to be entered up in accordance with its opinion on the law, there is error. A verdict must be absolute and unconditional. *S. v. Nies*, 820.

WAIVER.

Where it appeared that the husband refused to receive the proceeds of sale, and said, at the time, he wanted his wife to have it, but this was not set up in the complaint, and the answer denied any interest in the wife, averring ownership in the husband, which averment was uncontradicted: *Held*, that the contention that the husband had thereby waived his right to the proceeds could not be allowed. *Ferrell v. Thompson*, 420.

Of jury trial by guardian *ad litem*, 92.

Vendor's lien, not waived, 562.

WASTE.

1. In an action brought by the reversioners for waste against the tenant in dower, the jury rendered a verdict for the plaintiffs: *Held*, that they were entitled to treble damages under The Code, sec. 629, in the discretion of the court. *Sherrill v. Connor*, 543.

2. The Code, sec. 629, says the court *may* give judgment for treble damages and the place wasted, and this Court will not make such discretionary power obligatory. *Ib.*

3. Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted that constitute such injury differ according to the condition of the country. *Sherrill v. Connor*, 630.

4. The clearing of land by life-tenant is waste in England, but in this country it is left for the jury to say whether the life-tenant has dealt with the land in a husbandman-like manner and has observed the proportions of cleared and wood land as a prudent owner in fee would in the management of his own land. *Ib.*

5. A life-tenant is liable for permissive waste, under The Code, sec. 624 to 630, if, through his neglect or wantonness, permanent injury is done to the inheritance. *Ib.*

WASTE—*Continued.*

6. But where it appears that the husband of the tenant in dower, and the ancestor of the plaintiffs died in 1866, before his farm was accommodated to the changed condition of the country, and left a farm containing about two thousand acres and lying in three counties, with barns and out-houses built, where the slaves engaged in the cultivation of the farm and the stock necessary for the support of the slaves and family were provided for and housed near his dwelling, the courts will take notice of the change, and when tenement houses dotted all over the farm are substituted for the negro cabins located near the dwelling, will leave the jury to determine whether a prudent owner of the fee would, under the circumstances, have incurred the expense of keeping in repair a barn used originally for the protection of stock needed for the whole farm: *Held*, that it was error, in such case, to instruct the jury that the tenant in dower was liable for permissive waste in suffering such barn to fall into decay. *Ib.*

7. It was error, in such case, where damages were asked for the time elapsing from the year 1866 to 1885, when the action was brought, to instruct the jury that no statute of limitations applied. *Ib.*

8. Those of the plaintiffs who were not under disability were barred by the statute from recovering damages for waste permitted more than three years before the action was brought, but damages might be estimated for the whole time from the allotment of dower for the purpose of using the damage as set-off against permanent improvements placed on the land by the life-tenant during the same period. *Ib.*

9. The jury could not allow damages for prospective waste, but damage can be assessed only up to the time of trial. *Ib.*

10. If the life-tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. *Ib.*

By executrix, 168.

WARRANTY.

Breach of, 726.

WITNESS.

1. Conversation between a witness and defendant—the plaintiff not being present—is competent as affecting the credibility or accuracy of the witness. *Blake v. Broughton*, 220.

2. Objection should be made to the *question*—not to the *answer*—of a witness. *Ib.*

3. The Code, sec. 589, abolishes the common law incompetency of witnesses on account of interest (with the restrictions contained in section 590), except in the special cases provided for by sections 580 and 588. *Burn v. Todd*, 266.

4. An interest in the thing in controversy does not disqualify a witness to testify as to a communication with one deceased. The disqualifying interest is an interest in the event of the action. *Mull v. Martin*, 85 N. C., 406, approved. *Ib.*

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5. Unless, in the discretion of the court, at the close of the State's evidence, the State is restricted to one of the transactions shown by it and tending to prove the offense charged, the solicitor, on cross-examination of defendant's witnesses, can bring out any other transaction within the statute of limitations tending to prove the charge. This rule is not varied when the defendant is a witness in his own behalf. *S. v. Parish*, 104 N. C., 679; *S. v. Thomas*, 98 N. C., 599, cited and approved. *S. v. Allen*, 805.

6. The defendant waives his constitutional privilege not to answer questions tending to criminate when he voluntarily testifies in his own behalf. *Ib.*

7. The answer of a witness to a question in reference to a collateral matter, put to him with a purpose to attack his credibility, is conclusive. *S. v. Hawn*, 810.

8. Nor can the character of a witness be attacked by evidence that there was a general report that he was guilty of a particular offense. *Ib.*

9. Whether or not a witness is an expert is a question of fact for the court, and its finding is not reviewable. *S. v. Cole*, 94 N. C., 958, approved. *S. v. Brady*, 822.

10. The testimony of a witness as to a collateral matter cannot be contradicted in order merely to impeach him by showing its untruth. *Ib.*

11. A witness having stated, upon cross-examination, that the relations between her and the defendant were unfriendly, it was not error to refuse to permit the further inquiry, whether there was not a bitter feud between her family and that of the defendant, to be made. *S. v. Berrier*, 856.

12. A witness whose credibility has been assailed by the cross-examination may be corroborated by evidence of prior consistent declarations and events. *S. v. Jacobs*, 873.

13. Where the tendency of the cross-examination of a witness is to attack his credibility, or his relation to the facts about which he testifies is such as casts suspicion upon his statements, evidence of other circumstances connected with those deposed to by him, and of his prior consistent declarations, is admissible as corroborative testimony. *S. v. Morton*, 890.

14. Upon a trial for murder, a witness for the State testified that he was present at the time of the killing, and identified the prisoner as the perpetrator of the act. Soon after, a number of persons assembled at the place, and, in the presence of the witness, accused persons other than the prisoner of the crime, to which witness made no response: *Held*, that his silence, under such circumstances, was a fact going to his discredit, and it was error to exclude the evidence of it from the jury. *Ib.*

WILLS.

1. Where it appeared that the defendant was executrix of the husband's will, and tenant for life, or during widowhood, of all his property,

WILLS—*Continued.*

real, personal and mixed; that the testator made sundry devises and bequests, to take effect upon her death, or remarriage; that she did marry again, and took possession and wasted and lavishly used said property; that she was insolvent, and had filed no account of the property, as required by law, except one inventory: *Held*, that there was no error in giving judgment directing the executrix to account and give bond for the security of the property, and, in default thereof, that a receiver be appointed. *Godwin v. Watford*, 168.

2. The court had jurisdiction to grant the relief given. *Ib.*

3. It was not necessary to wait for the lapse of two years next after qualification before bringing an action to compel an executor to account. *Ib.*

4. A power of appointment in one who is a joint tenant for life with her husband does not confer upon her an absolute estate. *Reid v. Boushall*, 345.

5. The conditions annexed to a power of appointment must be strictly complied with; and where, by the terms of a deed of settlement, power of appointment was given a wife "by her last will and testament," such power can only be exercised by such instrument. *Ib.*

6. A will is, by its nature, and whether or not in the execution of a power of appointment, ambulatory during the lifetime of the maker. *Ib.*

7. Where the donee of a power of appointment, by will, being also at the same time life-tenant with her husband of the land which was the subject thereof, had made a contract, he joining, to convey said land in fee: *Held*, that an instrument in the nature of a will, with covenants against revocation, executed by her jointly with her husband, was not sufficient execution of the power, and that the vendee, under the contract of purchase, could not be compelled to accept a title depending for its validity upon such instrument. *Ib.*

8. A will, which after providing for the testator's other children, devised property to his son in trust for such person or persons and use or uses as he, by deed or will, should appoint, and until and in default of such appointment in trust for the sole and separate and exclusive use and benefit of the testator's daughter-in-law, the appointee's wife, confers upon the son a general power of appointment, under which he had a right to convey by mortgage or otherwise. *Hicks v. Ward*, 392.

9. The mortgage by the donee of the power, providing that surplus was to be paid over to him and his heirs, etc., was a complete revocation of the trusts declared in the will. *Ib.*

10. A testator left his wife certain personal estate described to be hers absolutely, and certain real estate for life, and then bequeathed to her also "a child's share, equal with one of my children, of all the property not disposed of otherwise in this will"; and, after making a bequest of part, he further directed that "the balance of my bank-stock be equally divided between my children, unless it can be more agreeably arranged between themselves." He further devised to the

WILLS—*Continued.*

heirs of T. C. W., his grandchildren, a tract of land theretofore advanced to him (T. C. W.), and remainder in another tract, and added: "I mean the above-named heirs (grandchildren) are to have an equal share of my estate with the balance of my children" (naming them). The will mentions the names of those who had been theretofore advanced, and their amounts, among who was T. C. W., whose advancement was valued at $5,900: *Held*, (1) that, in an action by the executor to obtain construction of this will, it was not error in the court below to require the children and grandchildren to account to the widow for advancements in ascertaining her child's part; (2) it was not error to allow T. C. W., and others most advanced, to share equally in the bank-stock—the residuum—without accounting to those less advanced. *Eller v. Lillard*, 486.

11. A devise to a child who died before the testator, does not lapse, but, by force of our statute, goes to the issue of such deceased child. *Cox v. Ward*, 507.

12. A testatrix left certain property to one L. H., her sister, with provision that, should she die without lawful issue, the property so devised and bequeathed to her should revert back to her estate: *Held*, (1) that L. H. took a fee simple estate, defeasible upon dying without issue; (2) the testatrix contemplated the happening of such contingency after her own death. *Trexler v. Holler*, 617.