ANNOTATIONS INCLUDE 181 N. C

NORTH CAROLINA REPORTS

VOL. 108

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1891

REPORTED BY

THEODORE F. DAVIDSON

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2 ANNO. ED.

BY

WALTER CLARK

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4 " "	"	49	"
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1891

JANE E. KENNEDY v. M. A. CROMWELL, ADMR., ET AL.

Statute of Limitations—Guardian and Ward.

1. Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of. The Code, 155 (6).

2. Where the cause of action is to recover the balance admitted to be due by the final account, it is barred as to sureties on the bond after six years from auditing and filing such final account. The Code, 154 (2).

3. Whether such final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years.

4. When such final account is filed, and there is no demand and refusal: *Quære*, whether the action as to the executor, administrator or guardian himself is barred in six years or ten years.

5. When there is no final account filed: *Semble*, that the statute begins to run from the arrival of the ward of age, but whether in such case three years or ten years bars, *quære*.

6. When the statute begins to run, the subsequent marriage of the *feme* plaintiff will not stop it.

APPEAL from *Whitaker, J.*, at Fall Term, 1890, of EDGECOMBE. (2) The facts appear in the opinion. Judgment for plaintiff overruling the plea of the statute of limitations. Appeal by defendant.

J. L. Bridgers for plaintiff.
G. M. T. Fountain and H. L. Staton for defendant.

CLARK, J. The Code, 154 (2), bars an action against an executor, administrator or guardian on his official bond within six years after filing his audited final account, while by The Code, 155 (6), an action against the sureties on such bond is barred within three years after breach complained of.

As the action on the official bond necessarily embraces the sureties, it would seem that the distinction is, that where the final account is filed admitting a balance to be due, but no breach is alleged, such balance as to the sureties is conclusively presumed to be paid over after the lapse of six years if the statute of limitations is pleaded; whereas, if a breach is alleged before or after filing final account, as a *devastavit*, a failure to file final account, a demand and refusal to pay balance due by final account, or any other breach of the bond, the sureties are discharged by a delay to sue for more than three years after the breach which is complained of as the cause of action. *Norman v. Walker*, 101 N. C., 24.

When the executor, administrator or guardian files his final account, and there is a demand and refusal, the action as to him is barred in three years. *Wyrick v. Wyrick*, 106 N. C., 84. When he files such
(3) final account, and there is no demand and refusal, whether the action is barred as to him in six years under The Code, 154 (2) (*Vaughan v. Hines*, 87 N. C., 445), or in ten years by virtue of The Code, 158 (*Wyrick v. Wyrick, supra*), we are not called on to decide in the present case. Here, though one annual account was filed, no other was subsequently filed, nor any final account. Under such circumstances, whether or not there is an unclosed express trust against which no statute runs, was left an open question by *Pearson, J.*, in *Hamlin v. Mebane*, 54 N. C., 18, but *Smith, C. J.*, intimates strongly in *Hodges v. Council*, 86 N. C., 186, that even in such case the cause of action accrued upon the ward becoming of age, and that it would be at least barred by the lapse of ten years (The Code, sec. 158), and possibly in three years, citing Angell on Lim., secs. 174, 178. In *Wyrick v. Wyrick, supra*, the Court (*Shepherd, J.*) say that "it was the evident purpose of The Code to prescribe a period of limitations to all actions whatever, and thus make it a complete statute of repose," whether the limitation is three years or ten years from the ward's majority, when no final account has been filed and there has been no demand and refusal. In the present case there was a demand and refusal. This put an end to the trust itself, if it was not before terminated by the ward's becoming of age and capable of suing. By the demand and refusal the relation of the parties became adversary, and it is clear that the action would be barred by a delay to sue within three years thereafter. *Robertson v. Dunn*, 87 N. C., 191; *Patterson v. Lilly*, 90 N. C., 82; *Woody v. Brooks*, 102 N. C., 334; *Board of Education v. Board of Education*, 107 N. C., 366.

In the present case the facts as found by the referee and the findings approved by the court are, that the guardian qualified in 1861, made his returns in 1862, has made none since, and filed no final account. The ward, the plaintiff, married in 1872 and became of age in August, 1873, before which time her husband had died. She married (4) again in 1879. In September and October, 1877, the plaintiff wrote her former guardian, saying, in substance, that she hoped something was due her, and asking him to send it. To these letters the guardian replied that he had expended for her more than was due her. This was a demand and refusal, a denial of any liability or trust in respect to the plaintiff. This action was begun 24 September, 1888. This was more than fifteen years after the plaintiff became of age, being then discovert, and more than ten years after the demand and refusal. The statute, having begun to run, could not be stopped by the subsequent marriage of the plaintiff. The Code, sec. 169.

In any aspect of the case, the claim of the plaintiff was barred by the statute of limitations, and the court below should have dismissed the action.

MERRIMON, C. J., dissenting: I am of opinion that the plaintiff's cause of action is not barred by any statute of limitations. The intestate of the defendant was her guardian, a trustee of an express trust, which has never been closed as required by the statute pertinent (The Code, secs. 1617, 1619), or otherwise, nor did the intestate at any time deny or disavow the trust. In such case no statute of limitations applies. In *Grant v. Hughes,* 94 N. C., 231, the Court say: "The action is not brought upon the official bond as administrator of the testator of the defendant. It is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime. He was a trustee of *an express trust,* and the statute of limitations did not apply."

This case was afterwards cited in *Woody v. Brooks,* 102 N. C., 334, with approval, and the late *Chief Justice Smith* said, among other things: "Until a final account is filed and audited, there can be no bar, nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he (5) has disposed of it in some way authorized by law, or unless there has been a demand and refusal to pay *such admitted balance,* in which case the action is barred in three years after such demand and refusal." In this case the intestate never accounted by filing any final account; there was no admitted balance, nor did he ever come to an account or settlement in any way with the plaintiff. This express trust remains to this day unclosed. Other decisions to the like effect might be cited.

Furthermore, in my judgment, there was no sufficient evidence—none that should be treated as evidence—of a demand on the part of the plaintiff upon the intestate, her guardian, that he come to an account and settlement with her, and a refusal on his part to do so. The intestate of the defendant was the plaintiff's guardian and her uncle; he had never accounted as such, had neglected to state and file accounts as the statute required. Twice she wrote him, saying, in substance, that she hoped there was something due her as his ward. He simply said, hastily, in reply, that she had already received more than was due her. What she thus said could not fairly, especially in view of the relations of the parties, be treated as a demand for a settlement, nor what the intestate said a refusal to account. The parties had not reached the point of demand on one side and refusal on the other. The plaintiff did not say, or mean to say, "You owe me, and I demand a settlement," nor did the guardian say, or intend to say, "I do not owe you; I will not account with you; seek your legal remedy," or the substance of that. The language was not fairly that of demand and refusal. In such cases the demand and refusal should be clear and unmistakable. Here the plaintiff was the niece of her guardian. She simply made a timid inquiry and request of the latter. He did not say, "I am ready to account with you," as he ought to have done and was bound to do, no doubt,
(6) because he did not understand that a demand of settlement was made upon him. The guardian was derelict, never accounted; the plaintiff was trustful and confiding, and hence loses any sum due her! I do not think the law so intends.

Per Curiam. Error.

Cited: Brawley v. Brawley, 109 N. C., 525; *Culp v. Lee, ib.,* 678; *Koonce v. Pelletier,* 115 N. C., 235; *House v. Arnold,* 122 N. C., 222; *Dunn v. Beaman,* 126 N. C., 769; *Self v. Shugart,* 135 N. C., 187, 188, 190, 197; *Edwards v. Lemmond,* 136 N. C., 331; *Brown v. Wilson,* 174 N. C., 670; *White v. Scott,* 178 N. C., 630.

CHANEY ASHBY v. JAMES H. PAGE.

Apprentice—Parent and Child—Appeal—Res Judicata—Practice.

From a judgment of the Superior Court affirming an order of the clerk apprenticing and awarding the custody of a child, the mother appealed to the Supreme Court, where the judgment was held to be erroneous, upon the ground that the facts found did not warrant it. When the matter came

again before the Superior Court upon the certificate of the Supreme Court, additional evidence was heard, which brought the case within the statute: *Held*—

1. The judgment of the Supreme Court was not *res judicata*, and that it was proper for the court below to hear the matter *de novo*.

2. It was competent for the judge to determine the matter without sending it back to the clerk.

3. Where it is found that the mother is a person of bad character and unfit to have the care of her child, it may be apprenticed by the clerk to another person, under the statute (Laws 1889, ch. 169).

APPEAL from *McCorkle, J.*, at Fall Term, 1890, of STOKES.

On a former appeal, reported in 106 N. C., 328, this Court found error in the ruling below.

On 21 May, 1890, soon after said opinion had been filed, and before the next succeeding term of Stokes Superior Court, the plaintiff sued out a petition of *habeas corpus*, which defendant answered, 26 May, but, by successive continuances, the matter went over to the Fall (7) Term, at which time the Court heard additional affidavits from the defendant, the plaintiff excepting. Counter-affidavits were then offered by the plaintiff. The Court found as facts that the plaintiff had three bastard children (one of them the child in controversy) before her present marriage; that she had placed the child with the defendant when it was small, and he had reared it; that she is a woman of bad character for virtue and morality, and that she is not a fit person to have the custody of the child; that the defendant is a man of good moral character and a suitable person to have the custody of it, and remanded it to him by virtue of the apprenticeship heretofore made by the clerk of the Superior Court.

The defendant appealed, and assigned as error:

1. That the Court erred in hearing additional evidence, as the matter was *res judicata*.

2. That, by virtue of the decision of the Supreme Court, the plaintiff was entitled to judgment directing the child to be delivered to her.

3. That the child did not come under any of the provisions of chapter 169, Laws 1889, and plaintiff was entitled to its custody.

4. That by virtue of said act, and in the status of the cause, the Court had no jurisdiction to pass upon the right and propriety of allowing the defendant to hold the custody of the child.

This cause was submitted in this Court on printed briefs, without oral argument, under Rule 10.

A. M. Stack (by brief) for plaintiff.
W. W. King (by brief) for defendant.

CLARK, J., after stating the case: The decision of this Court on the former hearing, *Ashby v. Page,* 106 N. C., 328, was that there was error, because the facts as found by the court below did not bring the
(8) case within any of the five classes which the clerk was authorized to apprentice by chapter 169, Acts 1889. There was no final judgment here, and the cause stood on the docket of the court below for a new trial at the first term held after the certificate was sent down from this Court. Laws 1887, ch. 192, sec. 3. The attempted *habeas corpus* proceeding was irregular, as the defendant had possession of the child under the order of the Court (The Code, secs. 1645, 1646), and, though this Court had held there was error, no judgment had been given for plaintiff on the merits, and the matter stood for proper action at the next term. The *habeas corpus* proceeding seems to have been in the nature of a petition in the cause. It could serve no purpose, and may be treated as mere surplusage. The plaintiff contends, however, that the opinion of this Court was a finality, and that it was error in the court below to hear additional testimony. To this we do not assent. This Court decided that the facts found did not warrant the judgment that the plaintiff was not entitled to the custody of the child. It was competent for the court below to hear any additional testimony, and it was its duty to find the facts before entering its judgment. In *Jones v. Swepson* the Court had, on the former appeal (79 N. C., 510), held that there was error, and the Court, on the second appeal (94 N. C., 700), say (*Smith, C. J.*), in passing upon the same point now before us: "We think it clear that a new trial, awarded for some vitiating illegal ruling which may be reasonably supposed to have influenced the verdict, reopens the controversy for the admission of any evidence that is itself competent and ought to have been received, if offered, at the first trial. This is equally true when the judge assumes the function of passing upon the evidence and determining the facts upon which the judgment is founded." The decision of this Court that there was error had the effect to set aside the former decision, and the cause stood for
(9) trial on the merits *de novo.* The present case and the one just cited differ, therefore, somewhat, from *Jones v. Thorne,* 80 N. C., 72; *Sanderson v. Daily,* 83 N. C., 67; *Mabry v. Henry, ib.,* 298; *Roulhac v. Brown,* 87 N. C., 1; *Pasour v. Lineberger,* 90 N. C., 159; *Wingo v. Watson,* 98 N. C., 482, and the like. In those cases certain interlocutory orders as to refusing injunctions, appointing receivers, vacating attachments, and the like, were held to be *res judicata,* unless affidavits were presented showing additional facts subsequently transpiring, or at

least facts making an entirely different ground for the relief already refused. Here the Court, on appeal, has adjudged that the facts found did not warrant the judgment, and on the new trial the appellee has made out a stronger case.

The present finding of the court below upon the additional evidence offered is that the plaintiff is a woman of bad character and not a fit person to have the custody of the child, who is without a father. This brings the case within the fourth class of section 2, chapter 169, Laws 1889, and the clerk was authorized to apprentice the child to the defendant.

This being an appeal to the Superior Court from the clerk, it was competent for the judge, instead of sending the case back to the clerk, to proceed to hear and determine the matters in controversy himself. Laws 1887, ch. 276.

Affirmed.

Cited: Beville v. Cox, 109 N. C., 267; *Hunter v. R. R.,* 163 N. C., 283.

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(10)

C. J. HUDSON v. D. B. JORDAN.

Witness—Parties to Actions—Comments of Counsel—Registration—Evidence—Fraud.

1. The fact that a party to an action, who is present at the trial, does not become a witness in explanation of suspicious circumstances affecting the integrity of his conduct, and about which he has peculiar means of information, is a legitimate subject for comment by counsel, notwithstanding the deposition of such party, made on the application of his adversary, has been introduced by himself. (MERRIMON, C. J., dissenting.)

2. As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence.

3. Although the vendor at the time of the alleged fraudulent conveyance retained property sufficient to pay his indebtedness, and although the vendee paid the purchase-money, yet if the conveyance was made with the intent to defraud creditors, and this was known to and participated in by the vendee, the deed is void as to the creditors.

ACTION tried at February Term, 1891, of SAMPSON, *Graves, J.,* presiding.

The action is to recover land. The title was in issue. On the trial the plaintiff put in evidence a deed to him from the sheriff of Wayne, dated

10 March, 1890. The land embraced by this deed is the same as that the subject of this action, and was sold to satisfy certain judgments for money against E. B. Jordan. Those judgments, the executions issued upon the same, and the returns by the sheriff thereof were also put in evidence. "In order to estop defendant, plaintiff introduced in evidence a certified copy of a deed from E. B. Jordan (above named) and wife to D. B. Jordan, the defendant, dated 9 February, 1889, and duly proved and recorded in the office of Register of Deeds of Wayne, which was admitted to cover the land in controversy, which deed recites a consideration of $1,500." The plaintiff alleged that this deed was fraudu-
(11) lent, made by the defendant in the judgments above mentioned to the present defendant, his son, to defraud the creditors of the former, and he produced evidence tending to prove such fraudulent purpose, and that the defendant paid nothing for the land, etc.

Defendant then introduced his examination, had before the Clerk of the Superior Court of Wayne, at the instance of the plaintiff, under sections 581 and 582 of The Code.

Defendant introduced in his behalf his mother, who testified, among other things, that the money for the land was paid by D. B. Jordan to E. B. Jordan in her presence, no one except herself, her husband and son being present; that it was paid in a bundle and was not counted, and she could not say how much there was, but she heard him say there was $1,100 or $1,200; that she took the money and put it in her handsatchel and carried it home, and that night gave it to her husband, and has not seen it since.

In reply, plaintiff introduced evidence tending to prove that the defendant had been in Pender County only one year before the deed was executed by him, and that he was insolvent when he went to Pender.

E. B. Jordan was present in court during the whole of the trial, as was also the defendant, and neither of them was introduced as a witness. During the progress of the argument one of plaintiff's counsel was proceeding to comment on the failure of E. B. Jordan and D. B. Jordan to take the stand as witnesses, when the defendant objected that it was improper to comment on his failure to take the stand. His Honor overruled the objection, and defendant excepted.

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

(12) *C. B. Aycock and G. V. Strong for plaintiff.*
George Rountree and H. L. Stevens for defendant.

CLARK, J. The first three exceptions were without merit, and were abandoned on the argument.

The fourth exception was: "The defendant was present in court during the whole of the trial. The plaintiff's counsel was proceeding to comment on the failure of the defendant to take the stand as a witness, when defendant objected that it was improper to comment on his failure to take the stand. The court overruled the objection, and defendant excepted." There is no exception to the nature of the comments of counsel as being an abuse of the privilege of counsel, and an exception of that kind must be made at the time, or it is waived. *S. v. Suggs,* 89 N. C., 527; *S. v. Lewis,* 93 N. C., 581; *S. v. Powell,* 106 N. C., 635.

The point presented is the right to comment on the fact that the opposite party in a civil action does not go upon the stand as a witness in his own behalf. The Code, sec. 1353, prohibits such comment as to the defendant in a criminal action, but there is no such inhibition in regard to parties in civil actions. Whatever may have been the intimations of the Court in the earlier cases, when the statute allowing parties to civil actions to testify (The Code, sec. 1350) was fresh and considered almost revolutionary, there was never any statute prohibiting such comments in civil cases; and it has been settled in *Goodman v. Sapp,* 102 N. C., 477, that the introduction or nonintroduction of a party as a witness in his own behalf is the subject of comment exactly as the introduction or nonintroduction of any other witness would be. There was evidence tending to show, and which the jury found did show, fraud on the part of the defendant. He was in court and heard it. The truth of the facts was peculiarly within his knowledge, and he was a competent witness. That he failed to go upon the stand and contradict evidence affecting him so nearly was a pregnant circumstance which the jury (13) might well consider, and which counsel, within proper limits, might call to their attention.

It is contended, however, that while this is generally true, this case is an exception, because the plaintiff had caused the examination of the defendant to be taken prior to the trial, as authorized by The Code, secs. 581, 582. That proceeding is a substitute for the bill of discovery under the former practice (section 579), and the plaintiff could have rebutted his deposition on the trial by adverse testimony (section 583). Besides, the deposition was put in evidence by the defendant himself, and the plaintiff "did not make one his witness by taking his deposition which he declined to read." *Pearson, J.,* in *Neil v. Childs,* 32 N. C., 195.

Every one knows that, as a matter of practice, the evidence of a witness *viva voce* is usually more effective with a jury than the reading of a deposition; and, again, one of the recognized aids to a jury in arriving at the truth of controverted facts is the bearing of a witness on the stand, his manner in giving in his testimony, his frankness or efforts at concealment, and the like. That the defendant, who was in court when his

character for truth and honesty was so strongly impeached, should prefer to put in his deposition and deprive himself of the benefit of his *viva voce* testimony, and the jury of the advantage of seeing his bearing and manner on the stand, was surely a subject of legitimate comment. It was open to his counsel to argue that it proceeded from delicacy and a sense of propriety, but that it did not deprive the plaintiff's counsel from calling attention, in a proper way, to the fact that the defendant preferred giving the jury his deposition instead of the benefit of a personal examination before them. There was no exception that the comments of plaintiff's counsel were of a nature to be an abuse of the privilege. Besides, there was brought out on the trial for the first time the material testimony that the money was handed over in a package un-
(14) counted; the plaintiff's mother, who was relied on as a witness to prove the payment of money, not knowing, therefore, how much it was; and, further, that the defendant went to Pender only one year before the deed was executed to him, and that he was insolvent when he went there. That the defendant did not explain these circumstances, which did not appear in the deposition, of itself made it legitimate to comment upon his failure to go upon the stand. It is not always proper to comment upon the fact that any one does not go upon the stand. When, however, the witness is in court and can give important information to the court and jury in their search after the truth, the fact that he is not called by the party who should put him on the stand is a subject of proper criticism, and it makes no difference (in a civil case) that such witness is a party to the suit.

The fifth exception is that plaintiff's deed, though executed before action brought, was not registered till the same day the summons was issued. The plaintiff had the equitable title without registration, and could introduce the deed as evidence if registered the very day of the trial. There is no question here of the prior registration of a junior deed which would defeat plaintiff's claim. Laws 1885, ch. 147.

The sixth exception is that the court charged the jury: "If they should find that E. B. Jordan (the father of the defendant and the grantor in the deed) reserved sufficient, ample and available property to pay all his debts existing at the time of the execution of the deed to the defendant, and if they should also find that the purchase-money was paid by the defendant, yet if they should find that E. B. Jordan made said deed with intent to defraud his creditors, and that intent was known to and participated in by the defendant, the deed would be void." This charge is supported by *Savage v. Knight,* 92 N. C., 493; *Woodruff v. Bowles,* 104 N. C., 197.

MERRIMON, C. J., dissenting: Generally, a party to an action (15) may, but he is not bound to, become a witness in his own behalf on the trial, and that he does not, ordinarily creates no presumption to his prejudice, nor is the fact that he does not, the proper subject of comment to the jury by counsel in his argument to them upon the evidence. But when the evidence tends to prove material facts to the prejudice of a party as to facts, matters and things apparently within his knowledge, or that ought so to be, and he could contradict, modify or explain such adverse evidence, and he is present at the trial, or might conveniently be, and he fails to testify, as he might do, that he does not, is a subject fairly to be commented upon by the opposing party. If a party can, and has opportunity to, contradict, modify or explain any evidence produced on the trial to his prejudice, and he will not, the fair and reasonable inference is that he cannot, such inference being more or less strong, according to the attending circumstances. A party should, in justice to the court and jury, as well as to himself, produce competent evidence to prove his side of the case as clearly and strongly as he well can, without regard to a very nice or fanciful sense of delicacy on his part as to becoming a witness in his own behalf. A judicial trial is practical and earnest, and the purpose is to truly ascertain the material facts in issue, and to this end, all, certainly sufficient, competent evidence should be produced, whether the witnesses be the parties or otherwise. It is strong circumstantial evidence against a party that he omits to give evidence to repel circumstances and evidence to his prejudice which he has power to produce and will not, and it is not otherwise when he may do so by himself as a witness and will not. What I have thus said is fully sustained by what is decided and said, pertinent here, in *Goodman v. Sapp,* 102 N. C., 477; *Chambers v. Greenwood,* 68 N. C., 274; *Gragg v. Wagner,* 77 N. C., 246; *Black v. Wright,* 31 N. C., 447.

In this case I am of opinion that the failure of the defendant (16) to become a witness in his own behalf would have been a subject of fair comment but for the important fact that the plaintiff himself examined him before the trial, as allowed by the statute (The Code, secs. 581, 582), and his examination was duly filed by the clerk before whom the same was taken. That examination was very thorough and searching, embracing, substantially and very fully, the matters and things as to which the plaintiff's counsel complained he had not testified about on the trial, as he might have done. The plaintiff did not put such examination in evidence on the trial, as he had the right to do, but the defendant did, as he might do. The statute (The Code, sec. 582) expressly provides that such examination "may be read by either party on the trial." It was evidence for the defendant, subject to be rebutted by adverse testimony of the plaintiff and commented upon by counsel to

the jury. While the defendant was not examined before the jury, he was examined in a way allowed by law, and his evidence was before them for all pertinent purposes. Nevertheless, the plaintiff's counsel was allowed to make strong and prolonged comments, not simply upon his testimony as given, but as well upon the fact that he was not again examined and in the presence of the jury. He and his counsel, no doubt, thought that the examination of him by the plaintiff was full and sufficient.

Inasmuch as the defendant had thus been examined, I think the court erred in allowing the counsel to complain and comment and lay great stress upon the fact that he was not examined, at his own instance, in the presence of a jury. It is altogether probable that the very forcible comment had undue weight with them. The clear tendency of it was to strongly incline and prejudice them against the defendant because he had not been reëxamined before them, when, in fact, he had been examined very thoroughly by the plaintiff in a way he chose, and
(17) that examination was before them to be commented upon by counsel. It might be that if the plaintiff had, before the introduction of evidence on the trial was closed, notified the defendant that his counsel would comment before the jury on the fact that he abstained from going on the witness stand, the case would be different. But that case is not presented.

Per Curiam. Affirmed.

Cited: S. c., 110 N. C., 250; *Vann v. Lawrence,* 111 N. C., 34; *Cawfield v. R. R., ib.,* 603; *Byrd v. Hudson,* 113 N. C., 212; *Allen v. McLendon, ib.,* 324; *S. v. Hill,* 114 N. C., 783; *Bank v. Bridgers, ib.,* 389; *Cox v. R. R.,* 126 N. C., 106; *Ledford v. Emerson,* 141 N. C., 598; *Powell v. Strickland,* 163 N. C., 402; *Irvin v. R. R.,* 164 N. C., 16; *Davis v. Smoot,* 176 N. C., 541.

CALVIN McKESSON, ADMR. OF WESLEY McKESSON, v. G. C. SMART ET AL.

Evidence, Secondary—Lost Records—"Diligent Search."

1. If an officer charged with the custody of records and papers testifies that he made "diligent search" for, but could not find them, a presumption arises that the search was made in the places where the documents were usually kept, or likely to be found, and it is not essential the court should inquire into the particulars of the search before admitting secondary evidence of the contents of the missing papers. It seems, the rule is different where the witness was not specially entrusted with the documents.

2. Where a justice of the peace testified he had made diligent search for certain records of his office, but could not find them: *Held*, that thereupon secondary evidence of their contents became competent.

APPEAL from a justice's court, tried before *Bynum, J.*, at Spring Term, 1890, of MITCHELL.

The plaintiff complained upon an account for $63. The defendant denied the indebtedness, and also plead as an estoppel that the same cause of action had been sued upon in another and different action before a justice of the peace, based upon the same cause of action, and determined in favor of the defendant, and that from such judgment the plaintiff did not appeal. In support of this plea the defendant (18) introduced J. M. Riddle, who testified that "he was acting justice of the peace in 1889, and that during his term of office the plaintiff's intestate brought an action against the defendant before him, and that he tried and determined the same." Defendant then asked witness where were the records of the trial referred to. To this, witness replied "that he had his docket, but the case had never been put upon it; the other records of the trial were lost or destroyed; that he had made diligent search for them, but could not find them." Defendant then proposed to prove by witness the contents of the lost records. To this plaintiff objected. The objection was sustained by the court, and the defendant excepted.

The court charged the jury at this point that there was no evidence of a former trial of this action, and that they would not consider this question or plea. Judgment for plaintiff. Appeal by defendant.

W. B. Councill for plaintiff.
No counsel for defendant.

AVERY, J. The witness, a justice of the peace, had failed to enter the case upon his docket, and testified that he had made "diligent search" for the other papers and could not find them, and that they were lost or destroyed. He was the custodian of these *quasi* records, the contents of which were important to show a former trial and judgment which would operate as an estoppel against the plaintiff in this action. The inevitable inference is that, being an officer, entrusted by the State of North Carolina with judicial power and the custody of the process and papers pertaining to his position, he had sufficient knowledge of the language used in every-day life to know that he could not make diligent search for these particular documents among the papers of another person, or in any place except where he usually kept his own official (19) papers, or actually knew that they had been deposited. Making diligent search could not imply less than a careful hunting for them

there; it might have meant more—that in addition he had examined some other locality where he had, contrary to his usual custom, left them. When the clerk of a court testifies that he has made diligent search for a record belonging to the court, the testimony *ex vi termini* implies an examination of the place where he usually deposits such a paper. The judge is not expected to inquire or require counsel to ask how long a time the officer consumed in the search, in what corner of the room he usually kept the paper, how many packages he opened, whether he had adopted a good system of classification and arrangement of documents, and so on *ad infinitum,* in order to satisfy himself from this detailed statement that the search was in truth diligent, because every corner of an apartment or every pigeon-hole in a desk was ransacked. The preliminary inquiry addressed to the court is whether the evidence raises a reasonable presumption that the instrument has been lost. Best on Ev., 451; *Gillis v. R. R., post,* 441. In order to raise this presumption, it would not have been sufficient to have asked some person who did not appear to be charged by the law with the custody of the papers whether he had made diligent search, and to have received the answer that he had. But if the custodian had even stated how he searched the usual depository and failed to find the papers, and had also said that A. B. had some time before the search taken them to his house and had not, so far as he knew, returned them, it would have become necessary to call and examine A. B. Taylor on Evidence.

The witness testified that the papers had been in existence and in his care; that he still had his docket, upon which he had failed to enter the case. If his Honor had admitted the evidence, it still remained
(20) for the jury to pass upon its sufficiency to show the contents. The findings by the judge upon the preliminary question no more establishes the sufficiency of the evidence to show the actual existence and contents of the document than does the preliminary finding upon which the declaration of an alleged conspirator is admitted establishes the conspiracy.

In *Yount v. Miller,* 91 N. C., 332, the plaintiff proved "by M. O. Sherrill, former clerk of the Court of Pleas and Quarter Sessions, that the original papers in the case of Elizabeth Yount, widow of John Yount, against the heirs of John Yount, had been searched for by him, and had been lost." This was all of the preliminary proof offered in that case. The officer did not testify that he had searched diligently, as in our case, nor did he intimate where he searched. He was formerly the custodian as clerk of the Court of Pleas and Quarter Sessions, and then as clerk of the Superior Court had them in charge.

After objection, the court admitted secondary evidence in that case upon the idea, of course, that sufficient proof of the loss had been offered. It would seem useless to add any other case from our own Reports.

We think that it was error to refuse to admit the testimony and allow the jury, with proper instructions, to consider it as bearing upon the issues. The defendant is entitled to a new trial.

Error.

Cited: Isley v. Boon, 109 N. C., 559.

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(21)

CALVIN VESTAL v. J. M. WICKER ET AL.

Contract—Parol Evidence—Judgment, Satisfaction of.

A judgment debtor conveyed to his creditor a tract of land, and thereupon the latter executed to the former a bond, conditioned to convey the title to the same land whenever the sum therein mentioned—being identical with the amount due upon the judgment—was paid: *Held,* that parol evidence was admissible to show that the deed was executed in full payment and discharge of the judgment.

MOTION for leave to issue execution, made before the clerk of the Superior Court of MOORE, on 15 August, 1887, after notice to the defendants.

The judgment was recovered in the Superior Court of said county on 10 February, 1879.

The defendant Wicker filed a written answer to the motion, in which he alleged that he had paid the judgment in full. Thereupon, an issue of fact having been raised, the cause was transferred to the civil issue docket for trial.

The issue was tried at October Term, 1890, of Moore, before *Graves, J.* It was admitted on the trial that S. H. Buchanan, a surety, paid the amount of said judgment to the plaintiff, Vestal, and had the same assigned to one Joseph Buchanan, for his benefit, on 4 August, 1879, and that said S. H. Buchanan now is, and has ever since been, the beneficial owner of said judgment; that thereafter, to wit, on 26 January, 1880, the defendant Wicker executed and delivered a warranty deed to said S. H. Buchanan for a certain interest in a tract of land in Chatham County in consideration of $413.73, and on the same day the said S. H. Buchanan executed and delivered to said Wicker a bond for title to said land, agreeing to execute to him a deed upon the payment of the

(22) above named amount, with interest. Said deed and bond for title were introduced in evidence and read. The defendant proposed to prove that it was agreed between Wicker and Buchanan, at the time said deed was executed and delivered, that said deed was given in full payment of the amount that Buchanan had paid to Vestal in satisfaction of his judgment.

The plaintiff objected. Evidence allowed. Exception.

All the issues were found in favor of the defendants, and from the judgment thereon the plaintiff appealed.

J. C. Black for plaintiff.
John W. Hinsdale for defendant.

CLARK, J. It was admitted that the defendant Wicker, the judgment debtor, had executed to S. H. Buchanan, to whose use the judgment had been assigned, a deed for a certain tract of land, which deed recited as its consideration the exact amount due by the judgment. It did not tend to vary or contradict the deed in any way to admit parol evidence that the deed was given in consideration of the satisfaction of the judgment. It was, however, further in evidence that Buchanan, the beneficial owner of the judgment, had, on the same day the said deed was executed to him by Wicker, executed a bond to Wicker to make title back for the said tract upon payment of a sum which was the same as that named as the consideration in the deed, and which was also the amount of the judgment. It was, therefore, contended that, taking the deed and bond for title together, the legal effect was the same as if a mortgage had been executed by the judgment debtor to the owner of the judgment.

We cannot see that it makes any difference whether it was an absolute deed, a conditional sale, or a mortgage. If the agreement between the parties was that the mortgage (treating it as such) was taken in
(23) full satisfaction of the judgment, this could be shown by parol. Whether it was taken as additional security, as partial satisfaction, or in full satisfaction of the judgment, was a question of fact for the jury. Such agreement to cancel a judgment is not required to be in writing, nor is it essential that the cancellation should be entered on the judgment docket, if, in fact, the agreement to cancel and the payment of the consideration therefor are proven. A judgment creditor, rather than embarrass his debtor by having a judgment lien on all his realty, might consent to accept in satisfaction a mortgage for the same amount on one single tract; or, if doubtful of the sufficiency of his debtor's realty above the homestead, he might prefer the mortgage on part of the realty as a better security; or other motives might move the parties. The question

is simply one of fact for the jury to determine whether or not the transaction and agreement were a novation of the debt and satisfaction of the judgment.

The bond to make title recites that the deed was executed to secure to Buchanan the amount of the judgment, and if the land should sell for more than enough to pay the judgment, interest and costs of sale, the surplus to be paid to Wicker. But it is not stated therein whether such security was additional to or in satisfaction of the judgment. It was not necessary that such collateral agreement should be in writing, and when this is so, if only part of the agreement is reduced to writing, the other part can be shown by parol. *Terry v. R. R.*, 91 N. C., 236; *Cumming v. Barber,* 99 N. C., 332. It is true that in all such cases the presumption is that the conveyance is intended as additional security, and not in satisfaction of the preceding debt. *Hyman v. Devereux,* 63 N. C., 624. But there is no exception to the instruction to the jury. The sole question presented is as to the admissibility of parol testimony.

Affirmed.

Cited: Hicks v. Kenan, 139 N. C., 346.

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(24)

STATE EX REL. W. T. HODGE v. THE MARIETTA AND NORTH GEORGIA RAILROAD.

Penalty—Party—Constitution—Amendment—School Fund.

1. The penalty prescribed by The Code, sec. 1960, against corporations for failure to make the returns required by the preceding section can only be recovered in an action brought by the State. A private relator cannot maintain the action.

2. While an amendment substituting parties can be allowed in the Supreme Court, it will not be permitted when it will put the opposite party to a disadvantage.

3. In this case the motion to substitute the County Board of Education of Wake as party plaintiff is denied. The State alone is authorized to sue.

APPEAL from *MacRae, J.*, at April Term, 1890, of WAKE.

The defendant failed to make the annual report to the Governor required by the statute (The Code, sec. 1959) for the year ending 30 September, 1888. The relator brought this action in the name of the State to recover the penalty of $500 prescribed and allowed by the statute (The Code, sec. 1960) in case of such failure.

The defendant demurred to the complaint, and assigned as grounds of demurrer:

"1. That said complaint does not state facts sufficient to constitute a cause of action, in this: That upon the facts herein stated, no cause of action hath accrued to the said W. T. Hodge under the laws of North Carolina to demand and have of this defendant the sum of $500, but that upon said facts a cause of action hath accrued to the State of North Carolina to demand and have of this defendant the said sum of $500, to be faithfully appropriated for establishing and maintaining free public schools in the proper county or counties of this State, under section 5, Article IX of the Constitution of said State.

"2. That it appears upon the face of said complaint that W. T.
(25) Hodge is not the proper relator of the plaintiff, and that this action cannot be maintained by the State of North Carolina upon the relation of said W. T. Hodge."

The court sustained the demurrer and dismissed the action. The relator, having excepted, appealed to this Court.

In this Court "the County Board of Education for the County of Wake" moved that it be made a party plaintiff.

Armistead Jones and R. O. Burton, Jr., for Hodge.

S. G. Ryan and J. N. Holding for County Commissioners.

R. H. Battle, T. C. Fuller, A. W. Haywood, George V. Strong, F. H. Busbee, John Devereux, Jr., and J. W. Hinsdale for defendant.

CLARK, J. We concur in the conclusion reached by the learned judge who tried this cause below.

The statute prescribing the penalty sued for in this action (The Code, sec. 1960) is as follows: "Any such corporation (railroad) which shall neglect to make the report as provided in the preceding section (1959) shall be liable to a penalty of five hundred dollars, to be sued for in the name of the State of North Carolina in the Superior Court of Wake County." The Constitution, Art. IX, sec. 5, provides that "the clear proceeds of all penalties and forfeitures," etc., shall be "faithfully appropriated for establishing and maintaining free public schools." It is immaterial as to this action whether, by this clause of the Constitution, all penalties and forfeitures are appropriated to the public schools without power in the Legislature to give the penalty in any case to "the party suing for the same," or to "the party aggrieved," or whether the true construction is that the constitutional provision devotes to the school fund such penalties and forfeitures only as by the several statutes imposing them shall accrue to the State, as
(26) was held in *Katzenstein v. R. R.*, 84 N. C., 688, and we

leave that question open. However that may be, the penalty here, in any event, goes to the State. The act creating it (The Code, sec. 1960, *supra*) does not contemplate that any private person may sue for and recover the penalty. The act is to enforce a duty in which the public generally is interested, and as to which there could be, properly, no "person aggrieved." It requires the penalty "to be sued for in the name of the State of North Carolina in the Superior Court of Wake County." This is a clear expression, as it seems to us, of the legislative intent that the penalty should be sued for and recovered by the State. If, on the contrary, it had been intended to give the penalty to any person who would sue therefor, the statute would either have so stated or would have imposed the penalty without further provision. In the latter case there might have been ground for the plaintiff's contention that, by virtue of The Code, sec. 1212, he is entitled to recover it. That section enacts that when the act imposing a penalty does not provide "to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use." But here the statute imposing the penalty provides for its recovery by the State, and the Constitution devotes such penalties and forfeitures to the school fund.

In this Court the County Board of Education of Wake asked to be substituted as relator, or as party plaintiff, under the provisions of The Code, sec. 965. This Court has power to make such substitution of parties in proper cases (*Grant v. Rogers,* 94 N. C., 755; *Wilson v. Pearson,* 102 N. C., 290), provided the opposite party is put to no disadvantage. *Justices of Tyrrell v. Simmons,* 48 N. C., 187; *Grant v. Rogers, supra.* The amendment cannot be allowed, because the law confers no right upon the County Board of Education of Wake to maintain the action. That right is vested solely in the State, and it has not asked to be substituted as a party.

The demurrer to the complaint having been sustained, the usual (27) course is to dismiss the action, unless plaintiff asks and is allowed to amend. *Netherton v. Candler,* 78 N. C., 88. This was not the case here. The judgment dismissing the action is affirmed.

AVERY, J., concurring: I concur in the opinion of the Court, but I do not wish to be misunderstood as endorsing the principle laid down in *Katzenstein v. R. R.,* 84 N. C., 688. Should a case be presented involving the question whether the whole of a penalty can be given by statute to an informer, I should be in favor of overruling the doctrine established in that case. I am not willing to concede that a constitutional provision, made by the people in convention assembled, can be restricted in its application because of the terms of some preëxisting statute; and

if the point should be raised in future, I should feel it my duty to give at length my reasons for withholding my assent to such a principle. For the present I am content to state my legal conclusions.

I think that the Legislature may give one-half, or some other proportion deemed reasonable, as a reward to an informer, and the residue would then be the net proceeds which the Constitution devotes to the school fund of the counties. I think that the net proceeds of all penalties collected in the courts of justices of the peace, Criminal and Superior courts, should be paid over to the treasurers of the counties, to constitute a part of their school fund, while the penalties collected under town ordinances do not come within the constitutional provision, and may be given by law for the support of a city or town.

MERRIMON, C. J., concurring: The statute (The Code, sec. 1959) requires every railroad company to make annual report to the Governor of certain matters and things as therein prescribed; and it further pro-
(28) vides (The Code, sec. 1960) that "Any such corporation which shall neglect to make the report as provided in the preceding section shall be liable to a penalty of $500, to be sued for in the name of the State of North Carolina in the Superior Court of Wake County."

The relator contends that the penalty thus prescribed is not allowed in favor of any particular person, or to be devoted to any specified purpose, but is allowed to any person who shall first sue for the same, and, therefore, he is entitled to maintain this action. He relies upon the statute (The Code, sec. 1212), which prescribes that "When a penalty may be imposed by any law passed, or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use."

On the other hand, the defendant contends that such penalty belongs to the State, to be devoted to the support of public schools, as required and directed by the Constitution (Art. IX, sec. 5), which provides as follows: "All moneys, stocks, bonds, and other property belong to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penalty or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: *Provided,* that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction."

It is to be observed that the statute (The Code, sec. 1960) above recited does not simply impose the penalty as therein provided; it provides, further, that it is "to be sued for in the name of the State of North Carolina in the Superior Court of Wake County." This (29) provision is peculiar and unusual. It is not casual and meaningless; on the contrary, it is intended to serve an important public purpose. It fairly implies that the penalty, being intended to compel the performance of a duty imposed on railroad companies, affecting the State itself and its purposes, and, therefore, public in its nature, must be sued for in the name of and for the purposes of the State, in the county where civil actions in which the State is solely interested are ordinarily brought and prosecuted. The statute is to be treated and understood as imposing the penalty and directing an action to be brought in the name of and for the State by its proper officer when a railroad company shall incur such penalty. The penalty is prescribed by the section of the statute next after that prescribing important duties to be discharged by railroad companies; and as to the action to recover the same, the language is not simply permissive, as that the penalty "may be sued for," but the pertinent words employed are directory, in a sense mandatory, to wit, "to be sued for," etc. It is not contemplated or intended that a private person—any person—who will sue for it may have the penalty. If it had been so intended, the statute would simply have imposed the penalty without further provision, and the general statutory provision (The Code, sec. 1213), which provides that "when any penalty shall be given by any statute, and it is not prescribed in whose name suit therefor may be commenced, the same shall be brought in the name of the State," would apply. If the statute had simply prescribed the penalty, omitting the significant words, "to be sued for," etc., the contention of the relator might have force. But those words, the provision embodied by them, cannot be treated as mere surplusage, without meaning; they are reasonably capable of the meaning attributed to them above, and thus they serve an important public purpose. It must be taken that the Legislature intended that the penalty should be sued for in the (30) name of and for the State.

The court, therefore, properly held that the relator could not maintain this action.

It is further to be observed that the clause of the Constitution above recited does not prescribe penalties and forfeitures; it has reference to them as they are prescribed by legislative enactments. Nor does that clause, in terms or by necessary implication, purport to repeal or modify all such statutes and statutory provisions as prescribe them, so far as to require that such penalties and forfeitures shall all "belong to and remain in the several counties, and shall be faithfully appropriated for

establishing and maintaining free public schools in the several counties of this State"; nor does this clause declare that all penalties and forfeitures shall accrue, belong or go, in whole or in part, to the several counties, and thus clearly express the purpose to modify existing pertinent statutes and control all future like ones. It is organic in its nature and purpose, not legislative; it does not intend to enlarge, abridge or at all interfere with the power of the Legislature in respect to penalties and forfeitures, or to repeal or modify statutes; it simply declares, and only intends to declare, what shall constitute the fund in the several counties of the State "for establishing and maintaining free public schools" therein; what moneys, stocks, bonds and other property, and what sources of revenue in and of the several counties that belong to them, must and shall continually and perpetually constitute the fund to be devoted to the purposes specified. Such provision embraces all such penalties and forfeitures, and only such as by law accrue, belong and go to the several counties and the county school funds, and there are many such. The words, "also the clear proceeds of all penalties and forfeitures," of the clause in question, refer to and embrace only such as by some statute are given to the county or the county school fund.

The whole purpose of the clause in question is to establish and
(31) provide for a certain permanent fund for "establishing and maintaining free public schools in the several counties," and to provide such fund out of such funds and resources as by law belong or may belong to the counties. At the time this clause was adopted as part of the Constitution, numerous statutes prescribed penalties and forfeitures, giving the same to counties and county school funds, while numerous other statutes prescribed and gave the like to divers other classes of persons. If the purpose of this provision had been to repeal or modify such statutes, it would and ought to have done so by appropriate reference and pertinent words of repeal or modification. But such words do not appear—simply reference is made to "all penalties and forfeitures." These words, taken in connection with other words preceding and following them, and the purpose of the clause of which they are part, reasonably imply "all penalties and forfeitures" given to the county and the county school fund by the statutes prescribing them.

Moreover, in the absence of express words or necessary implication in some way arising to the contrary, and in view of the purposes to be accomplished by penalties and forfeitures in many cases, it is altogether improbable that there was any intent in framing the Constitution to devote all penalties and forfeitures to the single purpose of free public schools. To so devote them in all cases would defeat, in large measure, the ends usually sought to be accomplished by them in the enforcement of statutes and the rights of individuals.

In *Katzenstein v. R. R.*, 84 N. C., 688, this Court expressly held that the penalty sued for did not belong or go to the county school fund, under the Constitution, Art. IX, sec. 5 (the clause now under consideration); and in numerous cases where the action was brought by a party suing in his own name or in the name of the State on his relation, as for a penalty given by statute to him or to whomsoever might (32) sue for the same, this Court has uniformly given effect to the statute, thus in effect interpreting the clause of the Constitution in question as I have done here. *Branch v. R. R.*, 77 N. C., 347; *Keeter v. R. R.*, 86 N. C., 346; *Whitehead v. R. R.*, 87 N. C., 255; *McGowan v. R. R.*, 95 N. C., 417; *McGwigan v. R. R.*, 95 N. C., 428; *Williams v. Hodges*, 101 N. C., 300; *Cole v. Laws*, 104 N. C., 651; and there are many other like cases.

Then, as the Legislature may give by statute penalties and forfeitures to persons and particular purposes as in its wisdom it may deem proper, it fairly follows that counties and county school funds are entitled to have only such of them as are given to them by statute, and that the interpretation I have given the clause of the Constitution under consideration is the correct one. If the words, "all penalties and forfeitures," as employed in this clause, are to be limited at all (and I have shown they must be), then it is difficult to see how they can apply to and embrace any such penalties and forfeitures given by statute, otherwise than to counties and county school funds. How, at what point, and by what authority can the courts find or lay down a line of demarcation in the face of express statutory enactments? There is no classification of the penalties and forfeitures referred to in or embraced by the clause. It must be construed to embrace all penalties in the most comprehensive sense, or only *all* given to counties by statute.

The Constitution of the State of Missouri contained a clause (Art. XI, sec. 8) altogether in substance and very much in terms like that of this State in question, and the question whether, under it, *all penalties* belonged and went to the county school fund was directly presented to the Supreme Court of that State for its decision in *Bennett v. R. R.*, 68 Mo., 434, and that Court decided that the Legislature had power to prescribe to whom or to what purpose penalties should go or be devoted, and hence that the penalty sued for in that case did not belong or go (33) to the county school fund by virtue of the constitutional provision, thus adopting the interpretation I have adopted as the true one in this case. The case just cited was afterwards cited and approved in *Spellman v. R. R.*, 71 Mo., 434, and several other cases. Thus my view is fully sustained by a Supreme Court of great respectability, as well as by reason and principle.

I may add that the legislative interpretation of the clause in question, in numerous enactments, is not to be ignored or treated lightly. Indeed, such enactments are presumed to be consistent with and warranted by the Constitution, but not conclusively so. The courts, however, will be slow to declare and adjudge the contrary; they will not do so unless the inconsistency is clear and plain. The Legislature, at every one of its sessions since the adoption of the Constitution, has passed numerous statutes prescribing penalties and forfeitures, giving the same to parties and purposes other than counties and county school funds, and it seems never to have questioned or doubted its power and authority to do so.

I am, therefore, of opinion that neither any county nor any school fund is entitled to the penalty sued for in this action, notwithstanding the relator is not entitled to the same.

"The County Board of Education for the County of Wake" moved in this Court that it be made a party plaintiff. The motion cannot be allowed. It does not appear that that board has any interest in the action. If it be taken that it represents the county named and the school fund thereof, for the reasons already stated, it has no interest in the penalty sued for. But if it had such interest as it claims, and this Court has power to allow its motion, it would be unjust to do so, and thus render the judgment appealed from erroneous, when, otherwise, it would not be so. If that board had any interest in the action that
(34) entitled it to be made a party thereto, it should have moved in apt time in the court below to be made such. No reason is shown why it failed to do so. In such case this Court will not allow the motion. *Justices v. Simmons,* 48 N. C., 187; *Wilcox v. Hawkins,* 10 N. C., 84; *Allen v. Jackson,* 86 N. C., 321; *Grant v. Rogers,* 94 N. C., 755.

It is suggested that the State is entitled to the penalty sued for, that the relator should be treated as merely an unnecessary and improper party, and that the State should be allowed to further prosecute the action for its own benefit. But the State does not ask to be allowed to do this. There may be reasons why it ought not and would not bring and prosecute an action for such purpose. Besides, this action was not brought by or for the State. The relator brought it *in the name* of the State, as he insisted he had the right to do, for his own benefit and on his own account. This appears from the record. The complaint is framed and contains pertinent allegations for this purpose. The action is that of the relator, and must be so treated. *S. v. Mangum,* 61 N. C., 177.

Per Curiam. Affirmed.

Cited: Foster v. Boone, 114 N. C., 177; *Monger v. Kelly,* 115 N. C., 295; *Sutton v. Phillips,* 116 N. C., 505, 514; *Carter v. R. R.,* 126 N. C., 443; *School Directors v. Asheville,* 128 N. C., 250; *School Directors v. Asheville,* 137 N. C., 507; *S. v. Maultsby,* 139 N. C., 584.

(35)

FAULCON BROWNE v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Common Carrier—Passengers—Railroads—Reasonable Regulations—Evidence—Burden of Proof—Negligence.

1. A rule of a railroad company that passengers desiring to travel in a coach attached to a freight train shall enter the car at a point other than the station or place where persons traveling in the ordinary passenger trains are received is not an unreasonable regulation, provided the way by which the passenger is required to pass from the place tickets are furnished to the point of embarking is kept in proper condition.

2. The general rule is, that passengers who are injured while getting on or off moving trains cannot recover for such injuries.

3. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course.

4. A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion.

ACTION for damages for an injury received while getting on defendant's train, tried at September Term, 1890, of WARREN, before *Whitaker, J.*

The plaintiff testified that he was at Macon depot on or about 25 November, 1889, and purchased a ticket from Macon to Vaughan, from Rodwell, agent of the defendant. "In a few minutes the local freight came to Macon. Rodwell asked me if I was going off on that train, and I told him I was. He said to me that I had better get on; that the train would leave pretty soon. I asked Rodwell if it was not the duty of the company to pull the passenger coach to the platform. The conductor (Lassiter) said if I rode on that train at all I would have to go where the passenger coach was then standing and get on, or I would be left. Then the conductor went to the passenger coach and waved his engineer to go ahead. When I reached the coach it was slowly moving. After stepping on the coach and having a good footing, the sudden jerk of the train, with the weight of a valise in my right hand, threw me off my balance and caused my injury. I struck my leg against some part of the car step. The jerk of the train was caused by the engineer's putting on steam. I was incapacitated from my business for about five months.

(36) The coach was barely moving. I didn't think there was any danger. I knew that if a man jumped on a moving train it was at the risk of his life."

Robert Fisher, a witness for the plaintiff, testified: "I was at Macon depot on the day the injury occurred. I saw the conductor, agent, and plaintiff, and heard conversation between depot agent and plaintiff. Rodwell, the agent, said to plaintiff, 'Are you going down on this train?' Plaintiff said, 'Yes.' Rodwell said, 'You had better be getting on, as it is going away.' Plaintiff said to agent Rodwell that he thought that it was the duty of the company to pull the passenger coach up to the depot; that he did not feel disposed to walk fifty or a hundred yards to get on the coach in the mud. The conductor, being present, said to the plaintiff, 'If you are going on this train you had better go ahead and get on. We are going away.' Plaintiff started up the track to the coach, and when he was in two or three cars of the passenger coach the conductor waved the engineer ahead, and signaled him to go away. The conductor got on the train while it was moving. When the plaintiff got on the passenger coach the train had moved the length of two or three cars. The conductor got on the rear end of the coach, and he was not hurt. I saw the plaintiff at the time he stepped on the coach. The engine at this time gave a sudden jerk and increased its speed. I saw plaintiff get on the train, and the train go on to the next station. The passenger coach was 75 or 100 yards from the passenger station."

John Harris, a witness for the plaintiff, testified: "I was at Macon the day of the occurrence. Saw the conductor and the agent of the defendant company. Plaintiff told the conductor he wanted to go to Vaughan station on the freight. The conductor told the plaintiff that he was a little behind, and to go back and get on the coach. Plaintiff made for the coach. I did not see him get on the coach. The passenger coach was 50 or 60 yards from the passenger platform. It was a long train, the local freight."

(37) It was admitted that the train was a mixed one, with passenger coach attached.

Fred Yancey, a witness for the plaintiff, testified: "I was at Macon depot the time plaintiff was injured. I saw the plaintiff there, and heard the conductor tell the plaintiff if he was going it was time he was getting on the car. The plaintiff asked if the passenger coach was coming any nearer. The conductor told him no. The plaintiff went toward the passenger coach, but I did not see him get on. He had gotten within two or three car-lengths of the passenger coach when the train began to move."

This was all the evidence for the plaintiff as to the manner in which the accident occurred.

J. W. Lassiter, a witness for the defendant, testified: "I am a conductor of the defendant. On 25 November, last, I was a conductor on the local freight train, which has a passenger coach attached. The passenger coach on the freight train is in the rear of the train. It does not stop at the passenger platform, as this would take four or five minutes at each depot, and there are nineteen depots on the road. I recollect the day on which the plaintiff claims to have been injured. The passenger coach was seven or eight car-lengths from the platform. The train stopped at Macon that day not less than fifteen minutes. Just as soon as we load and unload the train, we leave just as soon as possible, so as to make the schedule. It is a hard schedule to make. I did not swear at or use bad language to the plaintiff. When I hallooed, 'All right,' to the hands my attention was called to the fact that a passenger was to go. The hands signaled the engineer ahead. I said to the passenger that we had been there fifteen minutes; time enough to get aboard the train. He got up. I do not remember any other conversation with the passenger. I got on the front end of the car, the plaintiff on the rear end. The plaintiff was at the freight platform when I saw him. He said nothing to me of being injured. I told the plaintiff that I would not stop any more after starting. When I got on the train I felt no jerk (38) more than common. I think that I can state positively that the train did not jerk. To the best of my recollection it did not. I never saw posted any rule that passenger coach on the local freight would not stop at the passenger platform."

John E. Rodwell testified: "I am the agent of the defendant at Macon. The passenger coach on the local freight train stops at no particular place. It does not pull up to the passenger platform for passengers to get on. I have sold tickets to the plaintiff to go as a passenger on the local freight train before the accident. I remember the day the plaintiff claims to have been injured. The train came there a little late, and after loading the train, which took some fifteen minutes, plaintiff said that he wanted to go on that train. The conductor said to the plaintiff that if he wanted to go on that train he had better get on. The passageway between the point where plaintiff was and the passenger coach was in good condition. There were no obstructions in the way. I have frequently, prior to the time of the alleged accident, sold tickets to the plaintiff to travel on the local freight train. On these occasions I cannot state positively that the passenger coach did not pull up to the passenger platform."

J. L. Coleman, a witness for the defendant, testified: "I remember the time that plaintiff says that he was hurt. I saw the plaintiff get on the train. It was moving as fast as an ordinary man would run. I did

not see Robert Fisher there. Plaintiff apparently got on the train very well. I did not see him stumble. When plaintiff got on the train it was going at a right good rate of speed. He had his valise in his hand."

The following prayers for instructions were, among others, submitted by defendant:

"That there is no evidence of negligence, and the jury will answer the first issue 'No.'" This was refused, and the defendant excepted, and assigned the refusal as error.

"That upon the whole evidence the plaintiff has contributed by
(39) his negligence to the injury, and the jury will answer the second question 'Yes.'" This was refused, and the defendant excepted, and assigned such refusal as error.

"That if the jury believe from the evidence that the plaintiff was under the influence of liquor when the accident occurred, and for that reason was not as well able to provide for his safety, and that the accident would not have occurred had the plaintiff been entirely sober, then he has contributed to the injury, and the jury will answer the second issue 'Yes.'" This was not given in this form, and, as the defendant contends, not in substance, and the defendant excepted and assigned the same as error.

"That even if it had been the duty of the defendant to stop its train at the platform, and although the jury should find that it failed in that duty, yet the plaintiff was not justified in attempting to board the moving train, but he should have remained at the station; that by attempting to board the moving train the plaintiff took all the risk of injury, and cannot recover in this action." This was refused, and the defendant excepted and assigned the same as error.

"That if the jury shall believe that the cars of the defendant stopped at the station long enough for the plaintiff to have gotten on board while they were stationary, and that the passageway from the depot building to the car was open and safe, and that instead of getting on the car the plaintiff loitered around the station until the cars were in motion and then attempted to get on them while the train was going as fast or faster than a man could walk, then he has contributed to his injury, and the jury will answer the second issue 'Yes.'" This was not given in this form, and the defendant excepted, because it contends that it was not substantially given, and assigns the same as error.

"That while getting on a moving train is not negligent under all circumstances, yet the plaintiff must show that under the circumstances it did not appear dangerous, and must also show some good reason
(40) for doing so, and for not getting on the train while it was stationary." This was refused, and the defendant excepted and assigned the same as error.

"That there is no evidence in this case of such facts and circumstances as would warrant the plaintiff in getting on the moving train." This was refused, and the defendant excepted and assigned such refusal as error.

In lieu of the charge asked, the judge instructed the jury as follows:

"If you should find from the evidence that the conductor of this train was told by the plaintiff that he wished to go on that train, and that upon being so told by the plaintiff he (the conductor) told him to go and get upon the passenger coach; that thereupon the plaintiff proceeded to do as directed, but before he could get to and on the coach the conductor signaled the engineer to go ahead, and the train was thus put in motion before the plaintiff could get on the coach, and the plaintiff was injured in the attempt to get on, then the defendant would be guilty of negligence." To this charge the defendant excepted and assigned the same for error. "It was the duty of the defendant to stop its train at the depot a sufficient time to enable passengers to get on its passenger coach, but if the defendant's train had already been at the depot a sufficient time for this purpose, it was not under any legal obligation to remain any longer for this purpose, although passengers might arrive and give notice of an intention to get on board.

"If you should find that the defendant's train, having been at Macon depot a sufficient time to take on passengers, upon the plaintiff's notifying the conductor that he desired to take passage on this train, the conductor told him that he would not delay or stop the train, and thereupon gave the signal for the train to move, then, nothing else appearing, the defendant would not be guilty of negligence.

"If you should find from the evidence that the plaintiff got on (41) the coach under the directions of the conductor, and, after getting on the platform of the coach, was injured by a sudden and unusual jerking, then the defendant would be guilty of negligence." To this charge the defendant excepted and assigned the same as error.

"If you find from the evidence that the conductor directed the plaintiff to get on the moving train, then if the plaintiff was injured in obeying such instruction, then the defendant was guilty of negligence." To this instruction the defendant excepted and assigned the same as error.

"If the jury should find that the plaintiff was injured while attempting to get on a moving train, the plaintiff is guilty of contributory negligence, unless the jury shall find that the conductor of the defendant directed him to do so, or unless they shall find that there was no such apparent danger as would prevent a prudent and sensible man from so attempting to get on." To the qualifications of this charge the defendant excepted and assigned the same as error.

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

W. R. Henry for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

AVERY, J., after stating the facts: At the request of the defendant, the court instructed the jury that the failure and refusal of the conductor to cause its passenger coach attached to its freight train to be drawn up to a point opposite the passenger platform was not negligence. The plaintiff did not except, and it is insisted that the question whether it was a reasonable regulation to require passengers to get on board the train at a point so remote from the place used for passenger trains is now so far eliminated in the discussion of the defendant's appeal that it cannot be considered even in determining whether on the one hand there was, as insisted by the defendant, no evidence of negligence on the part
(42) of its agents or servants, or whether on the other there was undisputed testimony showing that the proximate cause of the plaintiff's injury was his own contributory negligence. This case must be distinguished from *Rose v. R. R.*, 106 N. C., 168, and *Pickens v. R. R.*, 104 N. C., 312, because the defendant company relies, among others, upon two exceptions, the consideration of either of which necessarily involves a review of all of the evidence tending to show negligence on the part of the defendant company. We cannot determine whether there was any evidence of negligence on the part of the defendant and eliminate from the discussion the question whether, in the exercise of ordinary care, the passenger coach should have been drawn up to the platform, because the plaintiff contends that the court should have instructed the jury that the defendant was negligent in failing to give passengers an opportunity to get on at the platform. In passing upon the other exception also, it is insisted for the plaintiff that, though it may have appeared that he was negligent in waiting till the train was in motion before attempting to get on it, still the injury would have been avoided if the passenger coach had been stopped at the station. *Deans v. R. R.*, 107 N. C., 686. In both of the cases mentioned, the exceptions considered were addressed to questions growing out of particular portions of the testimony—not to the whole of it—and raised only the point whether there was undue force used in expelling a passenger.

It was not an unreasonable regulation of the company to require passengers to be received upon a coach attached to a freight train at some point other than the station or platform from which they usually enter its passenger cars, constituting a part of its passenger trains, but the space or route ordinarily traversed from the office where the ticket is procured to the place appointed for embarking should be kept in safe condition for transit, and passengers have a right to act upon the pre-

sumption that such way may be traversed without danger due to its defects. 2 Wood R. R., p. 1128, sec. 305; *Hurlburt v. R. R.*, 40 N. Y., 145; *Green v. R. R.*, 11 Hun (N. Y.), 333. (43)

Our statute (The Code, sec. 1963) is, in so far as it affects this question, an affirmance of the general principle, as it requires railroad companies to run their trains of cars for the transportation of passengers and property at regular times, to be fixed by public notice, and carry such passengers as shall be offered *"within a reasonable time"* at *"the place of starting, the junctions of other roads, and the usual stopping places established for receiving and discharging way passengers and freights for that train."* In the plainest terms the law recognizes the right of the companies to determine their places of receiving and discharging passengers for each train, subject only to the proviso attached by law to which we have adverted. If the plaintiff's injury was not caused by the failure of the defendant to use ordinary care in looking after the condition of the way from the ticket office to the cars, it incurred no liability by refusing to receive the plaintiff at the platform.

The general rule is, that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury. *Phillips v. R. R.*, 49 N. Y., 177; 2 Beach L. R., sec. 987. But, of course, this, like all other general rules, is subject to some exceptions. Where a train is stopped at a station, and after passengers are told to go aboard it is suddenly started before they have had time to do so, and when, without unreasonable delay, they are trying to get upon it, if a passenger who is in the act of getting upon the platform is injured by the sudden jerk of starting without a signal, the court may submit the question of negligence to the jury, but the company is under no obligation to delay the departure of the train beyond the usual time because a passenger has purposely or negligently deferred getting on it till the last moment, though he has had abundant time to do so while it was standing still. Thompson on Cor. and Par., p. 225, sec. 16.

In running its trains the officers of a company ought always to (44) be mindful of the fact that in order to insure the safety and subserve the interests of its patrons and accomplish the ends for which it was created, the corporation must move its trains, as far as possible, regularly and systematically. Hence the statute which we have already cited affirms another common-law principle in limiting the obligation to receive passengers to those who are offered or offer themselves within reasonable time.

The company would in any event be liable for an injury wantonly or purposely inflicted by its officers. If the conductor saw the plaintiff approaching the train at his suggestion or invitation, and purposely gave the signal to move when he was in the act of ascending the steps of

the platform, the company was liable for any injury sustained by the latter. But when the train had been stopped for the usual time, unless the number of passengers who debarked or embarked at the station was so great as to require a longer stop in order to insure the safety of its patrons, the conductor, though he had told a dilatory passenger that he must not get on at a certain point, was not bound, in order to relieve the company of liability, to look after his movements and refrain from giving the signal to the engineer to move until assured that he was seated on board the train.

We think that there was error in the failure of the court, in response to the request of the defendant, to present clearly to the jury the well established principle that, after holding the train long enough to disembark and receive passengers, the conductor was not bound to look to the safety of the plaintiff (though he may have told him he ought to get on) and to delay giving the signal till he saw the plaintiff enter the coach.

The company would have been liable, unquestionably, if the invitation of the conductor to get on the train had been extended when the train was already in motion instead of before giving the signal to leave at the usual time. It is equally clear that the jury might have been mis-
(45) led by the statement of the law in reference to contributory negligence by the court. The judge should have told them, as requested, that the fact of getting on a moving train was, as a general rule, evidence of contributory negligence, and that proposition should have been stated without qualification other than such as was manifestly suggested by and applicable to the evidence in the case at bar. 2 Beach R. R., sec. 987; 2 Wood's R. R., 1154; Wharton on Neg., sec. 369. From the plaintiff's own testimony it appears that he was first warned by Rodwell, the defendant's agent, to get on the train, and notified that it would leave soon, but instead of acting on the suggestion of the agent he manifested a disposition to stand upon his supposed legal rights. The conductor (Lassiter) then said, according to plaintiff's own statement, that if he "rode on that train he would have to go where the *passenger coach was then standing.*" This language could not be fairly construed as a command to get on the train, but it was simply a warning that he must comply with the regulation "if he rode on that train." The plaintiff was *prima facie* negligent in getting upon a moving train, and in order to relieve himself of the onus placed upon him, ought to have shown either that he went in obedience to an unequivocal invitation or command not to get upon a train standing still, but already in motion, and in obeying the order or accepting the invitation he did not expose himself to manifest danger, or that the conductor did not stop at the station a sufficient time to allow passengers to get on and off. Wharton on Neg.,

sec. 369. After admitting that he got upon a moving train, the burden was upon the plaintiff to bring himself under some exception to the general rule that such conduct is contributory negligence and will be deemed the proximate cause of any injury received in doing so. *Malcom v. R. R.*, 106 N. C., 63; 2 Wood R. R., p. 1126, sec. 305; 2 Beach R. R., *supra; Chambers v. R. R.*, 91 N. C., 471; *Smith v. R. R.*, 99 N. C., 241.

Upon the plaintiff's own testimony, or upon a review of the whole testimony, there is no such evidence of a command as to (46) warrant the charge given by the court or to go to the jury as tending to show that the injury was not caused by the plaintiff's own negligence in getting upon the train while in motion. There is no testimony tending to show that by the exercise of ordinary care the defendant could have prevented or avoided the injury.

If it were necessary, we might rest our ruling upon the additional ground that the instruction given to the jury in reference to the question whether the plaintiff's injury was proximately caused by intoxication and consequent inability to get upon the car with his valise in hand was not fully responsive to the request of defendant. But it is unnecessary to discuss that question, as it is to advert to the exception that there was no evidence to warrant the charge predicated upon the ground that the injury might have been caused by an "unusual jerk" in starting the train.

There was error, for which a new trial must be granted.

Error.

Cited: Burgin v. R. R., 115 N. C., 674; *Tillett v. R. R.*, 118 N. C., 1046; *Johnson v. R. R.*, 130 N. C., 490; *Denny v. R. R.*, 132 N. C., 345; *Dortch v. R. R.*, 148 N. C., 579; *Thorpe v. Traction Co.*, 159 N. C., 37, 38; *Carter v. R. R.*, 165 N. C., 250.

(47)

NANCY H. BARNES ET AL. v. WILLIAM H. MCCULLERS, SR.

Contract to Convey Land—Vendor and Vendee—Lien—Surety—Equity—Statute of Limitations.

In 1875 the defendant contracted to sell to B. a tract of land, and executed his bond to convey upon the payment of the purchase-money, evidenced by eight notes, due in successive annual installments. The mother of the vendee signed the notes as surety, it being agreed between her and her son that, upon the payment of the purchase-money, he should convey to her a life estate in the land, and this agreement was indorsed by the ven-

dor and witnessed by him upon the bond for title at the time of the delivery of the papers. The mother and son went into joint possession and paid off several of the notes. Subsequently, without the knowledge of the mother, the defendant and the son made an arrangement by which the remaining notes were surrendered and others substituted, to secure which, with other sums loaned to the son by defendant, mortgages were executed upon the land. Upon information of these facts, in 1889, the mother brought suit to restrain the defendant from selling under the mortgages, to protect her interest, and for general relief: *Held*—

1. That while the mother was no party to the contract to convey the land entered into between the son and the defendant, she, by virtue of the agreement between her and her son, had an equity to have the legal title to a life estate conveyed to her upon the payment of the purchase-money, and of this the defendant had notice; and that her equity was not subject to a lien for the satisfaction of the balance due on the purchase-money.

2. That upon the surrender of the original notes and the substitution of others to which she was not party, her liability as surety was terminated.

3. That while the entire interest in the land was subject to the payment of any balance that might be due on the purchase-money, and the vendor could not specifically subject the equitable estate of the mother to the payment thereof, the son's interest might be subject to such charge, as well as a lien for the loans subsequently made.

4. That the mother's right of action was not barred by the statute of limitations.

APPEAL at February Term, 1890, of JOHNSTON, from *MacRae, J.*

The *feme* plaintiff alleges, in substance, that on 28 September, 1875, the defendant contracted with her son, Nathan L. Barnes (who in the course of the action became her coplaintiff), to sell to him the tract of land, described in the complaint, for the price of $6,211.37; that to secure the payment of this purchase-money he took from her said son eight several notes, each of seven of them for $800, and the eighth of them for $911.37, one of them going due on the first day of each January next after the day and date first above stated, and the last and largest one of them to be due on 1 January, 1883; that the defendant, on
(48) the first above mentioned day, executed to her said son his bond for title for said land in the sum of $6,211.37, conditioned that he would make to the son a good and sufficient deed, with general warranty, etc., to convey to him the fee-simple estate therein when and as soon as the said notes should be paid as they came due; that it was made part of said contract that the *feme* plaintiff should sign and become surety to each of said notes, which she did, with the distinct understanding and agreement that when said purchase-money should be paid and her son should receive title for the land from the defendant, her said son would execute to her a deed sufficient to convey to her an estate for her

life or her widowhood (she then and ever thereafter and now being a widow); that the defendant well understood and had full knowledge of this agreement, and he wrote on the back of said bond for title a memorandum thereof, in these words: "I, Nathan L. Barnes, do hereby agree and promise my mother that she shall have a lifetime or widowhood estate upon the premises mentioned in the within bond. Witness my hand and seal, this 28 September, 1875." That this memorandum was signed under his seal by her said son, and the execution of the same was witnessed by the defendant; that she went upon and she and her son cultivated said land and paid the first six of said notes as they each matured; that afterwards, in 1881, the defendant called at her gate and said he had given her son, Nathan, a deed for the land, and the latter had fixed a paper to protect her life estate; that she had full confidence in the defendant and bade him keep the paper; that about this time the two remaining notes were delivered to her by her son, and she felt secure, as the bonds were all canceled; that about 1 January, 1889, her son told her she had no right to the land; that he could turn her out of possession; that she at once sent for the defendant and asked him if she had no estate in the land; that he at first told her she had none; that in a day or so he told her she did have a life interest in the land, (49) and produced from his pocket a bond for title for a life estate or for her widowhood, made to her, executed by her said son, dated 21 July, 1881; that she never knew or suspected until 25 December, 1888, that her son had taken a deed for the land and executed three mortgages thereon to the defendant, purporting to secure moneys loaned to her son, aggregating, including the said two last notes for the purchase-money, the sum of $7,640.67; that she is entitled to have the defendant and her said son convey to her a life estate in said land, she so having an estate in equity, etc.; that said mortgage deeds are a cloud on her equitable title; that she was never consulted concerning the making of any of said mortgages; that she knew nothing of their execution, and never assented to any one of them, and is not conscious of having received any benefit from them or any one of them, etc. She demands judgment that the defendant be restrained by injunction from selling her life estate in said land under any power in said mortgages or any one of them; that he execute to her a quitclaim deed for a life estate in said land; that he cancel such of said mortgages as have been discharged, and for general relief, etc.

The answer admits the alleged contract of sale of the land between the son of the *feme* plaintiff and the defendant, but it denies that she was a party to it, except that she was surety to the notes for the purchase-money; it alleges, as to the contract between herself and her son, that he had no connection with the same, except that he wrote and witnessed

the execution thereof on the back of the bond for title; he admits that, in consideration of the *feme* plaintiff's becoming surety to the said notes, her son agreed with her that she should have an estate for life or her widowhood in the land. The answer admits that the defendant conveyed title thereto to her son and took sundry mortgages on the land to secure the balance of the purchase-money and money she lent
(50) him, and alleges that $1,000 of the sum lent was to buy an engine for cotton-gin purposes, a store account, supplies, etc. The defendant pleads and relies upon the statute of limitations, and insists that the court has not jurisdiction to remove the alleged cloud upon the *feme* plaintiff's title, etc. He demands judgment for $2,500, with interest, and that the same be declared a first lien upon the said land, and particularly upon the interest of the *feme* plaintiff therein; and like judgment against the said son for $1,615.67, with interest, the same to be a lien upon his interest in the land; that the present mortgage be foreclosed, and for costs.

The jury found, upon pertinent issues submitted to it, that the sixth note for the purchase-money was paid before the loan to the son and the mortgages to secure the same; that the balance of the purchase-money for the land due the defendant was $1,665, with interest at 8 per cent from 3 March, 1889, and that the plaintiff's claim is not barred by the statute of limitations.

The court gave judgment that the *feme* plaintiff is entitled to a life estate, or an estate during her widowhood, in the land, subject to the payment of $1,665, with interest at 8 per cent annually from 3 March, 1890, and that this sum be a lien upon her life estate; that upon the payment of this sum to the defendant he shall execute to her a conveyance for the said land for her life or widowhood. The court also gave judgment against the male plaintiff in favor of the defendant for $4,115.67, with interest at 8 per cent from 3 March, 1889, this judgment embracing the amount of the judgment against the *feme* plaintiff, and to be a lien upon his interest in the land. Upon failure to pay the said judgment, a commissioner is directed to make sale of the land, etc.

The *feme* plaintiff excepted to the judgment, and assigned as grounds of her exception:

1. That said sum of $1,665 should not, under the complaint
(51) and answer and issues as found, be a lien and chargeable on her estate for life or widowhood in the land described in the complaint, but that her said interest should be exempt from said lien and charge.

2. That if held to be a lien and charge at all on said life estate, the amount should be apportioned between the two parts of the fee simple, according to the quantity and value of each estate—the remainder and the life estate.

The first issue was as follows: "Was the sixth note given by N. L. Barnes and Nancy H. Barnes paid before the execution of the note and mortgage for $2,500?"

The court, in instructing the jury, said:

"Now, if this testimony satisfies you that Mr. N. L. Barnes paid defendant the amount of the sixth note and took up the note, and afterwards, either before he left the defendant or after he left him and returned, borrowed $2,500 and took up the other two notes, you will respond to this issue 'Yes.'

"But if you find that Mr. Barnes borrowed $2,500 from the defendant and then took up the three notes with the money he had borrowed, you will answer 'No.'"

The defendant asked the following instruction, which was refused:

"If the jury believe that Nathan Barnes took currency to McCullers to pay the note in controversy, but stated that he needed the money, and that thereupon a new note was given for the amount of this note and two others, and a new mortgage executed, that the sixth note would be included in the amount of the new mortgage and would not be paid, but merged in the new note."

Defendant excepted to the charge as given, and to the failure to give the charge as requested.

The defendant asked the court, upon the point reserved as to (52) the cause of action, to rule that the plaintiff's complaint did not state a cause of action under *Busbee v. Macy,* 85 N. C., 329.

Motion overruled; defendant excepted.

The defendant then asked the court, upon the admitted facts and the verdict, to adjudge upon the point reserved as to the statute of limitations, and for judgment in favor of the defendant. The court held that the claim is not barred by the statute of limitations. Defendant excepted.

The *feme* plaintiff and the defendant appealed to this Court.

E. W. Pou for plaintiff.

J. H. Abell and F. H. Busbee for defendant.

MERRIMON, C. J. The contract of sale of the land in question between the son of the *feme* plaintiff and the defendant, as embodied in the bond for title and the notes for the purchase-money, had the effect to put the equitable title to the land in the son. The defendant retained the legal title as security for the purchase-money, and in trust for the son, the vendee, to be conveyed to him when and as soon as the purchase-money should be paid. *Winborn v. Gorrell,* 38 N. C., 117; *Deer v. Bellinger,* 75 N. C., 300; *Hinsdale v. Thornton, ib.,* 381; *Bank v. Clapp,* 76 N. C., 48.

Granting, as contended by the defendant, that the *feme* plaintiff had no connection with the contract of the sale of the land just mentioned to her son, except as surety to the notes for the purchase-money, still she purchased from the latter for a valuable and sufficient consideration an estate for her life or widowhood in the land, the legal title to be made to her by her son when and as soon as he should get the same from the defendant. That she had made such contract with her son, the defendant well knew; he had notice of her rights acquired by it at the
(53) time it was made, and ever thereafter, and certainly at the time he conveyed to the son the legal title for the land, lent him money and took the mortgages to secure the same and the balance of the purchase-money. Indeed, he wrote on the back of the bond for title he executed to the son the memorandum of the contract, and witnessed the signing of the same by him. Hence the defendant lent the money to the son and took the mortgages to secure the same with notice of and subject to the right and equitable estate of the *feme* plaintiff purchased from her son, except as to the balance of the purchase-money due to him. As to this, the land remained chargeable with it, not as against the *feme* plaintiff as the defendant's debtor—she owed him no debt in that respect—but as against the son, who was the debtor. The debt, the whole of it, for the purchase-money, was that of the son. The right of the *feme* plaintiff to have the legal title, under the circumstances, was delayed until the son should pay the purchase-money and get the legal title from the defendant in pursuance of the contract between him and the son.

The *feme* plaintiff was not liable for the balance of the purchase-money as surety, because she was discharged from such liability when the defendant surrendered the notes therefor and extended the time and took mortgages of the land to secure the payment of the same. Such surrender of the notes and entire change of the character of the debt, and the new security for the same, had the effect to discharge her liability as surety. This, however, did not relieve the land from the burden of the balance of the purchase-money, because the defendant was not bound to part with the legal title, nor did he intend to do so until the same should be paid. When he took a mortgage of the land to secure this balance, he simply changed the shape of his security. Moreover, it would be inequitable for the *feme* plaintiff to get the legal title to the estate she so purchased before the balance of the purchase-money
(54) should be paid. She purchased with the understanding that the land was chargeable and burdened with the whole debt for the purchase-money, and that the defendant was not bound, in any case, to part with the legal title until the debt should be paid, nor did he part with it for the purpose of relieving it from his just claim upon it in that respect.

The defendant could not burden the land in question with a debt due to him from the son mentioned on any account other than that for the purchase-money thereof, by mortgage or otherwise, to the prejudice of the *feme* plaintiff in the respects under consideration, nor can he reasonably complain that he could not, because he took the mortgages with knowledge and notice of her equitable estate and right to the land, without her knowledge and consent. *Linch v. Gibson,* 4 N. C., 676; *Pearson v. Daniel,* 22 N. C., 360; *Maxwell v. Wallace,* 45 N. C., 251; *Rutledge v. Smith, ib.,* 283; *Shaver v. Shoemaker,* 62 N. C., 327; *Staton v. Davenport,* 95 N. C., 11.

Nor was the *feme* plaintiff's equitable estate and interest in the land, as such, chargeable with the balance of the purchase-money due the defendant. She did not owe it, nor, as we have seen, was she liable for it as surety, if that could at all alter the case in this respect. She did not purchase her equitable estate from the defendant, but from her son. She has no relation in the matter with the former, who might sell the land to pay the purchase-money, or any part of it, if need be, but he would not sell it as that of the *feme* plaintiff, nor could he so sell it as to charge her interest specially in order to relieve or disburden that of her son. She is not debtor to him. He has no demand against her for the purchase-money. He has simply the right to sell the land, or some part of it, if need be, to pay the balance of the purchase-money, without reference to her estate therein, and as if she had none. The court, therefore, erroneously adjudged that the balance of the purchase-money is a lien "upon the life or widowhood estate" of the *feme* (55) plaintiff. It should have adjudged that she was entitled to have the legal title to such estate in the land when and as soon as the balance of the purchase-money therefor specified should be paid, and that this sum is a lien upon the land, and that upon the payment of such balance the defendant and the said son shall execute to her proper deeds conveying to her such estate as she is entitled in such case to have. The exception of the *feme* plaintiff must therefore be sustained.

The exceptions of the defendant are not well founded. There was evidence to warrant the instruction to the jury complained of, and we think it sufficiently embraced that specially asked for by the defendant. The court suggested two aspects of the evidence, and the jury could readily apply it without directing their attention to a particular view of part of it.

There was no ground for the second exception. This is not an action, in any view of it, to remove a cloud upon the *feme* plaintiff's title. Its purpose is to compel the defendant who conveyed the legal title to the land in question to her coplaintiff, and then lent him large sums of money and took mortgages of the land from him to secure the same and

the balance of the purchase-money, with notice of her equitable estate and rights in and to the land, to convey to her, under the circumstances, the legal title to the same, and, further, under the circumstances, if need be, to sell the land to pay the balance of the purchase-money, and to the end she may obtain such relief as she may be entitled to have.

Nor is the *feme* plaintiff's right to sue barred by any statute of limitation. Her right to have the legal title to her equitable estate in the land does not arise until the purchase-money shall be paid, and it has not yet been paid. This action is equitable in its nature, and its chief purpose is to enforce an equitable right of the *feme* plaintiff to have the
(56) relief specified against the defendant, as to which the statute of limitations does not apply, unless it be that (The Code, sec. 158) which bars an action for relief, if not otherwise provided for, if the same shall not be commenced within ten years next after the cause of action accrued. If it be granted that this statute applies in cases like the present one, clearly the action was brought within ten years after the right to sue accrued. *Libbett v. Maultsby,* 71 N. C., 345; *Ross v. Henderson,* 77 N. C., 170.

What we have said disposes of both appeals.

There is error in the plaintiff's appeal, and no error in that of the defendant.

The judgment appealed from must be modified as directed in this opinion, and, so modified,

Affirmed.

Cited: Hairston v. Bescherer, 141 N. C., 207; *Chatham v. Realty Co.,* 180 N. C., 505.

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*THE MURFREESBORO RAILROAD COMPANY AND JOHN H. WINDER v. THE BOARD OF COMMISSIONERS OF HERTFORD COUNTY.

Constitution—Corporations—Election—Injunction.

1. The provision in the Constitution (Art. VIII, sec. 1) which reserves to the General Assembly the power to alter or repeal acts incorporating companies does not authorize the enactment of a statute which, under the pretense of protecting a public interest or exercising an acknowledged police power, appropriates the corporate property to the public use.

2. While the courts have no power to enjoin municipal authorities from ordering an election in pursuance of a law to select officers, or to determine any question made dependent upon such election, nevertheless where it is

*CLARK, J., did not sit on the hearing of this case, having been of counsel.

apparent that such election will be of no possible benefit to any one, but may work irreparable injury to some, an injunction until the final hearing may be granted, particularly if the acts complained of have a tendency to prevent the construction of a railroad, or some other enterprise in which the public have an interest.

MOTION to continue an injunction till the hearing, heard at (57) chambers on 20 January, 1891, before *Brown, J.*

Under the provisions of the original charter of the plaintiff company (section 34, chapter 365, Laws 1887) it was required to begin the work of constructing its road within three years from 7 March, 1887 (when the act was ratified). At the election held in July, 1887, a majority of the qualified voters of Murfreesboro Township voted in favor of the subscription of $25,000 in bonds of the township to the capital stock of the company, and the bonds issued in payment of said subscription were declared valid by this Court in *Brown v. Comrs.,* 100 N. C., 92.

After causing two routes to be surveyed from the Meherrin River to the Roanoke & Tar River Railroad, the directors of the company located the line so as to intersect with the other road at a place called Pendleton Station. The directors had been empowered by the unanimous vote of the stockholders, at a regular meeting held 8 October, 1890, in which the stock of the township was lawfully represented, to make said location.

After expending large sums of money for the right of way along the line selected, the company contracted on 5 December, 1890, with its coplaintiff, John H. Winder, to construct said road from said river to said station; and the said Winder agreed to take the said bonds in part payment of the work of construction, and notified the corporation of his readiness to begin the grading on 1 January, 1891.

On 9 March, 1889, the General Assembly passed an act amending said charter (chapter 557, Laws 1889), the material portions of which were as follows:

"Section 1. That section 2 of said chapter 365 be amended by adding thereto the following clause: 'That said company *may extend the main* line of its road from the town of Murfreesboro to some point on the line of the Norfolk & Carolina Railroad, in said county of (58) Hertford, and the said company shall not be required to build that part of the main line of the road between the said town and the Roanoke & Tar River Railroad in order to entitle said company to the rights and privileges granted in said chapter.'

"Sec. 2. That the commissioners of Hertford County are authorized and it shall be their duty, whenever fifty taxpayers in said township shall petition the same, to cause an election to be held in said township as prescribed in said chapter, and submit to the qualified voters of said

township the question as to whether or not the bonds heretofore issued in payment of the subscription of said township to the capital stock of said Murfreesboro Railroad Company shall be used in building and constructing, or aiding in building and constructing, said railroad from said town to some point on the line of the Norfolk & Carolina Railroad. At such election those in favor of the latter route shall deposit a ballot on which is written or printed the words 'For Transfer'; and those opposed to same shall deposit a ballot on which is written or printed the words 'Against Transfer.' And if at such election a majority of the qualified voters of said township shall vote 'For Transfer,' *then the bonds heretofore issued for the subscription of said township* to the capital stock of said Murfreesboro Railroad Company shall be used and applied for the purpose of building and constructing, or aiding in building and constructing, that part of said railroad provided for in section 1 of this act, from said town of Murfreesboro to said Norfolk & Carolina Railroad in Hertford County."

The seven concluding sections of the complaint, upon the hearing of which the orders complained of were granted, together with the said orders, were as follows:

12. That on the first Monday in November, 1890, A. M. Dar-
(59) den, E. Carl, J. E. Jones and other taxpayers in Murfreesboro Township, numbering fifty or more, presented their petition to the Board of Commissioners of said county of Hertford in meeting assembled, asking for an election to be ordered by the board under section 2 of said act of 1889, and said board refused to grant said petition and order said election.

13. That on the first Monday in December, 1890, said petitioners, together with others, numbering fifty or more, and taxpayers as aforesaid, again presented their said petition to said board, the consideration of which was by said board continued to the first Monday in January, 1891.

14. That the chairman of said board is one of said petitioners in said matter, he having signed the petition before his qualification as commissioner, but after his election, as plaintiffs are informed and believe.

15. That plaintiffs are informed and believe that a majority of the members of said board intend, at their meeting on the first Monday in January, 1891, to grant said petition and order said election.

16. That plaintiffs are informed and believe that an election, if ordered under said act of 1889, will greatly damage and lessen the value of said township bonds, and would irreparably damage plaintiffs.

17. That plaintiff Winder was negotiating with plaintiff company in reference to the construction of said railroad from some time in the month of October, 1890, until the consummation of their said contract

of 5 December, 1890, and knew nothing of the above proceedings by the said petitioners until after the consummation of said contract, and about ten days ago.

Wherefore the plaintiffs pray that defendant be restrained and enjoined from ordering an election under chapter 557, Laws 1889, and for other relief as plaintiffs may be entitled, and for costs.

The court, being of the opinion that the order of election re- (60) ferred to in the complaint ought not to be made or the election be held until the rights of the petitioners can be determined upon a final hearing or until passed upon by the Supreme Court, ordered that the injunction theretofore issued be continued until the further order of the court.

The defendant appealed.

J. W. Hinsdale and B. B. Winborne for plaintiffs.
W. D. Pruden for defendant.

AVERY, J., after stating the facts: The salutary provision of the Constitution (Art. VIII, sec. 1), which reserves to the Legislature the right to alter or repeal all acts incorporating companies, enacted thereafter, does not authorize the passage of a subsequent act which, under the pretense of protecting the public or of exercising an acknowledged police power, appropriates a portion of the corporate property to the public use. Cooley's Con. Lim., Mar., pp. 577 and 578. The amendatory law under which the county commissioners proposed to proceed would not be allowed, if by its terms it provided for perpetrating such a wrong, to operate so as to divest the right of the plaintiff company to the bonds or to compel it, against the protest of its directors, to do other and possibly much more costly work than it stipulated to do as a consideration for said bonds. But, in fact, the Legislature did not attempt a vain thing, but simply gave to the plaintiff company the power to extend its road in a new direction and to be absolved from its obligation to construct a part of the line previously proposed if the township, by a vote of its qualified electors, on its part, should signify its assent to the new arrangement. The statute provides that "the company may extend its main line," etc., and therefore does not purport to compel, but only permits, the change to be made by agreement of both parties interested.

As a stimulus to diligence the company was required to begin (61) work within three years from 7 March, 1887, and it seems that they had not only begun, but had made the necessary contracts looking to the completion of the entire line which the parties originally contemplated constructing, when, as the plaintiffs insist, the defendants proposed to take a step that would for the time destroy the market value

of the bonds in which the plaintiff Winder was to be paid for the construction, and thereby cause a suspension of operations on his part. The holding of the election would obviously be productive of no benefit or profit to the people of the township, since the company has already agreed, as it had the right to do, with a contractor to finish the original line. The township cannot possibly gain anything by submitting the question of transferring a subscription which cannot be divested from application to the original purpose for which it was made, and the expense of holding the election would be incurred without reasonable ground to expect any substantial advantage to the taxpayers in return for it.

Conceding that a Court of Equity has not the power to restrain the municipal authorities from ordering an election in pursuance of any provisions of law for the purpose of selecting officers or determining any question that may be settled by the result of such election, we think that a different rule prevails where, though the election may be lawfully held, it is apparent that no possible benefit will accrue from holding it to the persons at whose instance it is ordered, and where irreparable injury may be done to others who cannot be compensated in damages. Not only unlawful but improper acts of public officers may be restrained in order to prevent irreparable injury when the relief can be manifestly granted without imperiling the rights or interests of the officer restrained or the public represented by him. 3 Pom. Eq. Jur., sec. 1345, p. 377, and note 1. While we do not hold that the plaintiffs can demand the
(62) extraordinary aid of a Court of Equity on the ground that the holding of the election will cause a cloud upon the right of the company to the bonds, we can see how the plaintiffs may be made to suffer by the temporary depreciation of those securities and the work of construction of the railroad embarrassed or delayed, without the possibility that any corresponding benefit can accrue to the defendants or the county or township for which they are acting, by holding the election. *Marshall v. Comrs.*, 89 N. C., 103; *McCorkle v. Brem*, 76 N. C., 407. When no conceivable injury can be done by granting an injunction to the hearing, the courts are the more ready to interpose if the injury complained of has a tendency to embarrass or prevent the completion of a railroad or canal in which the public have an interest. *Roanoke Nav. Co. v. Emry* (decided at this term).

We think that the judgment of the court should be

Affirmed.

Cited: Featherstone v. Carr, 132 N. C., 802; *Watts v. Turnpike Co.*, 181 N. C., 136.

THE COMMERCIAL BANK OF DANVILLE v. W. H. S. BURGWYN.

Negotiable Instruments—Evidence—Burden of Proof—Presumption—Purchaser for Value.

While there is a *prima facie* presumption of law that the holder of negotiable paper is the owner and took it for value and before dishonor, if fraud or illegality in the inception of the instrument is set up as a defense, and evidence tending to support it is offered, such presumption is rebutted and the burden of proof is shifted to the endorsee to show that he is a *bona fide* purchaser for value.

(*Applegarth v. Tillery*, 105 N. C., 407, cited and distinguished.)

ACTION which was tried before *Womack, J.*, at October Term, (63) 1890, of VANCE.

The plaintiff declared upon a note executed by the defendant to Ruffin & Hairston and one Ballou for $1,416.67, dated 14 June, 1888, due one year from date, and alleged that it purchased for value before maturity.

The defendant answered, setting up fraud and misrepresentation by the original payees at the time of, and vitiating the instrument sued on.

Plaintiff offered in evidence the note sued on, and rested.

The defendant then introduced evidence tending to establish his defense.

The court charged the jury that if they believed the testimony the plaintiff was entitled to recover.

Defendant excepted. Verdict and judgment for plaintiff, and defendant appealed.

A. W. Graham for plaintiff.
R. H. Battle and S. F. Mordecai for defendant.

SHEPHERD, J. The note sued upon was negotiable, "and there is a *prima facie* presumption of law in favor of every holder of a negotiable paper to the extent that he is the owner of it, and that he took it for value and before dishonor." Parsons' Notes and Bills, 255; *Tredwell v. Blount*, 86 N. C., 33.

Where, however, fraud or illegality in the inception of the instrument is pleaded, and the defendant introduces evidence tending to establish such plea, then the *prima facie* case made by the endorsee, who simply offers the note and proves its execution, is so far rebutted as to shift the burden of proof and to render it essential to his right of recovery that he show that he is a *bona fide* purchaser for value and without notice. *Pugh v. Grant*, 86 N. C., 39; 1 Daniel Neg. Instruments, 815. Mr.

(64) Daniel says (section 166) that in such a case "a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted to suffer; but as the knowledge of the manner in which it came into his hands must rest in his bosom, and the means of showing it must be much easier to him than to the defendant, he is required to give proof that he became possessed of it for a sufficient consideration. If he is innocent, the burden must generally be a light one, and if guilty it is but a proper shield to one who would be, but for its protection, his victim."

Applying these principles to the case before us, it is plain that his Honor erred in charging the jury that if they believed the evidence the plaintiff was a purchaser for value and without notice.

The defendant pleaded that the execution of the note was induced by the fraudulent representation of the payee, and there was evidence tending to establish the alleged fraud. It then became incumbent on the plaintiff to show that he purchased for value and without notice, and, failing to do this, he was not entitled to the instruction given by the court. It is but just to say that, while this point is properly taken here, it does not seem to have been made in the court below, the question there being the effect of actual notice to the vice president of the plaintiff, under the circumstances.

Applegarth v. Tillery, 105 N. C., 407, cited by the plaintiff's counsel, does not conflict with the view we have taken. In that case there was *ample testimony* to show that the plaintiff purchased before maturity for value and without notice, and there was no contradictory evidence as to these points. The court held that mere proof that the payee had procured the note by fraud was no evidence to contradict the express testimony of the plaintiff that he was the owner. This is very plainly the ground of that decision, and we cannot regard the reference to the first prayer of instruction as controlling the real meaning of the
(65) opinion. Certainly the court did not intend to impinge upon the firmly established principles which we have laid down as applicable to the facts before us.

It is further to be observed that the sole issue in that case related only to the *ownership* of the note sued upon.

Error.

Cited: S. c., 110 N. C., 272; *Campbell v. Patton,* 113 N. C., 484; *Triplett v. Foster,* 115 N. C., 336; *Mfg. Co. v. Tierney,* 133 N. C., 635; *Mfg. Co. v. Summers,* 143 N. C., 109; *Bank v. Brown,* 160 N. C., 25.

WILLIAM WHITEHEAD v. L. V. MORRILL ET AL.

Assignor and Assignee—Mortgage—Priority—Contract.

Where a mortgage to secure the payment of several notes, payable in successive yearly installments, contained a provision that "upon the failure of any payment" the land should be sold and after paying necessary expenses the proceeds should be applied "to the payment of the entire indebtedness" (of the mortgagor), "with interest thereon, whether the whole thereof be then due or not": *Held*, (1) that upon the failure to pay any one of the notes at maturity, all became due; (2) that, as between the assignees of the notes, the funds arising from the sale of the mortgaged property must be distributed *pro rata*, irrespective of the time of assignment; but as between the payee and the assignee the latter would be entitled to be first paid.

ACTION heard before *Boykin, J.*, at June Term, 1890, of PITT.

On 31 January, 1885, plaintiff sold and conveyed to defendant a certain tract of land in the County of Pitt, for which defendant promised and contracted to pay the plaintiff $12,500, which was evidenced by twelve bonds, under seal, for $1,000 each (except the last one to mature, which was for $1,500), which bonds were due and pay- (66) able 1 January, 1886, '87, '88, and so on to 1 January, 1896.

To secure the payment of these several bonds the defendant executed, on the said 31 January, 1885, his mortgage deed, from which the following extract is taken:

"But if the said L. V. Morrill shall fail to pay off and discharge the said bonds when the same shall become due and payable, with interest accrued, and the costs and charges of drawing and executing this instrument, then, upon the failure of any payment, the said William Whitehead shall, . . . and the proceeds of said sale shall apply—

"First, to the costs and charges of drawing and executing this instrument; and, second, to the payment of the entire indebtedness of the said L. V. Morrill to the said William Whitehead, with the interest thereon, whether the whole thereof be then due or not, and the residue thereof, if any there be, after retaining a reasonable commission for services, shall pay over to the said L. V. Morrill or his legal representatives."

Before the maturity of the bonds falling due 1 January, 1886 and 1888, the payee therein, William Whitehead, sold and transferred for value these two bonds to A. M. Moore, guardian to certain minor children. The said guardian having removed from the State, E. A. Moye was appointed receiver of the estate of said wards, and, as such, he received into his possession, and now holds, the said two bonds.

Before the maturity of the bond falling due January, 1887, the payee, William Whitehead, sold and transferred said bond for value to one E. A. Beech, from whom it passed by subsequent transfer to F. G. James, who now holds the same.

The transfer of this bond to Beech was subsequent to the transfer of the two to Moore.

Subsequent to the transfer of the two bonds to Moore and the
(67) one to Beech, William Whitehead, the payee, sold and transferred the other nine bonds to Elliott Bros., which sale and transfer took place before the maturity of either one of said bonds.

William Whitehead brought his action to foreclose his mortgage against defendant, a decree of foreclosure was made, and A. M. Moore was appointed commissioner to make sale. The lands brought only $6,000.

At March Term, 1890, the commissioners made a supplemental report, in which they bring to the attention of the court the controversy which had arisen among the holders of the bonds as to the distribution of the fund, and at said term a partial decree of distribution was made, in which the facts as to the transfer of the bonds to the holders thereof were found by the judge and the cause retained for a final decree.

Moye, receiver, and James, who had intervened and made themselves parties, appeared and insisted that their bonds should be paid in full. Elliott Bros. contended that as the fund was insufficient to pay all the bonds, the distribution should be made *pro rata,* without any regard to time of assignment. His Honor held that the distribution should be *pro rata,* and a degree was entered to that effect. From this decree Moye, receiver, and James appealed to the Supreme Court.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
T. J. Jarvis and T. F. Davidson for appellants.

CLARK, J. By the terms of the mortgage from L. V. Morrill to William Whitehead it was provided that, upon default in the payment of any of the bonds at maturity, the property therein conveyed could be sold by the mortgagee, after advertisement at the courthouse door, for
(68) cash or credit, and that the proceeds should be applied "first to the costs and charges of drawing and executing this instrument; and, second, to the payment of the entire indebtedness of the said L. V. Morrill to the said William Whitehead, with the interest thereon, whether the whole thereof be due or not." The three bonds first falling due were assigned to the appellants, the other nine to the appellees. The assignees are bound by the terms of the mortgage, and in this contest between them, by reason of the failure of the property to produce enough to pay all the bonds in full, it is hard to see how the court could apply the proceeds otherwise than "to the entire indebtedness, whether the whole thereof be due or not," that is, *pro rata* to all the bonds. The validity of a provision in a mortgage that upon default in the payment

of any one bond at maturity all the bonds shall become due and payable, was sustained by this Court in *Capehart v. Dettrick,* 91 N. C., 344, citing *Howell v. R. R.,* 94 U. S., 463. And the very point now in issue was presented in *Kitchin v. Grandy,* 101 N. C., 86, in which it is held by *Smith, C. J.,* that upon a sale under a mortgage containing a similar provision, the proceeds should be applied *pro rata* to all the bonds, whether matured or not. In the absence of such provision in the mortgage a very different case might be presented, though the courts of different States differ as to this. 2 Jones Mort., 1701. But it was competent for the parties to insert the stipulation, and the assignees of the bond are bound by it. If the payee himself held the later bonds unassigned, in a contest between him and the holder of the earlier bonds assigned by him, the assignee of the earlier bonds would be entitled to be paid in full by virtue of the liability by reason of the endorsement. But here the contest is between two sets of assignees, and by the terms of the mortgage "the proceeds of the sale are to be applied to the entire indebtedness whether the whole thereof be due or not." The cases from other States cited by the distinguished counsel of the (69) appellant apply altogether to mortgages in which there was no such stipulation as in the present instance, and to cases in which the contest over the proceeds was between the assignee of certain of the bonds and the payee who held the others still unassigned. The authority of *Kitchin v. Grandy, supra,* is in our own Court. It is a very recent case, and "on all-fours." We would not feel at liberty, if so inclined, to disregard it upon the strength of precedents, even if equally in point, cited from other States.

But, in fact, their rulings agree with ours. Jones on Mortgages, sec. 1703, says: "When the mortgage provides that upon any default the whole mortgage debt shall become due and payable, then there can be no preference given to the holder of the note on which default was made over the holder of the note not then due, because by such default the whole debt became due at the same time. A *pro rata* distribution should then be made between the holders of different parts of the debt." And this is supported by numerous citations of authorities.

No error.

Cited: Kiger v. Harmon, 113 N. C., 407; *Walton Co. v. Davis,* 114 N. C., 106; *Gore v. Davis,* 124 N. C., 235; *Trust Co. v. Duffy,* 153 N. C., 65.

LEANDER TAYLOE v. LANGLEY TAYLOE, ADMR. OF W. S. TAYLOE.

Administration—Purchase by Administrator at His Own Sale—Negligence.

1. An administrator cannot purchase property at his own sale, although he pays a fair price and acts in good faith.

2. While an administrator is not an insurer, he will be held to that degree of diligence and care which prudent men under like circumstances would exercise, and the fact that he acted in good faith and with an honest purpose to protect his trust will not excuse him from liability for a failure to use such diligence and care.

(70) ACTION tried before *Whitaker, J.*, upon exceptions to referee's report, at Spring Term, 1890, of HERTFORD.

It appears that shortly before 25 August, 1877, W. S. Tayloe died intestate in the county of Hertford, and on that day the defendant was appointed and qualified as administrator of his estate. The plaintiff, his brother, and the surviving widow of his intestate, were the distributees of the estate, and this action was begun on 2 April, 1888, to compel an account, settlement and distribution of the estate in the hands of the defendant, as to the plaintiff.

The pleadings raised numerous issues of fact. In the course of the action it was referred to a referee to take and state an account and make report thereof, etc., all of which was done. To the report the plaintiff filed numerous exceptions, as did also the defendant. These exceptions were disposed of by the court below, except in two respects. The court charged the defendant with a rate of interest to which he excepted. This exception was abandoned in this Court. The court also charged the defendant with $333.33, the plaintiff's share of the face value of a certificate for $1,000 of the stock of the Chowan Baptist Female Institute, and the defendant excepted. With respect to this exception the court finds the following facts: One share of this stock, of the face value of $1,000, went into the hands of defendant as administrator of W. S. Tayloe.

After two years from defendant's qualification as administrator, an order was duly made by the clerk of Hertford Superior Court, under section 1412 of The Code, directing the sale of certain evidences of debt belonging to intestate, Tayloe, among which this stock was described. Under said order, the same was offered for sale at public biddings, and the defendant honestly and earnestly tried to induce bidders and secure purchasers, but without success, and it was finally knocked off to

(71) him at $103. After this, he tried to get other parties to take it

at that sum for the benefit, and failed, and finally charged himself with the amount, and surrendered the stock to trustees appointed by the Chowan Baptist Association to reorganize and establish the Chowan Baptist Female Institute. He received no pecuniary benefit from said stock, or benefit of any kind, except that he was allowed to send one indigent young lady to said institution free of charge, whose tuition would have amounted to $62.50. She was in no way related to him. The total stock was $10,500. This stock had no pecuniary market value whatever, and the defendant acted in the matter in good faith and, as he believed, for the best interest of the estate.

The stock was at the time believed by the defendant to be insolvent and without pecuniary value. The property consisted of the college buildings and grounds, constructed and arranged for college purposes, and was purchased and had been used by the Baptist denomination for many years for a female school. This is located in the village of Murfreesboro, and is worth $20,000 to $25,000, and pays an annual rental of $600, which has to be applied to repairs of said property.

In 1868 the title to said property was held by trustees for the Chowan Baptist Association. At that time the institution was much involved in debt, and the association directed and authorized said trustees to convey the property to a joint stock company upon the condition that such stock company would pay the outstanding debts of the institution and would reconvey the property to said association upon its repayment of the money expended by such stock company in paying said debts. The debts amounted to about $10,500, and a joint stock company was accordingly formed with a capital stock of $10,500, and the amount of stock held by each stockholder represented the amount of said debts paid by such stockholder. The $1,000 of stock owned by W. S. Tayloe, and sold by the defendant administrator 7 February, 1881, was a part of said capital stock. At the time of said sale the owners of the (72) stock in said company, except two, had voluntarily surrendered their stock to trustees, as heretofore stated, without demanding or receiving payment of the money expended by them in paying the debts of the institution. Of these two stockholders, one, holding $500 of stock, under an agreement with the trustees, was permitted to consume the whole of his stock in literary tuition for his own children; and the other, holding the same amount, consumed $440 thereof under the same agreement, and then surrendered the balance. When the stock of W. S. Tayloe was sold, it was unpaid, and there was no other stock then outstanding.

The facts as above stated during the argument before his Honor were admitted by both the plaintiff and defendant to be true, and the Court so find.

Upon this evidence the court held that the stock was solvent and could by due diligence have been collected in full, and charged the defendant with the same, as above.

There was judgment for the plaintiff, and the defendant, having excepted, appealed to this Court.

B. B. Winborne for plaintiff.
W. D. Pruden for defendant.

MERRIMON, C. J., after stating the facts: It appears by the record that each of the parties waived his right to trial by a jury. It was thus consented by the parties that the court might find the facts, and we are not at liberty to review the findings of fact by a tribunal thus selected by the parties. Moreover, it is stated in the case settled on appeal that the facts as stated by the court, "during the argument before his Honor, were admitted by both the plaintiff and defendant to be true, and the court so finds." This statement is part of the record, and we must
(73) accept and act upon the record as it comes to us, as duly certified, by transcript. It was therefore wholly unnecessary to send up the whole or any part of the evidence upon which the court based its findings of fact.

The appellant insists that the court improperly charged him with the face value of the stock of the institute mentioned, because, first, he purchased the same at a sale thereof made by him as allowed by law, and accounted for the sum of money bid, and paid for it in good faith and with the view to benefit the estate of which he was administrator; and, secondly, that the "stock had no pecuniary market value whatever, and the defendant acted in the matter in good faith and, as he believed, for the best interest of the estate."

Very certainly, the appellant had no right to purchase the stock of himself at his own sale, made in pursuance of an order of the clerk of the Superior Court allowing a sale of such stock, as he undertook and purported to do. To say the most for him, such sale was voidable at the will of the next of kin (of whom the appellee is one) and interested creditors. An administrator cannot purchase property at his own sale, even in good faith, fairly and for a fair price; certainly, he cannot in any case, without the sanction or ratification in some sufficient way manifested for those interested. This rule is well settled and founded in reason, justice and sound policy. For convenience of reference, we here cite several cases more or less in point and stating the reason and grounds of the rule. *Ryden v. Jones,* 8 N. C., 497; *Cannon v. Jenkins,* 16 N. C., 426; *Villines v. Norfleet,* 17 N. C., 167; *Ford v. Blount,* 25 N. C., 516; *Tate v. Dalton,* 41 N. C., 562; *Stewart v. Rutherford,* 49

N. C., 483; *Robinson v. Clark,* 52 N. C., 562; *Roberts v. Roberts,* 65 N. C., 27; *Froneberger v. Lewis,* 70 N. C., 456; *Froneberger v. Lewis,* 79 N. C., 426; *Howell v. Tyler,* 91 N. C., 207.

It does not appear that the appellee in any way sanctioned, (74) assented to, or ratified the sale in question. He was not bound by it, and he has the right to avoid it. It must be treated as wholly ineffectual for the present purpose.

If the appellant had sold the stock at a fair sale and in good faith, under the order of the clerk of the court, to some person who might purchase the same and who bid and paid less than the real value of the property, he would be chargeable only with the sum of money he so received; but he chose not to make an effectual sale, thinking and believing he ought not to allow a great sacrifice of the stock. But this did not justify him in afterwards virtually giving it to the association, as he did do. It was not his. There had been no sale of it, and he was bound, as administrator, not simply to exercise good faith, but as well to observe reasonable care and prudence in the disposition of it. An administrator is not an insurer, but he is required to observe good faith and ordinary care. He must honestly and faithfully intend to care for and promote the just advantage in all respects of the estate for the benefit of those interested in it. But this is not sufficient. He is further bound to exercise reasonable prudence and care. What is such prudence and ordinary care must depend more or less upon the condition and circumstances of the matters and things to be done or disposed of in the course of administering the estate. However honest an administrator may be, and however much he may desire to protect and promote the estate with which he is charged, he is required to use such ordinary diligence, care, foresight, and circumspection as an ordinary sensible and prudent man would do, under the like conditions and circumstances, as to his own property and affairs. *Nelson v. Hall,* 58 N. C., 32; *Patterson v. Wadsworth,* 89 N. C., 407, and numerous cases there cited; *Torrence v. Davidson,* 92 N. C., 437; *Grant v. Reese,* 94 N. C., 725; *Green v. Rountree,* 88 N. C., 164, and the cases there cited.

In this case the court finds that the appellant acted "in good (75) faith and, as he believed, for the best interest of the estate"; but it finds further "that the stock was solvent and could by due diligence have been collected in full," and hence it charged him with the face value of the same. It finds that he was honest; that, however, he was not reasonably diligent, prudent and careful; that he disposed of the stock unlawfully and for a sum of money greatly less than its value, to the appellee's injury. And surely the facts as found show that the appellant was chargeable with gross negligence. The property of the institute was worth from $20,000 to $25,000. It owed debts to the

amount of $10,500. Its capital stock was $10,500. The appellant treated $1,000 of the stock in his hands as worth but $103, and accounts for only that sum. He failed to dispose of it as the law directed, as he should have done to relieve himself from liability. The court finds that it is worth the sum specified in the certificate. Hence, clearly, the appellant was properly charged with that sum.

Affirmed.

Cited: Warren v. Susman, 168 N. C., 461.

J. W. ALBERTSON & SON v. HARVEY TERRY AND T. ELY.

Appeal—Vacating Judgments—Exceptions—Excusable Neglect.

1. The Supreme Court will not review the finding of facts by the trial judge upon a motion to vacate a judgment upon the ground of excusable neglect, surprise, or inadvertence; it can only pass upon the question whether such facts, in law, do or do not constitute such neglect, surprise, or inadvertence.

2. A party making a motion to vacate a judgment because of mistake, surprise, or inadvertence has the right to request the court to specify the ground of its decision, and a refusal to grant such request will be error.

3. Where such a motion is denied in the exercise of the discretion of the court, the Supreme Court will not review the judgment.

(76) MOTION to vacate judgment rendered in PASQUOTANK, heard before *Connor, J.,* on Fall Circuit, 1890.

The defendants moved to set aside a judgment obtained against them by the plaintiffs upon the ground of surprise and excusable neglect. The following are the facts found by the court below, and its order thereupon:

The Fall Term, 1890, of Pasquotank Court began on Monday, 15 September. On Monday of the said term the defendant Harvey Terry, being an attorney of said court, for himself and his codefendant, requested the court to make an order directing the plaintiffs to file a bill of particulars before the said defendants be required to answer the complaint; also asking that defendants be allowed thirty days within which to file their answer, the plaintiffs having filed a verified complaint.

Counsel for the plaintiffs stated that they would file a bill of particulars, and requested that an order be made directing the defendants to file copies of certain vouchers which they had in their possession.

The said counsel also stated that they would file said bill on Wednesday of said term, but could not consent to an extension of time to defendants to file their answer. Mr. Terry thereupon assented to the making of the order, which appears in the record, directing both parties to file said bill and copies on Wednesday. It was stated by members of the bar that the docket was small and would be disposed of before the end of the week. On Thursday, 18 September, the civil docket was called for the last time, when plaintiffs announced that they had complied with the said order, but that defendants had failed to do so. Mr. Terry had not, so far as the memory of the judge serves him, been in the courthouse since Monday. The court, thereupon, on motion of the plaintiffs' counsel, rendered judgment by default and inquiry, as appears in the record. The business of the court, except the discharge of the grand jury, was disposed of at that time. The judge remained in Elizabeth City until Saturday at 12 m., when he left for the next term, begin- (77) ning at Perquimans on Monday, 22 September. The court remained open for the reports of the grand jury and hearing any motion which might be made, until 5 o'clock p. m., Friday, 19 September, 1890. The defendant did not apply for any order setting aside said judgment or extending the time for filing answer, except as hereinbefore stated, as appears by the record. The defendant Terry, on Monday, 22 September, filed with the clerk the answer which appears in the record. The defendant Harvey Terry resides in the county of Pasquotank.

The court, upon the foregoing facts, declined to set aside the said judgment.

The defendants excepted and appealed.

E. F. Aydlett for plaintiffs.
No counsel contra.

MERRIMON, C. J., after stating the case: It is not the province of this Court in this and like cases to review the findings of fact by the court below. It can only decide upon appeal that the facts found do or do not constitute "mistake, inadvertence, surprise, or excusable neglect"; it cannot go beyond that and decide that the court ought or ought not to allow or disallow a motion founded upon such cause to set aside a judgment, order or other proceeding, as allowed by the statute (The Code, sec. 274). This statute vests the discretion to set aside a judgment for such cause in the judge before whom the motion is made, and his exercise of discretion is not reviewable by this Court. *Branch v. Walker,* 92 N. C., 87; *Foley v. Blank, ib.,* 476.

It does not appear that the court refused to allow the motion to set aside the judgment complained of, upon the ground that in no view of

(78) the facts could they constitute mistake, surprise, inadvertence, or excusable neglect. So far as appears, it may, as it might do, have denied the motion in the exercise of its discretion, in which case this Court could not review its action. The burden is on the appellants to show error. If they fail to do so, the judgment should be affirmed. The presumption is in favor of its correctness and validity.

If the appellants intended to assign as error that the court based its order upon some particular erroneous ground, they should have requested it to specify the ground of its decision; and, the court having done so, they should have assigned error in that respect. If the court had refused in such case to specify the ground, such refusal would have been erroneous.

Affirmed.

Cited: Williams v. R. R., 110 N. C., 474; *Marsh v. Griffin,* 123 N. C., 669; *Norton v. McLaurin,* 125 N. C., 187; *Pharr v. R. R.,* 132 N. C., 422; *Osborn v. Leach,* 133 N. C., 428; *Hardware Co. v. Buhmann,* 159 N. C., 513; *Lumber Co. v. Buhmann,* 160 N. C., 387; *McLeod v. Gooch,* 162 N. C., 124; *School v. Pierce,* 163 N. C., 428; *In re Smith, ib.,* 466; *Gardner v. May,* 172 N. C., 194; *Lumber Co. v. Cottingham,* 173 N. C., 327; *LeRoy v. Saliba,* 180 N. C., 16; *Shepherd v. Shepherd, ib.,* 496.

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(79)

THE STATE EX REL. MARY E. PRESSON v. JAMES D. BOONE ET AL.

Clerk of Superior Court—Receiver—Official Bond—Interest—Pleading and Judgment.

1. Prior to the enactment of section 72 of The Code (November, 1883), clerks of the Superior Courts were not liable upon their official bonds for moneys received by them in the capacity of receivers of funds belonging to infants; but now, by virtue of that section, such bonds are responsible for all moneys and effects which may come to their hands by color of their office or under any decree or order of a judge, though such order or decree may have been irregular or even void for want of jurisdiction.

2. A bond executed prior to but current at the time of the enactment of that section would be liable for all such moneys and effects received thereafter while the bond was in force.

3. Where it was shown that in December, 1882, the clerk of a Superior Court who had theretofore been appointed a receiver of funds belonging to a minor, received from an administrator a sum of money belonging to a minor, and a receipt therefor, signed "Clerk of the Superior Court and

receiver of," etc.: *Held*, that he was liable upon his bond *as clerk*, inasmuch as under sections 1543-1544 of The Code it was made his official duty to receive and account for all moneys, etc., paid into his office by executors and administrators, and it will be presumed he received the money by virtue of that authority.

4. In an action to recover from the clerk and his sureties moneys received by him in his official capacity, the plaintiff is entitled to interest at 6 per cent per annum from the time of its receipt by the officer, and to 12 per cent from the time of demand and refusal to pay.

APPEAL from *Womack, J.*, at January Term, 1890, of NORTHAMPTON.

The defendant, James D. Boone, was continuously clerk of the Superior Court of the county of Northampton from December, 1879, until 8 December, 1884, and his codefendants are sureties to his official bonds, alleged breaches of which are the subject of this action.

At Spring Term, of 1880, of the Superior Court of that county, the court, on motion of the solicitor of the State, made an order relieving a former "receiver" (presently to be mentioned) and appointing the said clerk "receiver" . . . to manage the funds of said minor children and lunatics (numerous persons mentioned), including the relator (who was at that time an infant), for their benefit, and make his annual report," etc.

Afterwards, on 4 December, 1882, the said clerk, as such receiver, received from James W. Grant, administrator *de bonis non* of Samuel Presson, $770.59, which sum was due the relator (then an infant) as her share of her father's personal estate, and executed to him a receipt, whereof the following is a copy:

"770.59. Received of James W. Grant, as administrator *de* (80) *bonis non* of Samuel Presson, the sum of seven hundred and seventy dollars and fifty-nine cents, in full payment of Mary E. Presson's share of said Samuel Presson, which said sum was coming to her as distributee of said Samuel Presson. This 4 September, 1882.

(Seal.) JAMES D. BOONE,

Clerk of the Superior Court of Northampton County and Receiver of Mary E. Presson."

The said Mary E. Presson, after she attained the age of twenty-one years, on 18 March, 1885, demanded of the said Boone that he pay her the said sum of money, with interest thereon, and he refused and failed to pay or account to her for the same. Whereupon, she brought this action to recover the said sum. She alleges, among other things, that the said Boone misapplied, converted to his own use, and re-

fused to account to her for the same, etc., etc. The defendants denied most of the material allegations of the complaint, and the pleadings raised issues of fact.

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

"The plaintiff offered in evidence the record of the appointment of J. D. Boone as receiver of Mary E. Presson, the relator, at Spring Term, 1880, of said court. The defendants objected to this evidence, for that the record did not show that the court had jurisdiction of the person of Mary E. Presson or of her property; that this was not all of the record, in that the appointment of N. R. Odom, a former receiver, should be first introduced, which defendants contended was invalid, and that hence the appointment of Boone was invalid. This record of appointment of N. R. Odom was subsequently introduced by the defendants. Objection overruled, and exception by the defendants.

"The plaintiff then offered in evidence the receipt of Boone, (81) dated 4 September, 1882, and then closed his case."

With a view of showing that N. R. Odom (the former clerk and receiver) was never legally appointed receiver of Mary E. Presson's estate, the defendants introduced the record of said appointment, as follows:

"NORTH CAROLINA—Superior Court, Spring Term, 1877.

"It is ordered by the court that N. R. Odom be and hereby is appointed receiver for Mary E. Presson and Martha A. Presson, minor children of Samuel Presson, deceased, and that N. R. Odom is hereby authorized and empowered to collect and receive from James W. Grant, public administrator, who is administrator *de bonis non* of the said Samuel Presson, all sums of money that may be or came into his hands, belonging to said infants, and expend the income, if necessary, for their maintenance and support."

W. W. Peebles, a witness for the defendant, then testified that he and the former clerk of said court, the said J. D. Boone, made a thorough search of the records in said office for said county, and that no report or presentment by the grand jury that Mary E. Presson was a minor, having an estate, and was without guardian, could be found, and that no entry or memorandum of such report or presentment could be found; that the record introduced contained all that could be found in said office touching the appointment of said Odom as receiver of Mary E. Presson.

The defendants insisted, that when the court appointed Odom receiver of Mary E. Presson's estate it had jurisdiction neither of the person of

Mary E. Presson nor of her estate, and that the appointment was a nullity; and that the appointment of James D. Boone as receiver in his stead was also null and void, and asked the court so to charge.

The judge instructed the jury that, if the evidence is believed, (82) the defendant Boone received the money alleged in the complaint by virtue and color of his office as clerk of the Superior Court, and that the jury would answer the first issue "Yes." The defendants excepted to this charge.

The judge further charged the jury to allow the plaintiff six per cent interest from the time the defendant J. D. Boone received the fund until the time a demand was made on him, which was at the time of the service of the summons on the defendant Boone, and twelve per cent thereafter. The defendants excepted to this charge on the ground that the fund did not bear interest until a demand was made.

The following issues were submitted to the jury—

1. Did the defendant J. D. Boone receive the money mentioned in the complaint by virtue or color of his office as clerk of the Superior Court of Northampton County? To which the jury answered, "Yes."

2. What amount is due the relator? To which the jury answered, "$700."

There was a judgment upon the verdict, and appeal by defendants.

The defendants filed the following exceptions—

1. The judge erred in admitting the record of the appointment of J. D. Boone as receiver of Mary E. Presson.

2. In instructions to the jury.

3. In refusing to give the instructions asked by the defendants.

T. W. Mason for plaintiff.

R. B. Peebles and B. S. Gay for defendants.

MERRIMON, C. J., after stating the case: The defendant Boone was clerk at and before the Spring Term, 1880, of the Superior Court mentioned above. At that term he was appointed, as clerk, receiver of the funds belonging to the relator, then an infant. Afterwards, (83) on 4 December, 1882, he received of funds due to her, $770.59, which, it is alleged, he misapplied to his own use and purposes. He purported to be appointed such receiver under and in pursuance of the statute (Bat. Rev., ch. 53, secs. 22, 47). The liability of such clerk as receiver arising under these statutory provisions was not, at the time just mentioned, embraced by his official bonds, because, as has been decided, his office and duties as such clerk did not embrace the receivership and the duties and liabilities incident thereto. The receivership and its incidents were outside of and beyond his official duties as clerk, and hence

not embraced by his official bond and its purposes. Bat. Rev., ch. 17, sec. 137; *Kerr v. Brandon,* 84 N. C., 128; *Rogers v. Odom,* 86 N. C., 432; *Syme v. Bunting,* 91 N. C., 52.

The scope and purpose of the official bonds of clerks of the Superior Courts were afterwards enlarged by the statute (The Code, sec. 72), which provided, among other things, that the bond required should be void, "If he (the clerk) shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands by virtue or color of his office, or *under an order or decree of a Judge, even though such order or decree be void for want of jurisdiction or other irregularities,*" etc. This statutory provision greatly enlarged the compass of the clerk's bond, and, as enlarged, it embraces receiverships and the incidental liabilities growing out of them. *Syme v. Bunting, supra.* But the receivership and the liability growing out of it in this case was created and arose before the statutory provision just cited, and it operated only prospectively; it did not apply to and embrace such liabilities existing at the time it was enacted. *Syme v. Bunting, supra; Thomas v. Connelly,* 104 N. C., 342. The bond of the clerk current at the time of the enactment would, however, embrace such liabilities of the

(84) clerk arising thereafter, because it was contemplated, at the time the bond in such case was given, that new and additional duties and obligations might be added to those of the clerk existing at that time. The statute so expressly provided. Bat. Rev., ch. 17, sec. 137; *Wilmington v. Nutt,* 78 N. C., 177; S. c., 80 N. C., 265.

It appears that the defendant clerk and receiver received the fund in question in December of 1882. The statute enlarging the scope of clerk's bond above cited took effect on the first day of November, 1883. The Code, sec. 3866. The bond sued upon does not, therefore, embrace the liability of the defendant clerk as receiver. *Syme v. Bunting, supra.* It might possibly be otherwise if it appeared that the clerk, as receiver, had the fund at and after the time the enlarging statute took effect. It does not appear that he so had the same.

It is made a ground of defense in the answer of the defendants, that the appointment of the defendant clerk as receiver of the relator was void, because, as alleged, there was no action pending in which such appointment might be made, nor was there any presentment of a grand jury that authorized such appointment as contemplated and intended by the statute (Bat. Rev., ch. 53, secs. 21, 22, 46, 47) then in force. The appointment seems to have been, at least, irregular. So far as appears, it was made upon the mere suggestion and motion of the solicitor for the State. But we need not decide that such appointment was or was not void, because we are of opinion that the relator is entitled to recover whether the defendant clerk was or was not such receiver.

The statute (The Code, secs. 1543, 1544; Laws 1881, ch. 305, secs. 1, 3) prescribes that "It shall be competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of clerk of the Superior Court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of (85) his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector, and his sureties on his official bond, to the extent of the amount so paid.

"It shall be the duty of the clerk, in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office."

Now, when a clerk receives money as contemplated by this statutory provision, he clearly receives it by virtue of his office. It is made his duty, and he is required to receive money in the cases provided for, and in the nature of the matter he is charged and chargeable with it as clerk when and as soon as he receives it. He is required to keep the same safely until he shall pay it to the persons entitled to have the same. His bond is intended to secure "all moneys and effects which have come or may come into his hands by virtue or color of his office," etc. *Thomas v. Connelly, supra; Cassidey ex parte,* 95 N. C., 225; *Sharpe v. Connelly,* 105 N. C., 87.

It appears here, by and from the complaint, among other material facts alleged, that an administrator *de bonis non,* after the lapse of more than twelve months next after the date of his letters of administration, paid the sum of money mentioned for the relator, a distributee of the intestate, to the clerk of the Superior Court of the county where such letters were granted; that the clerk gave his receipt for the same, signing it as "Clerk of the Superior Court of Northampton County, and receiver of Mary E. Presson," the relator, and under the seal of his office. The clerk thus received money that he might receive and be charged with in a case in the way provided for by the statute. He seems to have had the statute in view, and to have intended to comply with its requirements. He gave his receipt as clerk "under the seal of his office"—that is, the seal of the court—kept and used by him. He had no other seal of office required or recognized by law. Hence, the seal of the (86) court is meant. Although the clerk may have been receiver, still he might receive such fund into his office as clerk. The statute required that he should receive it as clerk, to be paid out to whomsoever might be entitled to have it. It was in his hands—in his office—for all lawful purposes. He received it, as he might do, as clerk as well as receiver. He purported to receive it by virtue of his office in the case provided for

by law. Else, wherefore did he give and sign the receipt as clerk under his seal of office? There is no reason why he might not receive the fund into his office as clerk, although the court might, in some appropriate pertinent way, require him to deal with the fund as receiver, if he were such receiver. He might be chargeable with the fund in the double capacity of clerk and receiver. In a proper case, the court might have jurisdiction to require him, in such double capacity, to account for and dispose of the fund according to law. The mere fact that the clerk was receiver did not prevent him from receiving the fund that he was required by law to receive as clerk.

As the defendant might thus receive the fund and did so, as appears from the pleadings, and his receipt not being denied, the law charged him with it as clerk by virtue of his office, and when he made default in failing to pay the same to the relator, who was entitled to have it, as he was bound to do, she at once became entitled to have her remedy for such default against his sureties to his appropriate official bond for a breach of the condition thereof.

Nor is there any just reason why the relator may not have her remedy in this action, because the allegations of the complaint fully develop informally her cause of action against the defendant as clerk as well as receiver, and it appears from material facts admitted in the answer, and the verdict of the jury upon the pertinent issues of fact sub-
(87) mitted to them, that the relator is entitled to have the judgment appealed from. When the cause of action appears sufficiently from the complaint, though informally alleged, and the case is tried upon its merits, the court ought to enter such judgment, as the pleadings, the admissions of fact, the findings of fact in some cases by the court or a referee, or the verdict of a jury upon issues submitted to them, warrant, without regard to an imperfect or improper demand for judgment in the complaint or other pleadings, or whether there be any formal demand therefor. The merits of the matter litigated and settled appearing, the law at once suggests the proper judgment to be given. While it is far better and very desirable that the pleadings shall be directly pertinent, precise and orderly, still when they can be upheld as sufficient, this must be done, if to do so works no injustice to a party. This is the spirit and purpose of the present method of civil procedure. *Dempsey v. Rhodes,* 93 N. C., 120; *Moore v. Nowell,* 94 N. C., 265; *Harris v. Sneeden,* 104 N. C., 369.

The exception to the instruction the court gave the jury as to interest is unfounded. As the defendant clerk failed to pay the relator the money he had so received when she demanded that he pay her the same, the presumption is that he used it as soon as he received it. He might show the contrary. If he used it, he was properly chargeable with inter-

est at the rate of six per centum per annum, and twelve per centum, certainly, from the time of the demand. The Code, sec. 1890; *S. v. Allen,* 27 N. C., 36. The judgment is

Affirmed.

Cited: Smith v. Patton, 131 N. C., 397.

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(88)

J. L. DOVER AND WIFE v. H. L. RHEA ET AL.

Trust—Trustee—Contract—Statute of Frauds—Evidence.

1. Where A conveyed a tract of land to B upon a parol trust to pay certain judgments, etc., and these were paid off and discharged with the proceeds of other lands held by A: *Held,* that a trust resulted to him, and that such an interest cannot be transferred by parol.

2. Although the trustor intended to give the land, which he sold, to his daughter, the plaintiff, and defendant agreed by parol to convey the lands held in trust to her: *Held,* that this did not constitute the defendant a trustee for the plaintiff, but amounted to a parol contract to convey, which was within the statute of frauds, and that the resulting trust descended to the heirs at law of the trustor.

ACTION, tried before *Philips, J.,* and a jury, at Fall Term, 1890, of MADISON.

The purpose of the action was to declare the defendant a trustee for the benefit of the plaintiff Polly as to a certain tract of land described in the complaint. The only issue submitted to the jury was as follows:

"Does H. R. Rhea hold the land under a parol agreement to convey to Polly Dover?"

It was in evidence that J. L. Rhea, the father of the *feme* plaintiff and defendant, conveyed the said land (it being known as the Arrington tract) to his son N. L. Rhea by deed absolute, upon a parol trust to sell the same and pay certain judgments which had been obtained against the said J. L. Rhea by one Flasher, and also certain costs, etc. That said N. L. Rhea, with the consent of his father, conveyed to the defendant by deed absolute, upon similar parol trusts, all of said tract except twelve acres, which he had sold to one Hensley, and substituting for said twelve acres, twenty-five acres of other land which his father had previously given him. That there was an express agreement that the defendant should hold all of said land upon the trusts above mentioned. (89)

It was also in evidence that said J. L. Rhea had divided all of his land (except that above mentioned) among his children and conveyed to them except a tract intended for Polly.

That afterwards, being pressed upon the judgments and being unable to sell the land conveyed in trust, and there being an offer for the tract intended for Polly, J. L. Rhea sold and conveyed the same to W. S. Rhea for $400, and that this was done upon an understanding with the defendant that he would convey the land he held in trust to said Polly whenever she called for a deed. It was also in evidence that defendant took the money and paid off and discharged the said judgments, costs, etc.

The defendant denied that he took the land in question upon any trust whatever, claiming that he purchased the same for a valuable consideration. He denies that he ever promised to convey the land to Polly. There was no evidence that Polly was ever in possession of the tract set apart and intended for her, nor was it ever conveyed to her. The Flasher judgments were against J. L. Rhea as principal, and the defendant as his surety.

The defendant objected to evidence as to his declaration that he would convey the land to Polly, claiming that it was inhibited by the statute of frauds. It was admitted, and he excepted.

The court, after stating the contention of the parties, etc., charged as follows:

"If, upon the whole evidence, it is shown to the satisfaction of the jury that J. L. Rhea, in the division of his lands among his children, set apart a tract which he intended for his daughter Polly, and also set apart a tract to be sold to pay off the judgments against him, which he conveyed to his son N. L. Rhea for that purpose and with that understand-
(90) ing, and N. L. Rhea, while holding the same for that purpose, conveyed twelve acres to Hensley, and to replace the value of the twelve acres conveyed twenty-five acres spoken of in the evidence, together with the said tract to his brother H. R. Rhea, with the consent of J. L. Rhea, and H. R. Rhea accepted the said deed from N. L. Rhea for the same purpose and with the same understanding, then he was simply a trustee. And if before H. R. Rhea sold the land or paid the judgments, he agreed with J. L. Rhea that if J. L. Rhea would convey to W. S. Rhea the tract intended for Polly and let him take the money and pay on the judgments, he would hold the tract (including the twenty-five acres) which N. L. Rhea had conveyed to him for Polly, and make a deed to her for the same, and J. L. Rhea conveyed the land to W. S. Rhea and the purchase-price was paid to H. R. Rhea, then the jury should answer the issue, 'Yes'; otherwise, they will answer, 'No.' "

There were several exceptions to the charge, but these are not necessary to be stated to a proper understanding of the opinion.

The jury found the issue submitted to them by the court, which appears in the record of the plaintiff.

The counsel for the defendant then moved for judgment *non obstante veredicto*. The court stated to counsel that a judgment *non obstante veredicto* was a judgment rendered in favor of the plaintiff, notwithstanding the verdict for the defendant, and that this judgment was given upon motion, which can only be made by the plaintiff, and refused the motion of the defendants' counsel, to which he excepted.

The counsel for the defendants moved that, notwithstanding the verdict, that as it appeared that the defendants had paid several hundred dollars to discharge encumbrances upon the land in dispute held chargeable with such sum, that an account be ordered to ascertain the same. Motion refused by the court, and the defendant excepted.

The court denied the motion for a new trial and gave judgment for the plaintiff. (91)

The following note was appended by his Honor:

"I sign and settle the above as the case on appeal for the Supreme Court, notice of time and place for settling the same being waived by the parties. I send up the entire evidence because of the defendants' motion for judgment *non obstante veredicto* and his motion for a new trial. For these reasons I adopt the suggestion of the defendants' counsel to send up all the evidence, that the case and my rulings may be clearly seen and fully reviewed by the Supreme Court."

The judgment declared that the plaintiff was the owner of the land, and that, upon the failure of the defendants to convey to her in ten days, the decree should operate as passing the title.

Defendants appealed.

T. F. Davidson for plaintiffs.
W. H. Malone (by brief) for defendants.

SHEPHERD, J. There was evidence tending to show that J. L. Rhea, in effect, conveyed the land to the defendant upon a parol trust to sell the same and apply the proceeds to the satisfaction and discharge of the judgments and costs mentioned in the complaint. Assuming this to be true, we are, nevertheless, unable to find anything in the record which warrants the judgment of his Honor declaring that the defendant held the land in trust for the *feme* plaintiff, and directing that he execute a conveyance to her. If, as contended, the purposes of the trust were effectuated by the trustor with other means furnished by him, it is plain that there was a resulting trust in his favor. 1 Perry on Trusts, 152. This resulting trust descended to the heirs at law of the trustor, unless the *feme* plaintiff can show that he transferred it to her in his lifetime.

(92) It is well settled that while an express trust in lands may, in this State, be created by a parol declaration made contemporaneously with the transfer of the legal title (*Pittman v. Pittman,* 107 N. C., 159), such trust, when created, together with the resultant interest of the trustor, can be conveyed only in the same manner as other equitable interests in real property. *Patton v. Clendennin,* 7 N. C., 68; *Holmes v. Holmes,* 86 S. C., 208. The question then to be determined is whether the resultant interest of J. L. Rhea has been acquired by his daughter, the *feme* plaintiff.

The said trustor had another tract of land which he intended to give his daughter, but instead of conveying it to her he sold it and with the proceeds paid off the judgments and costs above mentioned. The *feme* plaintiff had no legal or equitable interest whatever in this land, and her father was at liberty to dispose of it as he pleased. It is true that the defendant promised that, upon a sale of the same and the payment of the said indebtedness, he would convey the tract which he held to the *feme* plaintiff; but if we consider this as a mere agreement to convey, it is void under the statute of frauds, and if we treat it as a declaration of trust it must likewise fail, because it is not evidenced by any writing, and was not made in connection with a conveyance of the legal title. *Frey v. Ramsour,* 66 N. C., 466; *Pittman v. Pittman, supra.* It amounted simply to a parol agreement to convey the land to the *feme* plaintiff, and this, we have seen, cannot be enforced where it is denied by the answer. *Hollar v. Richards,* 102 N. C., 545; *Fortescue v. Crawford,* 105 N. C., 30. It is urged, however, that the plaintiff is entitled to relief by way of subrogation or by constructive trust, but this is founded entirely upon the idea that she had some interest in the property sold by her father, and, as such was not the case, it is clear that the position cannot be maintained. Her father relied simply upon the verbal agreement of the defendant to convey, and as the latter denies the agreement it must follow that
(93) there was error in holding that the plaintiff acquired the equitable title to the land in question.

As the case goes back for a new trial, we think it proper to say that the other heirs at law may be made parties, and if a resulting trust be established, the plaintiff may, upon petition, obtain substantial justice by requiring the heirs to account for the advancements made to them.

New trial.

THOMAS T. FLOYD ET AL. v. EDWIN I. THOMAS.

Waste—Evidence, Collateral and Direct—Witness.

In an action by remainderman against tenant for life for waste, the defendant testified that he used the land as a prudent owner of the fee would have done; and, further, that at the time of the commission of the alleged waste he believed he was the owner of the fee: *Held*, that the testimony of his belief of ownership was not collateral merely, but went directly to support his evidence as to the manner in which he had used the land, and, therefore, might be contradicted by competent proofs.

ACTION of waste, tried at Spring Term, 1890, of NORTHAMPTON, before *Womack, J.*

The plaintiffs alleged as a ground for demanding damage that the defendant committed voluntary waste by cutting valuable timber trees, and also permitted the dwelling-house, stables, barns and outhouses to fall into decay for want of repairs.

The defendant answered that he had dealt with the land in a husbandmanlike manner, and, in clearing, had been careful to observe the proper proportions which prudent owners in fee would, between cleared and woodland, observe in clearing the woodland, and that, until the dwelling-house was burned, it was occupied by John G. Floyd (94) and wife, Emily. The defendant averred further that, under his management, the land had been made more valuable than when he took possession.

The defendant, Thomas, was examined as a witness in his own behalf, and testified, in substance, that there had been no waste committed; that he (witness) had used the land as a prudent man would his own land, and that at the time the acts alleged to constitute waste were committed he believed that he was the owner in fee simple of the *locus in quo*, and used it as he did his own land.

On cross-examination he was asked by plaintiffs' counsel if he did not know that he never was the owner in fee simple of the land. Witness answered "No."

He was then asked whether in another action between plaintiffs and witness, determined at January Term, 1889, of Northampton Superior Court, it had not been decided that witness was tenant for life of Mrs. J. G. Floyd, and that the plaintiffs herein were the remaindermen. Witness answered "Yes."

Witness was then asked whether he did not, in his verified answer, filed in that action, admit that when he bought the land from J. G. Floyd he knew that said Floyd paid for it with the proceeds of slaves in

which Mrs. Floyd had a life estate, with remainder to the present plaintiffs. Witness answered "No; he never knew anything about how it was paid for."

Thereupon the plaintiffs offered in evidence the said answer of defendant. Defendant objected, on the ground that the matter was collateral and plaintiffs were bound by his answer. Objection overruled, and defendant excepted to the part of the answer mentioned which admitted notice of the purchase of the land with said slaves at the time witness purchased. Verdict for the plaintiff. Motion for a new trial refused. Judgment. Appeal by defendant.

(95) *R. O. Burton, Jr., for plaintiff.*
W. H. Day and R. B. Peebles for defendant.

AVERY, J., after stating the facts: The defendant, after testifying on his examination in chief that he had, as tenant for life of Mrs. Emily Floyd, used the land as a prudent man would his own, stated further, without objection, that at the time when it was alleged he had incurred liability for waste he believed he was the owner in fee simple, and had exercised the same care in the management of it that he had exhibited in dealing with his own land.

The gravamen of the complaint is that the defendant unlawfully cut down and destroyed valuable timber trees. The defense is that he cut down trees in clearing such a portion of the woodland as a prudent owner in fee, observing the accepted rules of good husbandry, would have cleared for cultivation, and was not therefore answerable to the remainder*men for voluntary waste.*

The jury, in responding to the issues, would be required to pass upon the question whether the defendant inflicted lasting injury to the inheritance in preparing timbered land for cultivation, or whether the cutting of trees was merely incidental to the opening for cultivation of such portion of the woodland as, in the exercise of reasonable care, he would have cleared had he been owner in fee. He had been allowed to testify, without objection, that he did not believe at the time he was only a life tenant. Whether this testimony was competent or not, it was certainly not collateral. The defendant had been permitted to state his opinion as to the nature of his own estate in the land. He had, therefore, the benefit of whatever weight the jury might give to that fact in determining whether he was as careful as a prudent owner of the fee would have been in adjusting the proportion of cleared and wooded land. Having testified, therefore, to an opinion which tended to corroborate his statement that in fact he managed the land as a skillful husbandman
(96) would his own, it was competent to contradict him by asking

whether he knew certain facts inconsistent with such belief on his part, and then to put in evidence a verified answer filed by the witness embodying statements not reconcilable with his evidence. 1 Greenleaf on Ev., sec. 449; *S. v. Kirkman,* 63 N. C., 246; Stephens' Dig. of Ev., Art. 132. Collateral facts are such as are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. 1 Greenleaf, sec. 52. As we have seen, the opinion given in this case became important on account of its tendency to corroborate the evidence of the defendant upon the very question on which the finding of the jury depended, and the plaintiff could not refrain from contradicting it without peril. The case, therefore, does not fall within the rule in reference to collateral matters. *Edwards v. Sullivan,* 30 N. C., 302. The belief that he was the owner in fee, if it existed, was calculated to stimulate the defendant to exercise care in dealing with the land. It was a motive to make him act the part of a prudent person holding the fee. Proof that he knew he had no more than a life estate was evidence, if not of an incentive to commit waste, at least of the absence of any selfish motive for protecting the inheritance against injury.

We think, therefore, that there was no error in admitting the testimony, and the judgment is

Affirmed.

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(97)

THOMAS J. HARRELL v. JOHN WILSON ET AL.

Fraud, When Courts Will Not Interfere to Remedy.

The courts will not set aside a decree confirming a judicial sale of land at the suit of one who, being a party to the original cause, alleges that he was induced by the purchaser not to bid at the sale or resist a confirmation thereof, at a grossly inadequate price, by a promise that the purchaser would reconvey to him. Both parties being guilty of the fraud, the law will leave them alone.

ACTION tried at May Term, 1890, of BERTIE, before *Armfield, J.,* on the verified complaint, which is in these words:

The plaintiff complains and alleges:

1. That on 9 October, 1882, the defendants above named commenced an action against this plaintiff in the Probate Court of Bertie, North Carolina, for partition by a sale thereof of the following land, to wit (here follows a description of the land, not material to the question before the court), in which said action the plaintiffs therein admit

Thomas J. Harrell, this plaintiff, to be the owner of an undivided three-fifths interest in, and to the same.

2. That on 3 November, 1882, a decree of sale was entered in said action directing a sale of said land for partition among the tenants in common, and James B. Martin, attorney for the plaintiffs in that action, was appointed by the court a commissioner to make said sale.

3. That said commissioner made sale of said land on 1 January, 1883, when and where J. B. Spivey and Etherton Williams became the last and highest bidders, in the sum of $300, which said sum was not a fair and adequate price for said land, the same being reasonably worth $1,000.

4. These defendants have admitted the rental value of the land
(98) to be worth $150 a year.

5. That said sum of $300 ought not to have been reported as a fair and adequate bid for said land, but a resale of the same should have been had; that the plaintiff, T. J. Harrell, was deterred and prevented from filing exceptions and objections to the report of the commissioner in said action, and filing objections and exceptions to said sale, for the reason that no report of sale was filed in said action until on 18 January, 1883, and on that day and simultaneously with the filing of the said report a decree was made confirming said report and ordering title to be made to the purchaser.

6. That on that day, to wit, 18 January, 1883, the plaintiff, Thomas J. Harrell, offered and tendered to the then clerk of the Superior Court of Bertie County, W. M. Sutton, the sum of $30, which was 10 per cent of the amount bid, which tender was made as an advance bid and for the purpose of having said land resold, which said sum of $30 so tendered by the plaintiff was refused and declined by said W. M. Sutton, the then clerk of the Superior Court of Bertie County, said Sutton stating at the time of said refusal that he was instructed by counsel for the plaintiff not to receive said sum.

7. That plaintiff was induced not to object to a confirmation of any report that might be made in the cause by the promises and representations of J. B. Spivey, who purchased the land under a verbal agreement with T. J. Harrell to let said T. J. Harrell have said land back, as it was the old homestead of plaintiff's ancestors; that said Spivey made said contract falsely and fraudulently, with no intention of performing it, for the purpose of inducing the plaintiff not to run the land, and for the purpose of inducing plaintiff not to object to said sale.

8. That by reason of said fraudulent acts of said Spivey, who
(99) was acting for his coplaintiffs in said matter, said decree of confirmation was made, and said final decree confirming said report is void in law and irregular, and ought not to bind the plaintiff.

9. That the plaintiff hereby tenders the sum of $30 advance on the amount of the bid in said action for the purpose of having said land resold.

10. That the rights of no third parties have intervened, and, if any, they were taken with notice of the fraud and irregularity in said decree confirming said report.

Wherefore, the plaintiff demands judgment:

1. That the final decree confirming the report of sale made in the action referred to in this action be declared void, and that the same be set aside.

2. That a resale of said land be ordered.

3. All legal and equitable relief and costs.

The court rendered judgment as follows:

"This cause coming on to be tried, the court intimated an opinion that plaintiff could not recover upon his complaint, and the plaintiff, in deference to such intimation, submitted to a nonsuit and appealed."

F. D. Winston and D. C. Winston for plaintiff.
No counsel contra.

AVERY, J., after stating the case: It is familiar learning that he who comes into a court of conscience for relief must come with clean hands. Where two persons enter into a scheme to prevent fair competition of bidders for a tract of land exposed to public sale, and thereby defraud others who are interested in causing it to bring a fair price, and one, in furtherance of the plan, buys the property at much less than its true value, and takes title in his own name, a Court of Equity will not set aside the decree confirming the sale at the instance of the other who is *particeps doli,* but will leave the parties in the position where (100) they have placed themselves. 1 Pom. Eq. Jur., sec. 401.

In the seventh paragraph of his complaint the plaintiff alleges that he was deterred from bidding for the land and making it bring its full value, and also from objecting to the order confirming the sale, by a verbal promise of the defendants, J. B. Spivey and Etherton Wilson, to convey to him the old family homestead, a tract of land bought at said sale. Such an agreement will not be enforced. It is not necessary to inquire whether relief should be sought in a new action or by motion in the original cause, since the complainant, on his own showing, cannot invoke the aid of the court to set aside the sale for fraud in which he participated. We concur, therefore, with the judge who tried the cause below in the opinion that the plaintiff is not entitled to recover upon the facts stated in the complaint. The judgment must be

Affirmed.

(101)

J. K. PURIFOY, APPELLANT, v. RICHMOND & DANVILLE RAILROAD COMPANY.

Railroads—Right of Way—Counterclaim—"At"—Change of Terminus.

1. When a railroad is empowered to connect with another railroad "at the city of Charlotte, at the point which may be found most practicable," and the connection is made at a point 1,000 yards outside the city limits, but at the most practicable point, this is within the charter. "At" does not necessarily mean "in" the city.

2. When authority is given to connect with the C. & S. C. Railroad or with the N. C. Railroad at Charlotte, and the railroad locates its line and proceeds to construct it to a junction with the N. C. Railroad, but, a few months before its completion to the latter point, crosses another railroad which connects with the C. & S. C. Railroad, and by permission of this latter railroad it runs its cars temporarily over it to the C. & S. C. Railroad (laying down a third rail by reason of difference in gauge), this is not a "construction of its railroad to a junction with the C. & S. C. Railroad" which deprives it of its election to connect with the N. C. Railroad.

3. Where the railroad was completed through the *locus in quo* prior to the act of 1872 (The Code, sec. 1952), it was not necessary to the validity of the location that a map of the route should be filed.

4. When the charter provides that, in the absence of any contract, the corporation acquires title to 100 feet on each side of the track, and if no claim for damages is brought in two years from the completion of that part of the road, it is barred, the corporation has a valid title to the right of way as its track is completed. *R. R. v. McCaskill*, 94 N. C., 746.

5. The title of the railroad to the right of way, once acquired, cannot be lost by occupancy as to any part of it by the lapse of time. The Code, sec. 150; *R. R. v. McCaskill*, 94 N. C., 746.

6. In a civil action, when there is no conflict of evidence, the judge should direct the verdict to be entered.

ACTION tried before *Philips, J.*, and a jury, at Spring Term, 1890, of MECKLENBURG.

Appeal by the plaintiff. The facts sufficiently appear in the opinion.

W. B. Dowd for plaintiff.
D. Schenck and G. F. Bason for defendant.

CLARK, J. Acts Special Session 1868, ch. 8, incorporated the A.-L. Railroad of South Carolina, and authorized it "to construct, equip and

operate its road within the limits of this State from any point on the South Carolina line to such point on the C. & S. C. Railroad or the N. C. Railroad at Charlotte as shall be found most practicable," and gave the company "all the rights, powers and privileges conferred on the C. & S. C. Railroad by chapter 84, Acts 1846-47." Sections 25 and 27 of this last act give the corporation a right of way of (102) 100 feet on each side of the center of the roadbed, reserving to the owners the right to apply for an assessment of damages within two years from the completion of that part of the road, and if application is not made within that time the claim is barred.

By a succession of charters and conveyances, all of which were in evidence, and are set out in the record, the rights conferred by aforesaid charter of 1868 have been transferred to and are vested in the A. & C. A.-L. Railroad Company, the principal defendant.

The plaintiff sues in ejectment to recover land occupied by the track of defendant A. & C. A.-L. Railroad, and damages for use and occupation. The *locus in quo* lies east of the A. & C. A.-L. Railroad, Trade street depot, in Charlotte, and between said depot and the junction of the A. & C. A.-L. Railroad with the N. C. Railroad, which last point is 1,000 yards east of the city limits of Charlotte. The plaintiff's entire tract lies within the 100 feet from the center of the track of the defendant A. & C. Railroad Company, and said company in its answer by way of counterclaim sought to recover possession of the whole of said lot. Two sets of issues were submitted by the court—one as to the plaintiff's right to recover the land covered by the roadbed and damages; the other, as to defendant's right to recover the whole tract, it being within the 100 feet. There was no conflict of evidence, and the court instructed the jury that they should return a verdict in favor of the defendant upon all the issues, and it was so entered. The plaintiff excepted to such direction and to the judgment, and appealed.

The plaintiff contends:

1. That the A. & C. A.-L. Railroad Company, having elected to construct its road to a junction with the C. & S. C. Railroad, could not afterwards change it to connect with the N. C. Railroad, and asked the court so to charge. But the evidence did not support (103) this view. There was no evidence that the A. & C. A.-L. Railroad Company ever located its line or constructed its road to a junction with the C. & S. C. Railroad. The evidence is that in 1871, when the A. & C. A.-L. Railroad Company had completed its road to its Trade street depot at the north end of Charlotte, and further northeastward through the *locus in quo,* it found the A., T. & O. Railroad running from that point round the southwest side of Charlotte to the C. & S. C. Railroad, and, by consent of the A., T. & O. Railroad, it used its track temporarily

some eight months to transfer its freight and passengers, laying down a third rail on the A., T. & O. Railroad, owing to the difference in gauge. In the meantime the A. & C. A.-L. Railroad Company was prosecuting the construction of its line as located, and for which it had bought rights of way straightforward to their connection with the N. C. Railroad on the northeast side of Charlotte, to which point it was completed prior to August, 1872. The evidence shows no construction of the A. & C. A.-L. Railroad to the C. & S. C. Railroad, but a mere temporary connection over another railroad, and to make which the A. & C. A.-L. Railroad Company had to run backwards and over a part of its own line. Its natural connection was from the Trade street depot straightforward to the N. C. Railroad, and the evidence is that it had located and at that very time was prosecuting the construction of its line to its junction with the N. C. Railroad, to which point it was completed eight months later. Besides, as the evidence is uncontradicted that when this temporary connection was had over the A., T. & O. Railroad, the A. & C. A.-L. Railroad Company had already completed its track through the *locus in quo,* we do not see how the plaintiff could be affected if its contention that there had since been a change of the terminus was sound, for, before going to either terminus, the track of the A. & C. A.-L. Railroad had been built through this land and title to the 100 feet on either side acquired
(104) by virtue of its charter, and such track has been continuously used ever since.

2. The plaintiff further contends that the charter authorized a connection with the N. C. Railroad *at* Charlotte, and that this is not done by the present connection, which is at a point 1,000 yards east of Charlotte. Possibly this point might have been raised by the owner of land sought to be condemned at the junction outside of the city limits, but we cannot see how it can avail the plaintiff, through whose land the track ran, any more than any other landowner along its whole line, for, after passing through the plaintiff's land, the connection could still have been made either within or without the city limits. Nor do we concur in plaintiff's view that the authority to make the connection "at such point on the N. C. Railroad at Charlotte as shall be found most practicable" necessarily required the connection to be made *in* the city. The phraseology imports some discretion, and the evidence was that the location as selected was the best, according to the surveyor's report, and cost $80,000 less than any other would have done.

The A. & C. A.-L. Railroad is 272 miles long, and authority to connect with the N. C. Railroad at Charlotte at the most practicable point is surely not transgressed when the most practicable point is half a mile from the city limits. "At" is defined by Webster to express, primarily, "nearness in place or time. *At* the house may be in or near the house."

In Park's appeal, 64 Pa. (St.), 137, where a railroad 24 miles long was chartered from a point "at or near Parkersburg," it was held that a connection one and a half miles east of Parkersburg was not a transgression of the act. To the same purport is *O'Neal v. King,* 48 N. C., 517. But we need not cite further authorities.

3. The plaintiff further contends that the location was invalid because no map of the route was filed as required by the act of 1872 (The Code, sec. 1952). But, prior to the passage of that act, the (105) A. & C. A.-L. Railroad had been constructed through the *locus in quo,* and the filing of a map was therefore not required.

It was in evidence, and not contradicted, that the A. & C. A.-L. Railroad was constructed through the *locus in quo* in 1871. This gave it a title to 100 feet on each side from the center of the track, and no statute of limitations runs against the railroad by reason of the occupancy of the right of way. The Code, sec. 150; *R. R. v. McCaskill,* 94 N. C., 746. The plaintiff did not buy the land till 1874—three years after the railroad was completed, and when he was put thereby on inquiry. He did not obtain a deed covering the part he sues for till 1881, and no demand was made till 1889—eighteen years after the construction of the railroad. Upon the evidence, the defendant was entitled to recover possession of the land upon his counterclaim. Whether the plaintiff is entitled to allowance for betterments, upon the facts, under The Code, sec. 473 (*R. R. v. McCaskill,* 98 N. C., 526), is a matter which is not before us.

In the view we have taken of the case, the other exceptions noted by plaintiff become immaterial and need not be adverted to.

There being no conflict of evidence, there was nothing for the jury to pass upon. His Honor properly, it being a civil action, directed the verdict to be entered.

Per Curiam. No error.

Cited: Love v. Gregg, 117 N. C., 469; *Spruill v. Ins. Co.,* 120 N. C., 148; *Nelson v. Ins. Co., ib.,* 305; *Woodbury v. Evans,* 122 N. C., 781; *Riley v. Carter,* 165 N. C., 337.

(106)

JAMES E. SKINNER AND WIFE v. EMILY CARTER ET AL.

Appeal—Special Proceedings—Partition.

1. The omission in a report of commissioners to make partition of lands to state affirmatively that the allotments, in their opinion, were equal in value, affects the substantial rights of the parties, and the clerk or judge may set it aside with directions either that the commissioners shall make a reallotment or that others shall be appointed to do so.

2. The refusal of the court to hear affidavits upon a motion to confirm such report is a matter of discretion and not reviewable.

3. An appeal from an order setting aside such report will not be dismissed as premature.

SPECIAL PROCEEDING for partition of land, heard before *Whitaker, J.*, on appeal from the clerk, at Spring Term, 1890, of GATES.

The defendant had no counsel before the clerk, and filed no answer to the complaint.

As the record shows, the commissioners were regularly appointed, and met on the premises, and, after being duly sworn, divided the land and made their report. The plaintiffs excepted to the report, as shown by the record. The clerk overruled the exception and confirmed the report, from which the plaintiffs appealed to the Superior Court at term.

On the hearing of the appeal the defendant Caroline Carter employed counsel and moved to dismiss the appeal, because the exception filed was to a finding of fact by the commissioners, which is not a subject of exception. The court overruled the motion, and the defendant excepted.

The defendant then moved to remand the report to the commissioners, in order that any defect in the form thereof might be covered by
(107) amendment. This was also refused, and the defendants excepted.

The defendants then asked to be allowed to show by affidavits that the commissioners did in fact estimate the land and divide it according to its value, and that the failure so to show in their report was a mere clerical error, which they ought to be allowed to have corrected. This was also refused, and the defendants excepted.

Counsel for defendants then called the attention of the court to the fact that the report was drawn by plaintiffs' counsel, who would not state that the commissioners did not in fact estimate the land in their division. Plaintiffs' counsel then stated that, however honest the commissioners may have been in their estimate of the land, he was prepared to show by affidavits that the division was not equal as to value.

The court stated that it did not desire to hear affidavits on either side, and ordered the cause to be remanded to the clerk, with instructions to appoint new commissioners to divide the land according to law.

The defendant Caroline Carter excepted and appealed.

S. L. Scull for plaintiffs.
L. L. Smith for appellants.

AVERY, J., after stating the facts: The procedure in special proceedings instituted (under the provisions of The Code, ch. 47) for partition, or for sale for partition, is the same as where the relief sought in such proceedings is of a different character. The Code, sec. 1923. The rules of practice prescribed by the statute, where petitions are filed for the purpose of opening ditches through swamp lands, are also similar. The Code, sec. 1324. Where exceptions were filed to the report of commissioners appointed to lay off a drainage ditch, this Court compared the findings of fact made by them to the verdict of a jury, which (108) "must stand, unless set aside." *R. R. v. Ely,* 101 N. C., 8. In *R. R. v. Phillips,* 78 N. C., 50, *Justice Rodman* says: "There can be no appeal, in its ordinary acceptation, from the commissioners to the Superior Court, for the reason that they make their report directly to the Superior Court, just as a referee or master does." It seems, therefore, that even before the passage of the act of 1887 (chapter 276), which gives to the judge power, whenever special proceedings are brought before him by appeal or otherwise, to make any order that could have been made by the clerk, the report of commissioners appointed by the clerk was treated by the judge as if submitted directly to him like that of a referee.

It is well settled that where a case is heard on the report of a referee at term time the court may, in the exercise of an admitted discretion, set it aside without assigning any reason for such action. *Busbee v. Surles,* 79 N. C., 51.

But the counsel for the appellant cites and relies upon section 289 of The Code, which provides that "no report or return made by any commissioners shall be set aside and sent back *to them* or others for a new report by reason of any defect or omission not affecting the substantial rights of the parties, but such defect or omission may be amended by the court or by the commissioners by permission of the court." If we concede that the discretionary power extends only to cases where the defect complained of does not affect a substantial right, it is obvious that if in fact it appeared from the report of the commissioners that they allotted to each of the tenants in common a share equal in extent, but not in value, to that of her cotenant, or if the report failed to show affirmatively that the shares were, in their estimation, of equal value, the error

which the court was attempting to correct by re-reference was a radical and important one, involving the question whether they were guided by a just principle in making the partition. When such a question was involved, the judge might have heard the affidavits both of the (109) defendant and the plaintiff, but he did not deem it best to do so, and no appeal lies from his refusal. Having the power to set aside the report, he might also make any order that could formerly have been made by either the clerk or the judge under such circumstances. He might, therefore, have appointed new commissioners or have ordered those already appointed to act again, or he was empowered to remand the proceedings, with directions to the clerk to appoint others, as he did. Holding as we do that the judge below had the power to remand to the clerk, with instruction to appoint other commissioners because the omission of the commissioners affected a substantial right of the plaintiff, we think that the appeal is not premature and the action should not be dismissed for the reason that this case falls under the exception laid down in *Blackwell v. McCain,* 105 N. C., 460, that an appeal does lie from interlocutory orders when "it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal." The Code, sec. 548.

Affirmed.

Cited: Hanes v. R. R., 109 N. C., 492, 493; *Worthington v. Coward,* 114 N. C., 291, 292.

(110)

J. P. HORNE v. THE PEOPLES BANK OF MONROE.

Contract—Statute of Frauds—Issues.

1. Immaterial issues should never, and issues embracing incidental facts should not, ordinarily, be submitted, and if excepted to in apt time will be ground for new trial.

2. The parol promise of one to pay the debt of another in the event the latter failed to make payment is void, under the statute of frauds, unless in the creation of the debt the creditor trusted to both the parties and credited them jointly and severally.

3. The defendant received the note of the plaintiff, executed to S. as collateral security for a demand against S., for which defendant alleged plaintiff was also liable; it was in evidence that the plaintiff, when the note was paid by him and surrendered to him by the defendant, in reply to a notice that he

would be held liable for the balance of the debt due from S., said, "I will have the matter settled if I can": *Held*, that such a declaration did not constitute a promise to pay the amount alleged to be due from S.

APPEAL from *Philips, J.*, at February Term, 1890, of UNION.

The plaintiff alleges, in substance, that from 25 October, 1888, to 21 January, 1889, he deposited with the defendant from time to time divers sums of money, aggregating the sum of $19,405.72; that from time to time during that period he drew checks upon the defendant, which were paid, for divers sums, aggregating $16,804.21, leaving a balance due to him of $2,601.51; that afterwards, on 1 February, 1889, he demanded of the defendant that it pay to him such balance, and it refused to do so; that he drew a check for the same, which was not paid, etc.; and he demands judgment for such balance and general relief.

The defendant admits that the plaintiff made such deposits, and that it paid checks as alleged, and the demand for the balance, but it alleges that the balance due to the plaintiff is but the sum of $365.69. It alleges that in 1887 and 1888 the plaintiff was sheriff and M. L. Stevens was treasurer of the county of Union; that the plaintiff, as such sheriff, was bound to pay to the said treasurer a large sum of money as taxes collected by him for said county; that he failed to pay the same, but executed to the said Stevens, treasurer, his promissory note for $5,270.75, dated 12 September, 1887, due one day from date; that said Stevens, as treasurer, "at divers times, with the consent and at the request of the plaintiff, drew checks upon the defendant for different sums of money, each check being payable to the party entitled to receive money from him as treasurer, or to his order, and that said checks were (111) paid by the defendant. But before the said checks were drawn the plaintiff made and delivered to the said Stevens his promissory note for the sum of about $5,200, which, with the consent of the plaintiff, the said Stevens deposited with the defendant as collateral security to cover and protect the checks drawn or to be drawn by the said Stevens upon the defendant, and paid by it as aforesaid; that the plaintiff in consideration of his failure and inability to pay to Stevens, as treasurer, the money due by him as sheriff, undertook and agreed with said Stevens and the defendant that if the defendant bank would honor and pay the said checks of Stevens, drawn as aforesaid, he, the plaintiff, would from time to time deposit money in the defendant bank, which should be applied to the repayment of the sums advanced and paid by defendant on the checks of said Stevens, and the plaintiff, in consideration of the advances of money so made by the defendant bank on said checks, further and expressly undertook and promised to pay the amounts so advanced by the defendant—the plaintiff at the time of said promise and agreement having in his hand the tax books of said county, upon which large

sums of money were due to him as sheriff for taxes which should have been collected by him and paid to said Stevens, and applied by the latter to the payment of the claims of those persons to whose order and for whose benefit the said checks were drawn.

"2. That under and by virtue of the said arrangement between the said parties the said Stevens, as treasurer, drew checks on the defendant bank to the amount of five thousand four hundred and seventy-seven dollars and fifty-one cents ($5,477.51), and the defendant paid the same; that afterwards Stevens deposited with the defendant bank the sum of six hundred and eighty-one dollars and sixty-nine cents ($681.69), which, with his consent, was applied *pro tanto* to his overdraft, leaving (112) a balance of forty-seven hundred and ninety-five dollars and eighty-two cents ($4,795.82) as the amount to be paid by the plaintiff under and by virtue of his said promise and undertaking.

"3. That afterwards, in September, 1888, Stevens deposited with the defendant bank the aggregate sum of twenty-five hundred and sixty dollars ($2,560), which the defendant bank retained under said promise and agreement, leaving a balance of $2,235.82 still due the defendant bank on account of said checks and overdrafts."

It further alleges that "In consideration and performance of his said prior request, and in the further consideration of the surrender by the defendant of plaintiff's note, which the defendant held also as collateral security for the repayment of the money paid by it on said checks, the plaintiff agreed with defendant that the said alleged balance should be applied, as far as necessary, to the repayment of the money advanced or paid by the defendant on the said checks," *etc.*

The plaintiff, in his reply to the answer, says:

"3. That it is untrue that Stevens, as treasurer, 'at divers times, with the consent and at the request of the plaintiff, drew checks upon the defendant for different sums of money,' and it is also untrue that a note amounting to $5,200 was deposited with the defendant by the said Stevens, treasurer, with the consent of the plaintiff, as collateral security to cover and protect the checks drawn or to be drawn by the said Stevens upon the defendant; that the plaintiff, as sheriff, did execute to the said Stevens, as county treasurer, his note for $5,270.75, which said note the said Stevens deposited, as plaintiff is informed and believes, with the defendant after its maturity and without the knowledge or consent of the plaintiff, and the said note was paid by the plaintiff to the said Stevens and surrendered to the plaintiff by the defendant (113) without any notice to the plaintiff that the defendant had or held any claim upon the same; that it is untrue that the plaintiff undertook and agreed with the defendant and the said Stevens to pay the defendant any sum of money which it should expend in cashing the

checks or drafts of the said Stevens, or to deposit money with the defendant to be applied to the repayment of such sums as the defendant had advanced or should advance on the checks of said Stevens, or that the plaintiff obligated himself to the defendant, or in any way assumed liability for the debts of the said Stevens in any sum whatever contracted with the defendant by check, draft or otherwise.

"7. That it is true that the defendant bank surrendered to the plaintiff his note, executed to the said Stevens, county treasurer, for the sum of $5,270.75, but it did so voluntarily, without any notice to the plaintiff that it had or held any claim against him on account thereof, and the plaintiff paid the balance due by him on said note to the said Stevens without notice of any such claim on the part of the defendant bank."

On the trial the defendant tendered the following issues:

"1. Was the money which was paid out by the defendant bank upon the checks of M. L. Stevens, county treasurer, or any part of it, advanced and paid out upon the credit of plaintiff and for his benefit?

"2. If so, how much was so paid out by defendant?

"3. Was the note for $5,270.75, mentioned in the answer, dated 12 September, 1887, and signed by J. P. Horne, sheriff, and due one day after date, assigned to the defendant to secure any money that defendant might pay out on the checks of M. L. Stevens, county treasurer?

"4. If so, when was such assignment of the note made?

"5. How much money did defendant pay out for M. L. Stevens, county treasurer, on account of this assignment over and above what has been paid back to it by deposit of M. L. Stevens, county (114) treasurer?

"6. When did plaintiff first have notice that said note had been so assigned to defendant bank?

"7. What amount was owing by the plaintiff to M. L. Stevens, county treasurer, at the time of such notice?"

His Honor refused to submit these issues to the jury or any one of them, and the defendant excepted, plaintiff's counsel having objected to the issues tendered by the defendant. His Honor then submitted to the jury the following issues, to which the jury responded as hereinafter stated:

"1. Did the plaintiff undertake and agree with the defendant that he would repay to defendant such sum as it should pay out on the checks of M. L. Stevens, county treasurer? Answer: 'No.'

"2. Does any sum so advanced by defendant upon the said checks remain unpaid? Answer: 'No.'

"3. Did the plaintiff, at the time the defendant surrendered to him his note to M. L. Stevens for $5,270.75, agree that the defendant might deduct from his deposit the amount then due by said Stevens to defendant? Answer: 'No.'

"4. Did defendant take the note of plaintiff to said Stevens after maturity? Answer: (by consent) 'Yes, 15 September, 1887.'

"5. Did the plaintiff, at the time said note was surrendered to him, have any notice of defendant's claim against said note? Answer: 'No.' "

To the submission of these issues the defendant excepted.

The plaintiff requested the court to give the jury, among other instructions, the following:

"1. Even if the defendant advanced money upon the checks of Stevens, at the instance and request of the plaintiff and upon his promise to repay the same, yet if the defendant, in making such advancements, re-
(115) lied in any measure upon said Stevens, and not solely upon the plaintiff's promise, and the promise of the plaintiff was simply superadded to that of said Stevens, in such case there arose no liability against the plaintiff, and the jury should answer the first issue in the negative.

"2. As to the third issue, if the jury believe the evidence there was no express agreement on the part of the plaintiff and no implied agreement unless the plaintiff knew, at the time, that the defendant held the same as collateral security."

The court gave the same, adding to the first the following:

"But if the jury believe that money was advanced on the checks of Stevens at the instance and request of plaintiff, and upon his promise to repay the same, if the defendant bank in making said advancements trusted to one of the parties more than to the other, but did in fact trust to one together with the other, the plaintiff would be liable, and the jury should answer the first issue, 'Yes'."

The defendant excepted.

The defendant requested the court to give the jury the following, among numerous other special instructions; it declined to do so, and the defendant excepted:

"7. If, when the notice spoken of by the witness Wolfe was served upon the plaintiff, as testified by Wolfe, the plaintiff replied to said notice: 'I will go and see Lee and have the matter settled up, I will get a settlement if I can'; and thereafter the bank acted to its damage upon the supposition that the plaintiff admitted his liability, the plaintiff is estopped to deny the affirmative of the first issue, and the jury will answer that issue 'Yes,' though they may believe that the plaintiff did not intend in his interview with Wolfe to admit his liability for the treasurer's overdraft.

"8. Upon the statement of the plaintiff as to what occurred between him and the officer of the bank as to his liability for the overdraft of the county treasurer, he is estopped to deny the affirmative of the first issue, if after such occurrences, the officer of the bank, reasonably believing

that plaintiff admitted his liability, acted upon such belief (116) to the damage of the bank, and the jury will answer 'Yes' to the first issue."

The court, after calling the attention of the jury to the evidence that bore on the instruction of the defendant that was given, gave this instruction, to wit:

"If the jury believe that the plaintiff never authorized defendant bank to furnish money to M. L. Stevens, and denied his liability for money paid out upon the checks of said M. L. Stevens, and did not give the officer of the bank reasonable grounds to believe that he was liable for money paid out by it on checks of said M. L. Stevens, then the jury will answer the first issue, 'No,'" and the defendant excepted.

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

J. B. Batchelor, John Devereux, Jr., and Covington Adams (by brief) for plaintiff.

P. D. Walker and J. J. Vann for defendant.

MERRIMON, C. J., after stating the case: The pleadings raised but one principal issue. The defendant, in its answer, admitted to be true the allegation of the complaint that the plaintiff had from time to time deposited money with it, aggregating the sum specified, and had drawn his check upon it, as alleged, for divers sums of money aggregating the sum specified, which were duly paid; but it denied that any balance was due to the plaintiff except the sum of $365.69, and alleged further, as matter of principal defense, that it had, at the request and by direction of the plaintiff and for his benefit, paid divers checks for money to the amount alleged, drawn upon it by M. L. Stevens, treasurer of the county of Union, leaving the balance admitted to be due. This the plaintiff denied, and thus was raised the material issue of fact. The other (117) issues submitted to the jury, and others proposed by the defendant but not submitted, were incidental—not necessary to be tried—and might have been omitted.

The first issue in order submitted to the jury, though not so precise and formal as it might have been, sufficiently embodied that raised as indicated. It embraced and presented fully the whole matter in dispute, and the parties on the trial of it could have produced all pertinent competent evidence. Under proper instructions from the court, the jury could readily have understood its meaning and merits and rendered a just verdict. If the allegation of the defendant was found to be true, then the balance due the plaintiff was the sum it admitted to be due to him; if it were found not to be true, then the plaintiff was entitled to judgment for

the sum demanded by the complaint. The first issue proposed by the defendant was not sufficiently direct—it would settle only a material incidental fact involved in the issue really raised by the pleadings. Moreover, the first issue submitted gave the defendant the largest opportunity to prove his alleged defense, and this was sufficient. The second, third, fifth and seventh issues proposed by the defendant were not raised by the pleadings, they had reference to matters not controverted; the fourth and sixth issues proposed were embraced by the fourth and fifth issues submitted to the jury. Merely incidental and immaterial issues ought not, ordinarily, to be submitted; they may, and oftentimes do, confuse or tend to confuse the jury, and when they do, this will be ground for a new trial, if proper objection is made in apt time. In this case, we cannot see that the defendant probably suffered prejudice by reason of the issues submitted. These were quite as pertinent as those proposed by it. The exception to the issues cannot, therefore, be sustained.

Much of the evidence produced on the trial was conflicting and indefinite. While parts of it tended to prove, as alleged by the defendant, that, at the request and by the direction of the plaintiff, it paid
(118) checks drawn upon it by Stevens, treasurer, and he agreed to pay it for honoring such checks; there was also some evidence from which the jury might have inferred that the plaintiff promised to pay the defendant the sum of money advanced to Stevens, treasurer, on his own account, if he failed to do so. The plaintiff testified, among other things, that he never requested or directed the defendant to pay such checks, nor promised to pay it for doing so. There was evidence that, repeatedly, he was told by defendant's agents that it held him responsible on such account, and he did not deny his liability; that he said he would see Stevens, treasurer, and make him account, etc. It was also testified by the officers of the defendant "that there was nothing upon the books of the bank going to show any charge of Stevens' overdraft against Horne; that, according to the custom of their bank and by their usual methods of doing business, if the bank looked to Horne for any money advanced to Stevens, Horne ought to have been required to draw on the bank for the amount, and this check should have been charged to him and credited to Stevens; that even a depositor could not draw out his own money from the bank without giving his check for it, and that no money was paid out except upon the order of the president, unless a check was drawn or a note was made. This was not only the custom of their bank, but was a general custom with banks."

This, and like evidence, tending to prove that the defendant did not at first charge the plaintiff with the sums of money it paid in honoring the checks of Stevens, treasurer, but looked to him to repay the amounts so advanced to Stevens, treasurer, on his own account, if he failed to do

so, was not very strong, still the plaintiff might insist, as it seems he did, that if the jury believed from all the evidence he simply undertook to pay the debt of Stevens, treasurer, he would not be liable, because such undertaking and promise was not in writing, and (119) therefore void. The Code, sec. 1552. The first special instruction had reference to the aspect of the case presented by the evidence just referred to. It must be said that this instruction was vague and not very intelligible; still it can be seen that the purpose was to ask the court to instruct the jury that if they should find that the plaintiff promised and undertook to pay the debt of Stevens, treasurer, due to the defendant, if he failed to do so, then such agreement and promise would be void under the statute of frauds. As there was some evidence presenting such view of the case, the court might give the instruction, modified by what it added thereto. The addition was cautionary, and intended to prevent the jury from being misled—to tell them, in that connection, that if, on the contrary, the plaintiff was a principal in the debt created by the advancement of the money, along with Stevens, then he would be liable. Hence, the court said, in giving the instruction, "If the defendant bank, in making said advancements, trusted to one of the parties more than to the other, but did, in fact, trust to one, together with the other, the plaintiff would be liable," etc. The instruction, given simply as asked for, might have misled the jury, but, as modified and explained by the court, it was not misleading, certainly, taken in connection with the numerous instructions given at the request of the defendant. The second exception cannot, therefore, be sustained.

The third exception is clearly unfounded. The instruction must be taken in connection with the issue to which it refers. The whole of the evidence pertinent went to prove that, at the time the plaintiff received the note as mentioned in the issue, he made no agreement to pay the defendant the money it advanced to pay the checks drawn by Stevens, treasurer. Moreover, the evidence pertinent went to prove further that the defendant received the note from Stevens as *collateral* security after it was due, and the plaintiff had no notice or knowledge of (120) the fact that the defendant had it for any purpose until after he had paid and discharged the same. So that the defendant could not avail itself of the note for any purpose. The Code, sec. 177; *Martin v. Richardson,* 68 N. C., 255; *Whedbee v. Riddick,* 79 N. C., 521; *Pugh v. Grant,* 86 N. C., 39.

The defendant was not entitled to have the seventh special instruction asked for by it. What the plaintiff said on the occasion therein referred to was not a promise to pay the claim of the defendant, nor was it an admission that he was bound for the same, nor could the defendant reasonably act upon it as such promise or admission. Besides, what was

said must be taken in connection with other evidence going strongly to prove that the defendant's officers and agents well knew that the plaintiff denied his liability as claimed by it. Moreover, there was no evidence tending to prove that, after the occasion referred to, the defendant suffered any disadvantage or damage by reason of any reliance it placed on what the plaintiff said. After that time it surrendered the note mentioned to the plaintiff, but, for reasons already stated, it had no right to have or withhold it from him—he had paid and effectually discharged and was entitled to have it.

For the like reasons, the court properly declined to give the eighth special instruction asked for by the defendant. It might well have declined to do so, upon the ground that it had in substance given the seventh and eighth instructions in several prior special instructions asked for, which it granted without qualification.

The last instruction the court gave the jury was appropriate, certainly not objectionable—just after the numerous special instructions it had given at the request of the defendant's counsel. Indeed, having directed the attention of the jury to the view of the evidence contended for by the defendant, it fairly, in the same connection, directed their attention to the other view thereof contended for by the plaintiff. This was (121) fair and just. The defendant has no just ground of complaint at the court because of the instructions it gave or those which it refused to give. It gave, in substance, all the instructions the defendant asked for.

Affirmed.

Cited: Peele v. Powell, 156 N. C., 557; *Whitehurst v. Padgett,* 157 N. C., 427.

WILSON, COLSTON & CO. v. THE CITY OF CHARLOTTE.

Contract—Guaranty—Counterclaim.

Plaintiffs contracted with a municipal corporation to construct waterworks and to furnish the corporation with an adequate supply of water for all fire, sanitary and other public purposes, for which the corporation agreed to pay a fixed rent; it was stipulated in the same clause that upon a failure to furnish such supply the corporation should pay no rent. In another clause of the contract plaintiffs guaranteed to furnish a force or pressure sufficient to throw from any five hydrants, at same time, five streams of water 75 feet high. Plaintiffs complied with the conditions first named, but not with the last, and thereupon the city refused to pay rent: *Held,* (1) that the clauses were distinct in their purpose and effect, and that the

corporation had no right to refuse payment of rent for the breach of the guaranty in respect to the pressure necessary to throw the water 75 feet; (2) that for any breach of said guaranty the corporation had a remedy which might by proper pleading be set up as defense to an action for recovery of rents.

ACTION, tried before *Philips, J.*, at February Term, 1890, of MECKLENBURG.

It appears that certain contractors entered into an agreement on 17 March, 1881, with the defendant, the city of Charlotte, that they would "erect and establish in or near" that city "a system of waterworks, with all necessary mains, pipes, hydrants, fixtures and appurtenances of every kind to supply said city with pure and wholesome (122) water, fit for domestic purposes and sufficient for all purposes" specified, the same "to be of the best material and constructed in workmanlike manner," etc. Afterwards, the Charlotte City Waterworks Company was incorporated and organized, and, as it might do, with the consent of the defendant, it assumed and became party in place of the said contractors to the said agreement.

It is alleged in the complaint that the said Waterworks Company established and completed such a system of waterworks, and "furnished defendant with water from 1 July, 1887, to 31 December, 1887, as provided in said contract, and, in all other respects, performed its part of said contract, with the defendant"; and that it, during the time specified, supplied "all water necessary for fire, sanitary and other public purposes; that, as rental for the use of the eighty-eight hydrants aforesaid for six months, the defendant became and was, under and by virtue of said contract, indebted to said Waterworks Company in the sum of $2,200"; that afterwards, "on 25 February, 1888, the said Waterworks Company, for value, duly assigned to these plaintiffs their said claim, and demand cause of action therefor against the defendant"; that plaintiffs made demand for payment of the defendant, which was refused, etc.

It is admitted in the answer that waterworks were erected, "but the defendant denies that, from 1 July, 1887, to 31 December, 1887, the Waterworks Company furnished necessary water for fire, sanitary and other public purposes, as stipulated in said contract." It admits the agreement and the alleged demand, but denies other material allegations of the complaint. It denies that the said company kept and performed its part of the said agreement during the time specified, or at all, and alleges that, by its failure to do so, the defendant, at and next before the time of the alleged assignment of claim to the plaintiffs, was greatly endamaged, to the amount of $5,000; that it owed defendant that sum, and pleads the same as a set-off, etc. It is further alleged that the said company did not, at any time, "furnish a sufficient (123)

force or pressure to throw from any five of said hydrants at one and the same time, through one-inch nozzles and fifty feet of two-and-a-half-inch hose, five streams of water to the height of seventy-five feet, and, in fact, the works were so negligently constructed that the force or pressure so guaranteed in section 7 of the contract could not, at any time or under any circumstances, be furnished."

The agreement mentioned contained, among others, the following clauses:

"6. That if the said contractors shall fail at any time after the said waterworks are completed to furnish an adequate supply of water for all fire, sanitary and other public purposes, as herein stipulated, excepting by reason of accidents or injury to machinery and making necessary repairs, no rent shall be paid by the city of Charlotte during the time of such failure. And if they shall, at any time, for a period of three months continuously fail to give an adequate supply of water for all the purposes herein enumerated, then this contract shall cease and be at an end.

"7. That they guarantee at all times to furnish, if required, one hundred gallons of water, *per day* of twenty-four hours, for each inhabitant of the city of Charlotte and a sufficient force or pressure to throw from any five of said fire hydrants at one and the same time through one-inch nozzles and fifty feet of two-and-a-half-inch hose five streams of water to the height of seventy-five feet."

Appropriate issues, raised by the pleadings, were submitted to the jury.

On the trial, the plaintiffs produced evidence tending to prove the material allegations of the complaint, except that their own witness testified that the waterworks did not, and could not, throw water to the height of seventy-five feet, as it contracted to do in the seventh paragraph (124) set forth above of the said agreement.

The principal witness of the plaintiffs, among other things, testified that—

"The city used the waterworks for two or three weeks prior to 1 July, 1882; it paid rent from 1 July, 1882, to 1 July, 1887, in quarterly installments. It used the waterworks from 1 July, 1887, to 1 January, 1888, for all purposes, and just as it had before. The water supply and service was much better the last half of the year 1887 than in July, 1882. We had improved the works, giving much greater pressure. The Waterworks Company complied with its contract in all respects, except that the company never was able from 1882 to 1888 to furnish a sufficient force or pressure to throw from any five of its fire hydrants at one and the same time through one-inch nozzles and fifty feet of two-and-one-half-inch hose five streams of water to the height of seventy-five feet, as provided by the seventh clause or section of the contract.

"The company furnished to the city from 1 July, 1887, to 1 January, 1888, a sufficient supply for all practical public purposes, and this service was reasonably worth $2,200 for that period. I am acquainted with the service rendered by waterworks companies in other cities, and that in Charlotte is superior to most of them.

"November, 1887, experts examined the works at the instance of the plaintiff, and they reported that the works were sufficient for the city for all its present purposes, but that if the city required the five streams seventy-five feet at the same time, as provided in the seventh clause of the contract, then alterations and additions would have to be made, as the present works were inadequate for that purpose; that the company could not comply with this provision of the contract with its four-inch mains. About 25 September, 1887, two tests were made at my instance and under my supervision, to see if the five streams could be thrown from five hydrants under conditions named in the seventh clause (125) of the contract. We failed both times. The pipes could not stand the pressure."

The court expressed the opinion that in no aspect of the evidence could the plaintiffs recover. Thereupon, they submitted to a judgment of nonsuit and appealed.

C. W. Tillett for plaintiffs.
P. D. Walker for defendant.

MERRIMON, C. J., after stating the case. The defendant insisting that the Charlotte City Waterworks Company mentioned had failed to supply the city with water, as by its contract it was bound to do, suspend the further payment of rent claimed by that company to be due to it to the amount of $2,200. The company claimed that it had in all material respects complied with its contract, and that the sum of money mentioned was due to it. It sold its claim for such rent to the plaintiffs, and they demand judgment in this action for the amount so alleged to be due.

It is not questioned that the plaintiffs allege a cause of action, and there was evidence produced on the trial tending to prove the material allegations of the complaint except in a single respect, and as to this the plaintiffs insist that it was not material in this action and could not affect adversely their right to recover. If this is true, there is error, because, although the evidence was in some respects conflicting, still if it had been submitted to the jury they might have believed so much of it as was favorable to the plaintiffs to be true, and rendered a verdict in their favor. For the purpose of the assignment of error, the evidence must be accepted as true. The court, in effect, expressed the opinion that, taking the evidence as true in its most favorable aspect for the plaintiffs, they could not recover. (126)

The plaintiffs' alleged cause of action must be treated just as if the Waterworks Company was the present plaintiff and suing upon the same; they bought it in the same plight and condition as when the company owned and sold it to them, and subject to the rights of defendant under the agreement. The latter provides in the sixth paragraph thereof, among other things, that if the company named "shall fail at any time after the said waterworks are completed to furnish an adequate supply of water for all fire, sanitary and other public purposes as herein stipulated, excepting by reason of accidents or injury to machinery and making necessary repairs, no rent shall be paid by the city of Charlotte during the time of such failure." The seventh paragraph further provides, among other things, that the company "guarantee at all times to furnish, if required, . . . a sufficient force or pressure to throw from any five of said fire hydrants at one and the same time through one-inch nozzles and fifty feet of two-and-a-half-inch hose, five streams of water to the height of seventy-five feet." The evidence went to prove that the company complied with the agreement, and that the water supply was sufficient in all respects except that the "force or pressure" was not sufficient at any time to throw the water as specified to the height of seventy-five feet. The defendant, then, had no right to suspend the payment of rents as it did do, unless the failure of the machinery to throw the water to the height of seventy-five feet came within the meaning and purpose of the sixth paragraph of the agreement just recited as to the failure in the supply of water and the stipulation that no rent shall be paid during such failure. It is to be observed that this sixth paragraph has special reference to an "adequate supply of water for all fire, sanitary and other public purposes as herein (therein) stipulated," and taken in con-
(127) nection with provisions of the first paragraph, to have like reference to a supply of "pure and wholesome water fit for domestic purposes, and sufficient for all purposes hereinafter (thereinafter) stipulated for." It contemplates such an adequate supply of water as the parties to the agreement at the time it was executed deemed and intended to secure as continually necessary for the good of the city. The provision that no rent should be paid during the time of failure to make such supply of water was intended as a means the more effectually to secure the same.

The seventh paragraph of the agreement contemplates and intends a large supply of water at all times—equal to the quantity therein specified, and that the waterworks machinery shall have capacity to throw the quantity of water specified to the height of seventy-five feet, if the appropriate city authorities should so require. This provision was cautionary. It was agreed that the city authorities might afterwards avail themselves of it, if upon reflection or experience, they should determine that the

greater good of the city and its inhabitants so required. It was not at first deemed necessary to so require. To provide for an adequate supply of water was then supposed to be sufficient, and the main leading purpose was to secure that as thoroughly as practicable. The seventh paragraph was inserted in the agreement with the view to enlarged advantages to the defendant. It contained a distinct, particular and express guaranty, showing the intent of the parties to make this part of the agreement separate from the provisions of the sixth paragraph, and the purpose of the defendant to rely upon the guaranty as sufficient of itself. It did not deem it necessary to provide that the payment of rent should be suspended if the Waterworks Company should fail to throw the water seventy-five feet high, as required. As to that, it required a special guaranty of the company that it would do so, and, in case of failure, it was content to rely upon its remedy for a breach of the guaranty. Else, wherefore the special guaranty? And why was the (128) suspension of payment, as provided in the sixth paragraph, confined to a failure "to furnish an adequate supply of water for all fire, sanitary and other public purposes?" The seventh paragraph was exceptional, and intended to secure a particular and specified purpose, if the defendant should so require. Considering the nature of the matter apart from the terms and the relations of the several parts of the agreement, it is not at all probable that the parties intended that the payment of rent should be suspended if the supply of water was adequate and the force or pressure was not sufficient to throw the water to a height of seventy-five feet. It is much more probable that it was intended that the defendant should rely upon its remedy by action in that case.

The plaintiffs contended that the defendant never required the observance of the seventh paragraph, but if it be granted that, as it contends, it did, this was of itself not sufficient cause for suspending the payment of the rent.

As to a breach of the guaranty, the defendant can have its remedy. Indeed, it seems to seek the same in this action by asking affirmative relief. We are, therefore, of opinion that there is error. The judgment of nonsuit must be reversed and the action disposed of according to law. To that end, let this opinion be certified to the Superior Court.

Error.

Cited: S. c., 110 N. C., 454.

(129)

GRIFFIN PRITCHARD v. O. F. BAXTER.

Appeal—Injunction.

When, pending an appeal from a judgment dissolving a restraining order, the case is decided against plaintiff upon a trial, the appeal will be dismissed.

This was a motion to continue a restraining order in an action pending in PASQUOTANK Superior Court, heard at chambers, in Washington, N. C., 18 June, 1889, before *Brown, J.*

An affidavit (supported by certified copy of issues, etc.) was filed in this Court, to the effect that a judgment had been rendered in this case against the plaintiff upon issues found by a jury, and that no appeal was taken, and the trial was had since the order made in the injunction proceeding.

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

Per Curiam: It appears from a transcript from the court below, that since the issuing of this injunction, all of the issues have been tried and found against the appellant, and that a judgment accordingly has been rendered, finally disposing of the action. It thus appears that the appellant had no ground whatever for suing out the injunction, and there being only the cost involved, it is adjudicated that the appeal be dismissed.

Dismissed.

Cited: Russell v. Campbell, 112 N. C., 405; *Herring v. Pugh,* 125 N. C., 438.

(130)

ROANOKE NAVIGATION COMPANY v. T. L. EMRY ET AL.

Injunction.

1. It is against the policy of the law to enjoin the prosecution of such industries and enterprises as tend to develop the resources of the country, except in those cases where it is apparent that otherwise serious harm will result to the party complaining.

2. Where, therefore, it appeared that the plaintiff corporation was engaged in the erection of mills and an elevator of large capacity on land claimed by it, and, to connect them with a railway station, was constructing a railroad

running principally over its own land, when the defendants forcibly entered on a part of said lands, claiming them as their own, and obstructed the work, threatening plaintiff's servants with violence if they persisted, and it further appeared that defendants' claim was doubtful: *Held*, to be a proper case for an injunction till the hearing.

ACTION pending in HALIFAX, heard upon motion for an injunction before *Philips, J.*, at chambers, at Tarboro, 19 July, 1890.

The plaintiff, a corporation, alleges in its complaint that it is the owner and in possession of the real property described therein; that parts of the same are very valuable for manufacturing purposes; that it owns a canal, situate upon its land, to be enlarged and improved; that in connection with, and as part of the same, is a basin, situate in the town of Weldon, supplied with water by said canal, from which water is to be applied for the purpose of moving important machinery; that upon a parcel of land near to this basin it has selected a site and waterway on which it was and is about to erect, at great expense, a corn-mill and elevator with capacity to make ten thousand bushels of meal per day, and had purchased at great cost lumber, brick, machinery, labor, etc., for that purpose and to that end, and was engaged in constructing a railroad from the railroad shed in Weldon, the entire line of which except where it crosses First Street in said town, by permission of the town (131) authorities, runs on and over the land of the plaintiff company to a point in the neighborhood of the contemplated mill aforesaid, said point being on the plaintiff's land; that the plaintiff is the owner and in possession of the land over and across which said road passes and is to be completed, and on which it is intended to erect said mill and elevator and construct such water wasteway, etc.; that while the plaintiff was so in possession of its land about 10 July, 1890, engaged in constructing its said railroad, the defendant Emry, acting for himself and his co-defendants, "with a strong hand, unlawfully, wantonly and violently, armed with a shot gun, entered upon the lands of the plaintiff and erected across the proposed route of said railway a fence, and forbade and prohibited, under threats of shooting the servants and agents of the plaintiff company, from the further construction or building of said railway, and forbade and prohibited the agents and servants of this company from the laying off and constructing the said contemplated mill, elevator and wasteway, and threatens to shoot and kill any agent or servant of this company who shall enter upon said land for the purpose of building said mill, elevator and wasteway, or completing said road"; that the conduct of the defendants complained of greatly hinders, delays and interferes with the plaintiff's said enterprise, and destroys and impairs the same, the lumber, machinery and other supplies purchased for such purposes, etc.

Among other things, the complaint demands relief by injunction, etc.

The defendants admit some of the material facts as to the plaintiff's enterprise, but deny that the said railroad exclusively runs over the lands of the plaintiff; allege that they are the owners of two mill-houses situate on the plaintiff's land, near to the said road; that the (132) ownership of these houses is separate from that of the land on which they are situate; that the said road is about to be constructed on the lands of the defendants; that the defendants have been in continuous, uninterrupted possession of a lot on which said road is about to be located, both said mills and a foundry, said wasteway and all lands appurtenant to said mills, etc., and the plaintiff has never had actual possession thereof, etc.

The answer raises a question as to the location of the corner of a lot called the "Joyner lot." If this is located as contended by the defendants, then the said mill will be situate on their land; it will not be so if such corner is situate as contended by the plaintiff. The defendants claim that they had and have possession, though they do not claim title to the site for the projected new mill, elevator and water wasteway.

The court below, on motion of the plaintiff, granted an injunction pending the action restraining the defendants from all interference with the plaintiff's projected work, etc. The defendants excepted and appealed.

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

MERRIMON, C. J. The pleadings, exhibits and evidence satisfy us, for the present purpose, that the plaintiff is the owner of the canal, basin, the site for the projected mill, elevator and water wasteway, and that its land thereabout situate is well adapted for manufacturing purposes of great importance; that the plaintiff is about to erect the mill and elevator, and that to that end, has expended and is about to expend large sums of money, contracted for much machinery and other material for such purpose, and is constructing the short railroad complained of by the defendants, with the view and for the purpose to facilitate the projected work, its use and purpose. Whether this road is to be constructed en- (133) tirely on the plaintiff's own land is not entirely free from doubt, but if it be partly on a part of the defendants' lot in cannot in any sense greatly endamage the latter by its mere construction. Whether the defendants have mere possession of parts of the plaintiff's land, as they contend, is doubtful. And whether, in any view of the contention of the parties, the plaintiff has possession of any land of the defendants, is very questionable. So far as we can see, no serious harm can, in any event, happen to the defendants by the construction of the road; they may be

amply compensated in damages, and have remedy upon the bond given by the plaintiff. The completion of the road promptly, we can well see, will greatly facilitate the enterprise, which ought not to be delayed, and which the law encourages. It is against the policy of the law to restrain, delay and hinder such industries and enterprises as develop the country and its resources. This ought not to be done, unless in cases where serious harm may come to the party complaining. The plaintiff alleges, and the evidence tends strongly to prove, that the roadway is on its own land and that it is in possession. The courts have in many cases, not unlike the present one, granted relief by injunction pending the action, and when the evidence has left the material matter in dispute in doubt, this Court has generally directed the order granting such injunction to be affirmed. Here the defense alleged by the defendants is more than doubtful, but we are not to be understood as expressing any opinion upon the facts, further than as may be proper in directing an affirmance of the order appealed from. *Parker v. Parker,* 82 N. C., 165; *Lumber Co. v. Wallace,* 93 N. C., 22; *Lewis v. Lumber Co.,* 99 N. C., 11; *Evans v. R. R.,* 96 N. C., 45; *Whittaker v. Hill, ib.,* 2.

Affirmed.

Cited: R. R. v. Comrs., ante, 62; *R. R. v. Asheville,* 109 N. C., 691; *R. R. v. Lumber Co.,* 116 N. C., 925; *Staton v. R. R.,* 147 N. C., 439; *Griffin v. R. R.,* 150 N. C., 315; *Rope Co. v. Aluminum Co.,* 165 N. C., 577; *Waste Co. v. R. R.,* 167 N. C., 342; *R. R. v. Thompson,* 173 N. C., 262.

(134)

BASIL DEVEREUX v. M. MCMAHON ET AL.

Deed—Execution—Delivery—Seal—Subscribing Witness—Probate—Registration—Evidence—Fraud—Statute.

1. A party against whom the registry of a deed (or other instrument), or a copy thereof, has been introduced in evidence, cannot then raise the objection that there is a variance between such registry, or copy, and the original instrument. If he desired to avail himself of such objection, he should have required the production of the original in the way provided by the statute (The Code, sec. 1251).

2. While the statute of North Carolina (The Code, sec. 1554) requires all deeds conveying lands to be signed by the maker, the signing need not necessarily be at the end of the deed; if the signature is in the body of the instrument it is sufficient.

3. Nor is it essential that the maker should actually sign his name; he may authorize another to do so in his presence, or he may affix his mark or

other symbol and thereby adopt a seal attached, as well as his own name written in the deed, by another, and it makes no difference that the maker is able to write his name, or that there is no subscribing witness.

4. The execution of a deed by affixing a mark, either by the maker himself or by some one in his presence thereto duly authorized, may be proved by evidence that it was a substitute habitually used by the maker for his signature and capable of identity, as proof is made of handwriting or from the evidence of an eye-witness that he saw the mark attached or heard the maker acknowledge it as his.

5. A number of grantors may, by delivery, adopt a seal attached to the name of one of them, there being a recital in the deed that they had affixed their seals.

6. If a seal is attached to the maker's name, although there is no such recital, it will constitute the instrument a deed.

7. The law favors those who are illiterate, and will endeavor to arrive at and carry out their true intent by a liberal application of technical rules.

8. A subscribing witness to an instrument may adopt a mark or any other symbol for his signature when such mark or symbol has such peculiarities as will enable it to be identified as his act.

9. Registration of deeds and other instruments required to be recorded is not made void by reason of the mistake of the officer making them; such errors do not vitiate the probate or deprive a party of the right to read the registry as evidence. Such error being shown, the presumption of the correctness of the copy is rebutted and opens the way for the question whether the instrument was such as might be admitted to registration.

10. The facts of the signing by the grantor and possession of the deed by the grantee being established, a delivery will be presumed.

11. The misrecital or failure to read the contents of a deed to an illiterate grantor who requests to know what it contains is a fraud in the *factum*.

(135) ACTION for the recovery of possession of land, tried at September Term, 1890, of HALIFAX, before *Armfield, J.*

(138) *R. O. Burton, Jr., for plaintiff.*
Thomas N. Hill and W. H. Day for defendants, appellants.

AVERY, J. It is provided by statute (The Code, sec. 1251) that "the registry or a duly certified copy of the record of any deed, etc., may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, etc., although the party offering the same shall be entitled to the possession of the original, and shall not account for the non-production thereof, unless upon a rule or order of the court suggesting some material variance from the original in such registry, or
(139) other sufficient ground, *such party shall have been previously re-*

quired to produce the original, in which case the same shall be produced or its absence duly accounted for, according to the course and practice of the court."

After the plaintiff had read the deed recorded in the register's book, which was made competent evidence by the statute, he furnished, at the request of the defendant, voluntarily, and not in obedience to an order of the court, the original. The latter could not then avail himself of the objection that there was a variance between the original and what purported to be a copy on the book of the register, by objecting to the admission in evidence of the copy. If there had been any ground of complaint, the point intended to be raised was fairly presented by the exceptions to the charge of the court at a later stage of the trial, the defendant having, meantime, offered the original deed in evidence.

The last clause of the original deed and the attestation clause, with the signatures, were as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and affixed his seal the day and date above written."

X [Seal.]

"Signed, sealed and delivered in presence of X John Cobb, witness towards of what was *sed,* Thomas Alexander *did* agree to the deed. D. S. C."

The same portion of the deed was recorded in the register's office as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and fixed his seal the day and date above written.

"Witness: X [Seal.]

"Signed, sealed and delivered in the presence of X John Cobb, witness toward of what was *sed* Thomas Alexander *did* agree to (140) the deed. SOLOMON DAVIS."

The defendant contended that the deed was not signed in accordance with the requirements of our statute of frauds (The Code, sec. 1554) and that the judge below should have instructed the jury that the plaintiff had failed to adduce any evidence tending to show title in himself, and could not therefore recover.

Under the Saxon rule in England, it was only required that deeds should be subscribed with the sign of the cross. It was not necessary that a seal should be attached. After the Norman conquest sealing became a requisite, but signing of all kinds ceased to be required. 3 Wash., R. P., 242; Coke Lit., 171; 2 Bl. Com., 309. After the statute of frauds was enacted it became essential that every deed purporting to convey land, and every other instrument required under its provisions to be in writing, should be signed by the party to be charged therewith.

It is now an established rule that the name of the party to be charged may be written by an agent in his presence and under his direction, the act of the authorized agent being theoretically the act of the principal. Tiedeman R. P., sec. 807; *Pierce v. Hakes,* 23 Pa. State, 231; *Insurance Co. v. Brown,* 30 N. J., Eq., 193; Browne Stat. of Frauds, 12; *Kime v. Brooks,* 31 N. C., 218; *Frost v. Deering,* 21 Me., 156; *Gardner v. Gardner,* 6 Cush., 483.

Under the provisions of our statute (The Code, sec. 1554) all of the instruments enumerated are required to be in writing and *signed* by the party, etc., while in the statutes of some of the other States the word "subscribed" is substituted for signed. Modern text-writers generally concur in the opinion that it is not essential that the signatures should be placed at the end of the deed or other instrument, where the
(141) law requires signing only. Martindale on Conveyancing, sec. 6; 5 A. & E., 441; Tiedeman Real Prop., sec. 807.

In the construction of statutes in reference to wills a similar rule has been generally adopted. Signatures in the body of the will have been declared to constitute a sufficient compliance with the requirement that there should be a signing, and the courts have gone so far as to sustain the validity of the execution of a will, where the name of the testator was written under the names of the witnesses to the attestation clause after having been written also as a part of that clause by him. 7 Mews Jacobs Dig., 879; 1 Williams Executors, 60. It is conceded that where another person has already written the signature of one who is illiterate, the latter may adopt the signing subsequently by attaching a cross or other mark used by him as a substitute for an actual signature, though he could not so ratify the act of an agent who signed his name not in his presence except by attaching such mark. The grantor in this case inquired who had written the deed, and was told that it was written by Mr. Thorpe, a lawyer, and in substance what were its contents. It was insisted with much force by the learned counsel on the argument, that when Thomas Alexander made the cross-mark opposite to the seal and beneath the clause reciting his name, he adopted the signing of his name in that clause, the name being in close proximity to the cross and seal. It is well established that any number of grantors may by delivery adopt a seal opposite to the name of the first of the number who signs the deed, there being a recital in it that they had attached their seals; while on the other hand where there is no such recital, a seal attached to the name will be deemed sufficient to constitute the instrument a deed. 3 Wash. Real Prop., 244, 245; Tiedeman, *supra,* 808; *Yarborough v. Monday,* 13 N. C., 493.

It seems not unreasonable to be guided by the principle, so often invoked in the construction of deeds and wills, that the law will

favor those who are *inops consilii* and illiterate, and attempt to (142) arrive at and carry out their true intent by a liberal application of technical rules. Washburn, *supra,* at page 244, says: "Affixing a mark by the grantor against his name, though written by another, is a *signing,* although it does not appear that he could not write his own name." It being settled, then, that our statute does not require that the name should be subscribed at the end of the instrument, when written by the party to be charged in his own handwriting, it would seem to be an unreasonable discrimination against, instead of in favor of, an illiterate person to declare his conveyance null and void because he attempted by a mark placed in proximity to the seal at the end of the deed to adopt a signing of his name in the last clause of the instrument. The courts, since the enactment of the statute of frauds (29 Charles II), have used the maxim *quod facit per alium facit per se* with great liberality, especially in making auctioneers, by implication of law, the agents of those who bid for land at sales. In construing the act of making the mark in this case, as an adoption of the signature just above it in the body of the deed, we can foresee no greater danger of opening the door for the evasion of the statute of frauds than in any other case where the mark is used and placed in juxtaposition to the written name. In either case the execution of the instrument must be ordinarily shown by the acknowledgment of the maker, or the testimony of a witness who saw it made, and even where both the maker and subscribing witness may have died, the necessity for proving the genuineness of the signature of the witness or some distinguishing feature in the mark made by the grantor, is an ample guaranty that the opportunity or incentive to evade the statute of frauds will not be enhanced by sustaining the validity of the signing of Thomas Alexander. *Davis v. Higgins,* 91 N. C., 382. If there had been no witness to the deed, then it could not have been admitted to probate without proof that the mark was habitually used by Alexander as (143) a substitute for signing his name, and that there was some peculiarity in its appearance which distinguished it from other marks and enabled the witness to recognize it as he would the peculiarities of handwriting. *Sellers v. Sellers,* 98 N. C., 16; *S. v. Byrd,* 93 N. C., 624; *Howell v. Ray,* 92 N. C., 510. In support of this view, *Justice Merrimon,* delivering the opinion of the Court in *S. v. Byrd, supra,* said: "While generally a mere cross-mark employed by a person who cannot write, as evidence that he executed a paper-writing to which it is affixed, cannot be proven, yet a person may have a mark so *peculiar* and so uniformly used by him for such purpose as that it may become well known as his mark, and may be proven just as the signature of one who writes may be proven to be in his own handwriting. A mark, *like the signature* of a party, is intended to be evidence of the fact that the party making

it made it, and identifies himself with the paper-writing signed in the way and for the purpose indicated in it, and it is just as *binding ordinarily without a subscribing witness as with one,* but it may be proven as a signature may be by one who saw it made or who heard the maker acknowledge it to be his, and the maker himself is generally a competent witness to prove that he made it." *Howell v. Ray,* 92 N. C., 510. We have reproduced this extract to make it clear that we are sustained by an adjudication of this Court, in which it is laid down as a principle, in the most explicit way, that an instrument purporting to be a deed and required to be in writing and signed by the party charged thereby is not void upon its face because the maker or grantor has signed by making a simple cross, nor even if there is no witness to such signing. The law still leaves the way open for proof of its execution by showing it to be a peculiar substitute habitually used by the grantor, instead of an ordinary signature, or for evidence from an eye-witness that he saw the mark attached, just as he could testify to the act of subscribing the
(144) name. Our view of the subject is sustained by reason and the current authority. While it is not probable that any case precisely similar in all respects to that under consideration has ever arisen, the principle announced finds abundant support in the adjudication of other courts, and the conclusions deduced from them by leading writers upon the subject of deeds and conveyances. 5 Lawson Rights & Rem., sec. 2270, says a person physically unable or too illiterate to write his name may sign by making a cross, a straight or a crooked line, a dot or any other symbol. In Martindale on Conveyancing, sec. 190, the rule is stated as follows: "As to what will constitute a sufficient signing, it may be observed that it is not necessary that the party should write his own name; *his mark is sufficient, though he be able to write."* In section 6 the same author says: "It seems that putting initials to a document, the name appearing elsewhere, is a sufficient signing to satisfy the requirements of the statute." If the initial letters of one's name be allowed to serve as a substitute for a formal signature because the name is *signed in full in the body of the deed,* why should we hold that a mark, the making or distinctive character of which is susceptible of proof, is insufficient under similar circumstances?

The second ground of exception was that the deed was not lawfully and properly registered. The certificate of probate and fiat are as follows:

"State of North Carolina—Nash County. I, John T. Morgan, clerk of the Superior Court, do hereby certify that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto, who says that the deed was signed and delivered in his presence, 13 January, 1888, to the grantee for

the purposes therein expressed. Witness my hand and official seal, this 20 January, 1888." (Signed and sealed by the clerk.)

"STATE OF NORTH CAROLINA—Halifax County. In the Supe- (145) rior Court, 9 February, 1888. The foregoing certificate of John T. Morgan, clerk of the Superior Court of Nash County, duly attested by his official seal, is adjudged to be correct. Let the instrument, with the certificates, be registered. John T. Gregory, clerk Superior Court.

"Filed for registration 9 February, 1888. L. Vinson, register of deeds."

If the objection to the probate is based upon the ground that the original deed shows that Solomon Davis, instead of signing his full name to the attestation, wrote the letters "D. S. C.," and the register recorded the signature "Solomon Davis," we think it is clearly untenable. Registration is not rendered void by reason of a mistake by the officer in recording deeds, but the registration is presumptively correct, and the remedy for such defective record is to demand the original, which, if legible, is the highest evidence of the form of the deed and probate. *Davis v. Inscoe,* 84 N. C., 396; *Love v. Hardin,* 87 N. C., 249. When this case was brought to this Court by a former appeal (102 N. C., 284), we held that the fact that a witness had made a cross-mark in attesting a deed, did not affect his competency to prove its execution. See also 5 Lawson, sec. 2271; *Nelins v. Brickell,* 2 N. C., 19. Upon the principle already announced in discussing the signature of the grantor, there can be no further controversy as to his eligibility, when it appears that he used characters so peculiar as a substitute for signing his name. *Tatom v. White,* 95 N. C., 453; *S. v. Byrd, supra; Sellers v. Sellers, supra;* Martindale, sec. 6.

His testimony was as follows: "I witnessed the deed; I saw Tom sign the deed, and he handed it to me and asked me to witness it; that is my name, D. S. for Davis, C. for Solomon; that is the way I sign it; the rest was put there merely to fill in; I thought the old man was in his right mind; I did not hear any one read the deed to Tom; Tom asked Basil if he had got the deed fixed up; he said yes; (146) Tom asked who fixed it; he said Mr. Thorpe, a lawyer, and told him what was in it; Tom signed the deed about twelve o'clock in the day, and died about twelve o'clock that night. I handed the deed either to Basil in Tom's presence or back to Tom and he handed it to Basil."

We think that though there was a mistake in recording the deed, it did not affect the right given by statute to the plaintiff to read the record, as already stated, subject to the right of defendant, if the original could be produced, to correct such mistakes by its introduction. The deed was properly proven by Solomon Davis, who was a competent witness. The

effect of showing the mistake of the register of deeds was not to annul the probate, not even to destroy the competency of the copy upon the book as evidence, but simply to rebut the presumption that the copy was correct, and open the way for the consideration and discussion of the question whether the paper-writing, in its original shape, was upon its face an instrument that, under our statute, might be probated and admitted to registration. Defendant's counsel insisted that there was no evidence of delivery. Though neither proof of possession of the deed by the grantee alone, nor evidence of the handwriting of the bargainor, unconnected with the facts, will raise a presumption of delivery so as to dispense with actual proof of it, yet when both the signing by the grantor and possession of the grantee are shown, there is *prima facie* evidence of delivery. *Williams v. Springs,* 29 N. C., 384; *Whitsell v. Mebane,* 64 N. C., 345; *Ingram v. Hall,* 2 N. C., 193. But the witness Davis testified that when the deed was handed to him by the grantor, he either handed it in his presence and with his acquiescence to the grantee Basil Devereux, or he returned it to Alexander, who handed it to Devereux. That was evidence, if believed, of an actual delivery. The failure to read a deed, or the misrecital of its contents to an illiterate grantor who asks to know what it contains, constitutes a fraud in the *factum,*
(147) and on proof of the facts the instrument was formerly treated as void in a court of law, and can now be attacked without initiating a direct proceeding to impeach it. But where a grantee, though an illiterate man, does not demand that the deed shall be read, and all of the testimony tends to show that a witness told him in substance what its provisions were, there is no evidence of fraud to be submitted to the jury. *School Com. v. Kesler,* 67 N. C., 443; *Nicholls v. Holmes,* 46 N. C., 360; *Canoy v. Troutman,* 29 N. C., 155.

There is no error, and the judgment must be

Affirmed.

Cited: Whitman v. Shingleton, post, 194; *Herndon v. Ins. Co.,* 110 N. C., 284; *Ratliff v. Ratliff,* 131 N. C., 427; *In re Pope,* 139 N. C., 486; *Richards v. Lumber Co.,* 158 N. C., 56; *Boger v. Lumber Co.,* 165 N. C., 559; *Burriss v. Star, ib.,* 660; *Peace v. Edwards,* 170 N. C., 66; *Lee v. Parker,* 171 N. C., 150; *Alexander v. Johnston, ib.,* 472.

R. H. DELOATCH v. J. C. VINSON.

Sham Pleading—Answer—Issue—Endorsement.

To a complaint by an executor, in which the execution by the defendant of the bond sued on, the death of the obligee, the appointment and qualification of the plaintiff, and that no payment had been made, were duly averred, the defendant answered that he was informed and believed that the plaintiff was not the owner of the bond at the time of the commencement of the action: *Held*, (1) that the answer was a sham and irrelevant, and, on motion, was properly stricken from the record; (2) where a party sets up the defense that the plaintiff is not the real owner of the instrument put in suit, he must state in his answer the facts upon which he relies to establish the ownership in some other person; (3) the payee or endorsee of a note is *prima facie* the owner and holder, and it is unnecessary that he should make such an allegation in his complaint.

Motion to strike out answer, at Fall Term, 1890, of NORTHAMPTON, before *Womack, J.*

The plaintiff alleges in his complaint, which is verified, the (148) execution of the bond sued on, the death of the obligee, the appointment and qualification of plaintiff as executor, and that no payment has been made on the bond. These allegations are not denied.

The defendant, as his sole answer, says "that he is informed and believes that the plaintiff is not the owner of the bond described in his complaint, and was not the owner thereof at the commencement of this action." The court, being of opinion that this was a sham and irrelevant plea, directed the answer to be stricken out, and rendered judgment for the amount of the bond and interest, according to the complaint. Defendant appealed.

R. O. Burton, Jr., for plaintiff.
Winborne & Bro. (by brief) for defendant.

CLARK, J. The answer of the defendant put no fact in issue, and was but a legal conclusion from facts which should have been, but were not, stated. Such illogical pleading is not allowed by The Code. It requires, first, that the plaintiff shall state the facts upon which he relies; and second, that the defendant shall deny each allegation to be controverted by him. The allegation controverted must be the statement of a fact; hence, in making an issue, he has nothing to do with legal conclusions. Thus, a denial that the plaintiff is entitled to the sum demanded by him, or any part thereof, puts in issue no fact, and is but the denial of a legal proposition. *Drake v. Cockraft,* 4 E. D. Smith, 34. So, in a suit by a payee of a note, who alleges that he is the owner and holder, a denial

that he is the owner and holder puts nothing in issue. *Seeley v. Edgell,* 17 Barb., 530. The payee or endorsee of a note is the *prima facie* owner and holder. The allegation that he is so is unnecessary, and if the defendant defends upon the ground that the plaintiff is not such
(149) owner, he should set up the facts showing title in some one else. *Fleary v. Roget,* 5 Sandford, 646. This citation is taken from Bliss on Code Pleading, sec. 334, and fully sustains the court below. There are many authorities to same purport. *Bank v. Smith,* 33 Mo., 364; *Wedderspoon v. Rogers,* 32 Cal., 569, and others. In *Russell v. Clapp,* 4 How. Pr., 347, it is said: "Under the present system, it is intended to confine the pleadings to a simple statement of facts. Neither the evidence by which the facts alleged are to be established, nor the legal conclusions to be derived from such facts, can properly be stated. A complaint is sufficient if it contains a simple statement of facts, which, if proved, will entitle the plaintiff to judgment. The answer, in like manner, is sufficient if it deny generally all the facts stated in the complaint, or, specifically, any particular fact stated, so as to form an issue of fact upon the matters in the complaint, or, admitting the facts stated in the complaint to be true, if it state other facts which, if proved to be true, will countervail the legal effect of the facts alleged in the complaint. . . . If the defendant would avoid the plaintiff's right to recover by showing that some other person, and not the plaintiff, is the real party in interest, he must state in his answer such facts as, when established by proof, will enable the court to say, as matters of law, that the plaintiff is not the real party in interest."

The answer must contain a denial of each material allegation in the complaint, or a statement of any new matter constituting a defense or counterclaim. The Code, sec. 243. The answer does not do either by merely alleging that the plaintiff is not the owner of the note sued on, while failing to deny any of the allegations of the complaint upon which the legal conclusion of ownership would arise. The answer should state the facts. It is suggested, however, that, in cases where the payee is not the plaintiff, the defendant might not be able to protect himself
(150) against an action by one who had stolen the note, because the defendant might not be able to aver the theft on information and belief. To this it is to be said that, as the plaintiff must aver the facts showing the execution of the note and the assignment or other transfer to himself, the defendant can, as to such transfer or assignment, deny "knowledge or information sufficient to form a belief," and demand strict proof.

The answer raises no issue, and was properly stricken out as sham and irrelevant. *Wedderspoon v. Rogers, supra;* The Code, sec. 247.

No error.

W. T. BRASWELL v. W. H. JOHNSTON, EXECUTOR OF NORFLEET CUTCHIN.

Issues—Pleading.

1. When issues of fact are raised by the pleadings it is error to submit only the question whether the plaintiff is entitled to recover; that is a question of law arising after verdict and addressed solely to the court.

2. The rules laid down for framing issues in *Emry v. R. R.*, 102 N. C., 109, and *McAdoo v. R. R.*, 105 N. C., 140, discussed and approved.

APPEAL, at Fall Term, 1890, of EDGECOMBE, from *Whitaker, J.*

Material facts were stated in the complaint and controverted in the answer, and a number of issues involving those questions were tendered. The judge submitted only the single issue, "How much, if any, is the plaintiff entitled to recover?"

J. L. Bridges for plaintiff.
G. M. T. Fountain (by brief) for defendant.

AVERY, J., after stating the facts: "Issues arise upon the plead- (151) ings when a *material fact* or conclusion of law is maintained by the one party and controverted by the other." The Code, sec. 391. "An issue of fact arises (1) upon a material allegation in the complaint controverted by answer; or (2) upon new matter in the answer controverted by the reply; or (3) upon new matter in the reply except an issue of law is joined thereon." The Code, sec. 393.

Instead of the issues tendered by the defendant and involving the question whether the contract was an entire one, the court submitted only the following: "How much, if anything, is the plaintiff entitled to recover?"

It is settled that the requirement of the statute that an issue or issues must be submitted is mandatory. *Denmark v. R. R.*, 107 N. C., 185. The judge who tries the case may, in his discretion, confine the inquiry to one or more of the issues raised by the pleadings, provided that he does not thereby deprive a party of the opportunity to present the law arising out of some view of the testimony to the jury through the medium of an issue submitted, and provided a judgment can be predicated upon the finding—though in the exercise of this power by the judge, it should be borne in mind that The Code system contemplates distinct findings upon material issues and these should be submitted where it can be done without repetition or confusion. *Emry v. R. R.*, 102 N. C., 209. It is not necessary that the language of the pleadings should be incorporated in the issues, or that it should be clearly followed in drawing them.

While it is not error, for instance, to submit only an issue involving the question whether a plaintiff has been injured and has sustained damage through the negligence of a defendant, even where contributory negligence is set up in the answer as a defense, and where the testimony also raises the further question whether, notwithstanding the negligence of the plaintiff, the defendant might by ordinary care have avoided the injury. *McAdoo v. R. R.,* 105 N. C., 140; *Lay v. R. R.,* 106 N. C., (152) 410; *Bonds v. Smith,* 106 N. C., 564; *Boyer v. Teague,* 106 N. C., 633. The issue as to contributory negligence is required by statute to be raised by the pleadings, where that defense is relied upon. The other issue, involving the doctrine laid down in *Davies v. Mann,* is not usually raised directly by any specific pleading. But it is left to the sound discretion of the trial judge to determine whether he will submit both, when the testimony suggests that course, or only an issue in terms involving the question of the defendant's negligence, and by instruction point out to the jury how the law governing the whole of the evidence may be applied in passing upon it. *Meredith v. Coal Co.,* 99 N. C., 576; *McDonald v. Carson,* 94 N. C., 497; *Scott v. R. R.,* 96 N. C., 428; *Kirk v. R. R.,* 97 N. C., 82.

On the other hand, in *Denmark v. R. R., supra,* this Court held that the inquiry, "What damage is the plaintiff entitled to recover?" was not an issue. In *Bowen v. Whitaker,* 92 N. C., 369, it was held to be error, where issues of fact were raised by the pleadings, to enter as the verdict of the jury that "they find all issues of fact in favor of plaintiff and assess his damages" at a sum mentioned.

In the case last cited the verdict was set aside because it was a finding in gross of all issues raised by pleadings, instead of a response to some issue arising out of facts controverted in the pleadings. The issue submitted in this case goes a step further, and leaves the jury to determine, first, the question of law whether the plaintiff is entitled to recover at all; and second, to assess the damages, as was done in *Denmark v. R. R., supra.* It is the province of the court to say, upon the facts found, whether the plaintiff shall recover or the defendant shall go without day. Instead of passing upon some "material allegation of the complaint controverted by the answer," the jury are asked whether they will (153) return a *verdict of "quod recuperit,"* and if so, what damages will be allowed.

In *Denmark v. R. R., supra,* we held that where issues of fact are raised by the pleadings and tendered by one of the parties to the action it was error to confine the jury to an inquiry as to damages. The rule announced in *Emry v. R. R., supra,* allowed the presiding judge to exercise his discretion, subject to certain restrictions, as to the necessity or propriety of submitting one or more of the issues raised. It could not

have been intended by the framers of the law, nor has it been suggested by this Court, that it would be a sufficient compliance with the mandatory requirement of The Code to submit, not an issue growing out of a denial in the answer, but the question of law, which it is the exclusive province of the judge to decide, and which is not addressed to him till the facts are found. That question is, whether upon the ascertained facts, the plaintiff is entitled to judgment *"quod recuperit,"* or the defendant to judgment that he go without day.

There is error, for which a new trial will be granted.

Error.

Cited: Blackwell v. R. R., 111 N. C., 153; *Clement v. Cozart,* 112 N. C., 415.

(154)

S. V. JOYNER, ADMR. D. B. N. OF B. S. ATKINSON, ET AL., v. G. A. STANCILL.

Reference—Findings of Fact—Exceptions—Mortgage—Release—Merger—Presumption.

1. The findings of fact by a referee, adopted by the trial judge, are conclusive.
2. The Supreme Court will not entertain an objection, made for the first time before it, that the findings of fact by a referee were not supported by any evidence.
3. While the mere change of the form of a debt secured by a mortgage, or even the incorporation of an additional indebtedness in the new form, will not release the mortgage, yet if it is the intention of the parties that the change shall operate as a satisfaction of the original debt and discharge the mortgage, that intention will be enforced, though the mortgage be not formally canceled.
4. The presumption, however, is against the extinguishment of the mortgage by such alteration.

EXCEPTIONS to referee's report, heard at March Term, 1890, of PITT, before *Boykin, J.*

The facts, extracted from the report of the referee, presented on appeal, were as follows:

1. On 24 March, 1876, B. S. Atkinson was indebted to Rountree & Co., in the sum of $621.63, which amount was evidenced by one promissory note and secured by a mortgage upon the lands mentioned in the complaint.

2. Afterward, and before 1882, the note and mortgage were assigned to defendant Stancill.

3. On 28 February, 1882, Atkinson was indebted to said Stancill in the amount of the note assigned to him, and various other amounts by note or account, and that on said day Atkinson and defendant came to a settlement and ascertainment of the debts due from him to defendant Stancill, and then executed his promissory note under seal, payable to Stancill, for the amount of $2,119.11, which amount included the Rountree note, with interest to that date, and some additional amounts due Stancill.

4. Stancill accepted said note in full satisfaction of and in payment of and in discharge of said Rountree & Co.'s note and other indebtedness, and from that time used said note as collateral, and has treated it as a discharge of preëxisting securities.

This action was brought to restrain the defendant from selling under the mortgage and for an account, etc.

From the judgment of the court overruling the exception to that (155) part of the report which held the mortgage to be extinguished by the acceptance of the new note the defendant appealed.

J. B. Batchelor for plaintiff.
James E. Moore and J. D. Murphy for defendants.

SHEPHERD, J. In the well-considered case of *Battle v. Mayo,* 102 N. C., 413, it was held that where there is reference by consent, the findings of fact by the referee adopted by the trial judge are final, and will not be reviewed here. It was also distinctly held that, while we pass upon the question whether there is *any evidence* to sustain such findings, the exceptions in this respect must be taken below, and will not be heard for the first time in this Court. There being no such exceptions in the present case, the report of the referee, as approved by the judge, is conclusive, and we can only review the findings of law.

The only exception insisted upon is addressed to the finding of law that "the note to Rountree & Co. was, by the transactions between the said Atkinson and the defendant, released and discharged, and the security thereunder lost." The foregoing legal conclusion is based upon the following findings of fact by the referee:

"I find that, on 28 February, 1882, said B. S. Atkinson was indebted to said G. A. Stancill in the amount of the note assigned to him, and various other amounts by note or account, and that on said day the said Atkinson and defendant same to a settlement and ascertainment of the debts due from Atkinson to defendant Stancill, and on that day said Atkinson executed his promissory note, under seal, payable to Stancill for amount of $2,119.11, which amount included the amount of the Rountree note, with interest to that date, with some additional amounts due Stan-

cill on account of his (Stancill's) tenant, for which he became (156) responsible. I find that defendant G. A. Stancill accepted said note in full satisfaction of and in discharge of said Rountree & Co.'s note and other indebtedness, and from that time until now he has used said note as collateral and has treated it as a discharge of preëxisting securities."

It is well settled that a mortgage may be discharged by matter *in pais* (*Faw v. Whittington,* 72 N. C., 321) and it is equally well established that the mere change in the form of the debt does not satisfy a mortgage given to secure it. *Bristol v. Pearson,* 107 N. C., 562; *Hyman v. Devereux,* 63 N. C., 624. Neither does the incorporation in the new note of additional indebtedness have this effect. 2 Jones Mort., 930. The presumption is against the discharge of the mortgage, and this can only be overcome by proof that the new note was actually intended by the parties as a satisfaction and extinguishment of the former one. *Hyman v. Devereux, supra.* "It is, however, competent for the parties to agree that a change in the form of the mortgage debt shall operate as a payment of the debt, although the mortgage be not canceled in form. . . . The question of intention in such cases always comes in with controlling force, and the intention may operate as well to extinguish the debt as to keep it alive. If a note be taken with the intention that it should operate as payment in whole or in part of the old debt, then the mortgage is accordingly paid, wholly or in part, as the case may be." 2 Jones Mort., 926. Applying these principles to the present case, we are constrained to hold that the mortgage debt has been extinguished by the agreement of the parties. The finding of the referee is explicit upon this point. He says that the new note was accepted "in full satisfaction of and in payment" of the former one, and that the defendant has also "treated it as a discharge of preëxisting securities."

Under the findings of fact, which we are precluded from reviewing, we must affirm the judgment.

Affirmed.

Cited: Tilley v. Bivens, 110 N. C., 344; *Hemmings v. Doss,* 125 N. C., 402; *Dawson v. Thigpen,* 137 N. C., 470; *Sturtevant v. Cotton Mills,* 171 N. C., 120; *Boyer v. Jarrell,* 180 N. C., 483.

(157)

H. B. CLAFLIN ET AL. v. J. A. HARRISON ET AL.

Party—Pleading—Mortgagee.

In an action brought against a trading firm to recover a debt in which it was sought, among other remedies, to subject the individual real estate of one of the firm—a woman—to the satisfaction of the judgment, the complaint did not allege that the said real property was any part of the assets of the firm, nor that the woman was married, nor that she had conveyed the lands fraudulently: *Held*, (1) that the complaint failed to disclose such a cause of action as authorized a sale of the land and a distribution of the proceeds among creditors: (2) that a prior mortgagee of the woman was not a necessary party, and the action as to him was properly dismissed.

APPEAL from an order of *Boykin, J.*, at May Term, 1890, of VANCE.

The action was instituted for the purpose, among others of subjecting the real estate of Mrs. Nancy Verrell, in Nash County, to the debts of the firm of Harrison Bridges Dry Goods Company, of which she was a member. After the action was instituted her death was suggested, and at the February Term, 1890, her administrator was made a party. The defendant Louis Hilliard, a resident of Norfolk, Virginia, claimed to have a mortgage on the real estate of Nancy Verrell. On 7 December, 1888, the clerk of Vance Superior Court, upon the filing of an affidavit by plaintiffs that Louis Hilliard was a necessary party, and that he claimed to have a mortgage on the real estate of Mrs. Verrell, made an order that summons be served by publication in the *Tomahawk* newspaper, a paper published in Vance County, for six weeks, and it was made. The defendant Louis Hilliard filed a special plea, and contended that it was an action *in personam*, and that service could not be made by publication. The plaintiffs contended that it was in the nature
(158) of an action to foreclose a mortgage, and was, in fact, a proceeding *in rem*. His Honor made an order dismissing the action, so far as Louis Hilliard was concerned, from which order the plaintiffs appealed.

H. T. Watkins (by brief) for plaintiffs.
J. B. Batchelor and John Devereux, Jr., for Hilliard.

SHEPHERD, J. The plaintiffs pray judgment for their debts; that the defendants be declared guilty of a fraud in contracting the same; that an execution be issued against their persons in the event that executions against their property be returned unsatisfied, and that one of the defendants be required to turn over to a receiver the personal property exemption hitherto allotted to him out of the assets of the firm. They also

pray that the lands of Nancy Verrell be sold by a commissioner and that the proceeds of the sale be distributed among them. We are at a loss to understand the precise nature of this action, but it is very clear from the face of the complaint that the lands of the defendant Nancy cannot be sold in this summary manner. It does not appear that they constitute any part of the assets of the partnership; nor does it appear that she is a married woman, and that her property is sought to be subjected in equity as such; nor is it shown that she has conveyed her said property for the purpose of defrauding the plaintiffs, so as possibly to bring the case within *Bank v. Harris,* 84 N. C., 206.

As, therefore, upon the facts alleged, no judgment can be rendered affecting her lands, it must follow that the defendant Hilliard, who has a mortgage upon the same, is not a proper or necessary party, and that there was no error on the part of his Honor in dismissing the action so far as he is concerned.

The Code, sec. 218, provides for service by publication in the cases mentioned, only where it appears "that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this (159) State."

As there is no cause of action alleged against the said Hilliard, nor any cause of action shown by which the land in which he is interested can be affected, the order of publication was improvidently granted, and the ruling of his Honor must be

Affirmed.

Cited: Bacon v. Johnson, 110 N. C., 118; *Bernhardt v. Brown,* 118 N. C., 706; *White v. White,* 179 N. C., 600.

J. B. ALLEN v. T. O. SALLINGER.

Boundary—Deed, Description in—Evidence.

A description in a deed of "a certain tract of land, begins at a pine on R's line, thence running K's line, thence binding on L's line, then to the first station, including twenty-five acres," is not void for uncertainty, and may be aided by parol proof.

ACTION involving the title and right to possession of a tract of land, tried at the September Term, 1890, of MARTIN, before *Womack, J.* Appeal by defendant. The case is stated in the opinion.

James E. Moore for plaintiff.
A. O. Gaylord for defendant.

AVERY, J. Not a single exception was taken to the rulings or the charge of the court below. The contention of the defendant, suggested for the first time in this Court, was, that there was a fatal variance between the description of the land sued for, as set forth in the complaint, and (160) that contained in the deed offered by the plaintiff, to establish title. As a remedy for this defect the plaintiff moved here to amend the complaint by embodying in it the calls of his deed instead of the imperfect boundaries now declared upon, and the motion was allowed in the exercise of an unquestionable power. *Knowles v. R. R.,* 102 N. C., 67; *Grant v. Rogers,* 94 N. C., 755; The Code, sec. 965; *Wilson v. Pearson,* 102 N. C., 291.

The defendant then moved for judgment here, on the ground that the description was, upon its face, void for uncertainty. The descriptive clause in the deed and the amended complaint is as follows: "A certain tract or parcel of land begins at pine on Rolach line; then running Kenneth Sallinger line; thence binding on Lovick Sexton's line; thence running the Thomas Latham's line; then to the first station, including twenty-five acres, be the same more or less." It is needless to cite authority to prove that evidence *aliunde* would have been competent to locate the pine at the beginning. Then, proof that a line known as the Kenneth Sallinger line extended from the pine to a point where it intersected with another line known as Lovick Sexton's line would have been admissible to establish the second corner at the point of intersection (where it was "binding on" or connected with the Sexton line). The term "binding on" is a local and provincial expression, but we take notice of the fact that it is used to indicate that a tract of land is bounded by another, and, as a result in this case, that the lines of the land intersect. The third call—"thence running Thomas Latham's line"—does not indicate in express terms at what point on this line the third corner could be located, nor does it give any *data* from which it could be determined what distance that line must be followed and what would be the point of departure from that line for the first station. From the second corner, at the intersection, the call is not "along the Lovick Sexton line," but "thence running Thomas Latham's line," and, according to a (161) settled rule of construction, if the Latham line could be established by parol proof, the third line of this tract would run from the intersection (the second corner) the most direct course to the nearest point on it, not necessarily with the Sexton line, but along the Sexton line, if it intersected with both the Rolach and Latham lines, at the

points in the two where they approached nearest to each other. *Spruill v. Davenport,* 46 N. C., 203; *Gause v. Perkins,* 47 N. C., 222; *Topping v. Sadler,* 50 N. C., 357; *Cansler v. Fite, ib.,* 424.

In *Campbell v. Branch,* 49 N. C., 313, the Court laid down the rule that where the object designated in the description was not a point, but a series of points, making an extended line, "as in the case of a river, swamps, or *the line of another tract of land,* then the disputed line must be run to the *nearest point* on said *river,* swamp, or *line of another tract,*" and that, in order to carry out this principle, even a call for course and distance must be disregarded. *Redmond v. Stepp,* 100 N. C., 212; *Wellons v. Jordan,* 83 N. C., 371.

Having reached the nearest point upon the Latham line, the next question presented is, how far, according to the calls of the deed, should the Latham line be followed, or how would the point of departure from that line to the first station be determined? There being nothing in the description to fix that corner at any point beyond the intersection of the second line with it, we must, as far as possible, give effect to all the descriptive words by first going to the Latham line by the most direct course, and then running the shortest line from our intersection to the first station, thus enclosing the land by three triangular lines. *Shultz v. Young,* 25 N. C., 385. In the case of *Osborne v. Anderson,* 89 N. C., 262, the late *Chief Justice Smith,* for the Court, construed the words of a description in a deed, "thence south to James and John McMillan's line, and thence west to Cynthia Gambrill's land," to mean that the lines should be run south first to the line of James, then along that line to its intersection with John's line, or, if the two (162) were shown to approach each other without intersecting, then from the nearest point in the line of James to that of John by direct course, and thence by the shortest line to Cynthia Gambrill's land. *Miller v. Bryan,* 86 N. C., 167.

In the consideration of the motion of the defendant, we must take an abstract view of the question, discussing it just as if the judge below had held the description too vague, and refused to hear testimony at all. It is too late, after failing to enter an exception, for the defendant to insist upon the insufficiency of the evidence. The jury have found that he was a trespasser on land belonging to the plaintiff, and it is not material now whether, in arriving at their conclusion as to the facts, they thought the plaintiff's deed ought to be run so that the boundary of land included should assume the shape of a parallelogram, a square, or triangle. The finding that defendant was a trespasser on land of which plaintiff was the owner in fee simple is conclusive upon the former. We are called upon to decide, and do hold, simply that the description is not too vague to be explained by competent parol proof *aliunde,* to which, by its terms,

it points, and is not, therefore, void upon its face. *Blow v. Vaughan,* 105 N. C., 198. Without assuming that the plaintiff did adduce precisely such evidence as, upon the theory advanced by us would have been sufficient to fit the description to the land claimed by him and cover the *locus in quo,* we must refuse the defendant's motion, because the language of the deed is such as to demonstrate the possibility, by extrinsic evidence pointed out by its terms, of establishing its boundary lines. If the defendant had excepted to the ruling of his Honor upon his demurrer to the evidence, we would not have been precluded from considering the other question discussed by counsel.

Affirmed.

Cited: Broadwell v. Morgan, 142 N. C., 478; *Bachelor v. Norris,* 166 N. C., 509.

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(163)

RICHARD HOLDEN v. J. K. PUREFOY ET AL.

Abandonment — Contract — Specific Performance—Equity—Waiver—Estoppel—Vacating Judgment—Excusable Neglect—Evidence.

1. Long delay, accompanied by acts inconsistent with a purpose to perform the contract, will, if not waived, bar the right to a specific performance.

2. A contract required by the statute of frauds to be in writing may be waived in parol by abandonment, but the acts constituting such abandonment must be positive, unequivocal and inconsistent with the contract. The rule is founded upon the doctrine of estoppel, and not upon the idea that an estate can be passed by such waiver or abandonment.

3. Not only will the courts refuse to decree a specific performance when such waiver is established, but the circumstances may be of such character that they will operate as an absolute discharge of the contract, even as between the original parties, and take away any remedy either at law or in equity.

4. Where, upon an appeal from an order setting aside a judgment for excusable neglect, there were no findings of fact in the record, and it did not appear that the appellant had requested that such findings should be made, the Supreme Court will assume that the exception is based upon the ground that, taking as true that view of the testimony most favorable to the appellee, he would not be, as a matter of law, entitled to have the motion allowed.

5. In the progress of a cause an order was entered, upon motion of defendant, to make another person party defendant, and a summons was issued and served upon such person in accordance with the order. The person so served did not, however, read or hear read the summons, and was unaware of the order making him party, but supposed he was summoned as a wit-

ness, in which capacity he attended the trial and was examined. He learned then that he had been made a party and judgment had been rendered against him for want of an answer: *Held*, that the judge committed no error in setting aside the judgment upon the ground of excusable neglect.

APPEAL at January Term, 1890, of FRANKLIN, from *Boykin, J.*

The only matter in controversy was between the defendant J. R. Purefoy and M. Woodlief. All the matters in said action (164) in which the plaintiff's testator, Richard Holden, had any interest, were tried and determined by the judgment of the court rendered before the death of the said Richard Holden, who was the original plaintiff, and who was the testator of the present plaintiff.

On 1 April, 1880, Richard Holden sued out a summons against the defendant Purefoy, returnable to April Term, 1880, of the Superior Court for said county. At Fall Term, 1881, the plaintiff filed his complaint, in which he demanded judgment for the amount of one of the notes referred to in the opinion. Subsequently, the defendant Purefoy filed an answer, setting up the contract to convey the land, and praying a specific performance. He further alleged that the defendant Woodlief had purchased a portion of the land and was in possession.

On motion of defendant Purefoy, it was ordered by the court that summons issue in the action to M. Woodlief and other parties mentioned in the order. The summons was issued on 20 March, 1882, and was served on Woodlief on 1 April, 1882, and was duly returned at the next term of the court, which began on 9 May, 1882. At April Term, 1888, there was a decree entered for defendant Purefoy for specific performance and account by plaintiff. At next term Woodlief moved to vacate it as to him, and filed the following affidavit:

"M. Woodlief, the above-named defendant, being duly sworn, says: That the above-named action was commenced by the said plaintiff against the said defendant J. K. Purefoy by the issuing of a summons on 30 March, 1880, and returnable to Spring Term, 1880, of this court; that after the return term of said action, as this affiant is now informed and believes, this affiant, M. Woodlief, was made a party to said action, and a summons was issued to the defendant on 20 March, 1882; that the sheriff of Franklin County saw this affiant and said to him (165) that he (said sheriff) had a summons for this affiant to be at the next term of the Superior Court of this county—something concerning the Richard Holden and Purefoy matter; that he did not know what it was; that the summons was not read to this affiant and he did not know the contents thereof, and was not then or at any other time informed that he was made a defendant in said action until he was examined as a witness before the referee and his attention was then called to the entry

of his name in the paper; that in obedience to the notice given or service of summons served on him, hence, as above said, he did not attend the next term of the court for three days, and saw plaintiff, Holden, and asked him if he had had the affiant summoned, and for what purpose; that said Holden told the affiant that he had not had the affiant summoned and knew nothing about it; he thought he had been summoned as a witness to attend for three days, and, not having heard his name called, left for home and did not again attend; that the defendant Purefoy was not at court at the said term, and therefore this affiant made no inquiry of him; that this affiant did not know and had no belief that he was a party to said action or that he had any interest therein, and did not, therefore, employ any attorney to represent him, and, so far as he knows, no attorney has assumed to act for and represent him in said action; that he is informed and believes, and so, therefore, avers that no complaint has been filed against him by the plaintiff in said action, and that in plaintiff's complaint made therein no averment or charge of fact is made by plaintiff against the defendant, and there is no prayer for judgment against him, and there is no prayer for judgment in plaintiff's said complaint against this affiant; that at Spring Term, 1885, of this court the defendant Purefoy filed his answer, in which he alleged
(166) that the affiant had purchased and was in the possession of part of the land mentioned."

The judgment was vacated as to Woodlief, and the defendant Purefoy appealed.

The other facts necessary to an understanding of the matters presented for review are stated in the opinion.

No counsel for plaintiff.
C. M. Cooke and T. M. Pittman for Purefoy.
J. B. Batchelor and John Devereux, Jr., for Woodlief.

SHEPHERD, J. Before proceeding to a consideration of the merits of this controversy, we must first pass upon the ruling of the court in setting aside the judgment against the defendant Woodlief.

1. At April Term, 1888, the case was tried upon the pleadings and report of the referee, and, there being no answer on the part of the said Woodlief, a judgment was rendered which precluded him from the important defenses which he was afterwards permitted to assert. The said defendant, within a year after the rendition of the judgment, moved that the same be set aside, on the ground of surprise and excusable neglect (The Code, sec. 274), and after a consideration of the affidavits the court allowed the motion, and the defendant Purefoy excepted.

No findings of fact accompany the several affidavits, nor does it appear that the appellant requested that such findings should be made. If he had desired the ruling of this Court upon any particular view of the facts, he should have asked for a finding of the same, but as he failed to do so, we must assume, in the absence of any specific exception or of a motion to remand, that his objection is based upon the ground that, taking as true that view of the testimony most favorable to the appellee, the latter, as a matter of law, would not be entitled to relief.
While this point of practice has never been determined with (167)
reference to motions under the above section of The Code, we
think that the rule as indicated is just, as well as convenient, and we can see no reason why it should not be adopted in such cases, as well as in motions to vacate attachments and other like proceedings. *Millhiser v. Balsley,* 106 N. C., 433.

Taking, then, the affidavit of Woodlief in connection with the undisputed facts disclosed by the record, we are of the opinion, without any further discussion, that enough appears to sustain the ruling of the court in setting aside the judgment.

2. It has long been settled that a parol waiver of a written contract, within the statute of frauds, "amounting to a complete abandonment and clearly proved, will bar a specific performance." *Price v. Draper,* 17 Ves., 356; *Inge v. Lippingwill,* 2 Dick., 469; *Jordan v. Lawkins,* 1 Ves. Jr., 404; *Rich v. Jackson,* 4 Bro. C. C., 519; *Filmer v. Gott,* 6 Ves., 337; *Coles v. Trecothick,* 9 Ves., 250; *Robinson v. Page,* 3 Russ., 119. But "it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract." *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., 389; *Falls v. Carpenter,* 21 N. C., 237. When, however, a contract for the sale of land has been partly performed by the entry of the vendee and a part payment of the purchase-money, the vendee is deemed to have acquired an equitable estate; and while, as was said by *Bynum, J.,* in *Faw v. Whittington,* there is a distinction between contracts to "sell and convey" land (the words of the statute) and contracts or agreements made between vendor and vendee after that relation is established, and which are intended to terminate that relation, the courts are peculiarly strict in requiring the clearest and most cogent proof, giving effect to such a discharge or abandonment by matter *in pais,* not upon the idea of passing an estate in lands, but by way of "equitable estoppel in
the vendee to assert a claim to specific performance, where his (168)
conduct has misled the vendor intentionally." *Faw v. Whittington, supra.*

It seems also established that the circumstances may be of such an extraordinary character as not only to constitute a bar to specific perform-

ance, but to work in effect such a discharge of the contract, even as between the original parties, as to take away all remedy at law, as well as all claim to the ordinary equitable adjustment between the parties. It is, however, unnecessary in this case to pass upon the latter question, as Holden, the vendor, by bringing this suit against Purefoy, the vendee, for the recovery of the balance of the purchase-money, has, so far as he is concerned, waived any right to insist upon a discharge by way of abandonment, and the vendee is now entitled, as against the said Holden, to insist upon any rights he may have growing out of the said contract, whether they be legal or equitable. These rights may hereafter be determined in this action, but as the case upon appeal is confined, as expressly stated, to the controversy between the defendants Purefoy and Woodlief, we can only consider the question presented, to wit, whether Purefoy is entitled to specific performance or any other equitable relief as against Woodlief.

While we do not concur in the ruling of his Honor as to Woodlief being protected by seven years adverse possession under color of title [the sheriff's deed not having been delivered, and the two years possession of the vendor after entry and before sale to Woodlief not being adverse (*Edwards v. University,* 21 N. C., 325), and therefore not to be computed in making out the requisite time], still enough, in our opinion, appears upon the issues found, the facts admitted, and the testimony of Purefoy himself, to sustain the judgment of the court. The facts are substantially as follows: Holden, the owner, contracted in 1868 to sell the land to Purefoy, and the latter executed to him notes of $200 each, payable, respectively, on 26 February, 1869; 26 February, 1870; (169) 26 February, 1871, and 26 February, 1872. Purefoy entered under this contract (which was registered) and cut wood and railroad ties, it is said, of considerable value. He paid about one-half of the purchase-money, and, being in default in the payment of one of the notes, was sued in 1871 by Holden. In that year a judgment was rendered against him on said note, and in June, 1872, an execution was issued, under which the land was sold and purchased by Holden. A deed to Holden was prepared by the sheriff, but for some reason was never delivered. Immediately after this attempted sale in 1872, Purefoy left the land and moved to a distant part of the State, and Holden reëntered and remained in possession until he sold for a valuable consideration, and without actual notice, to Woodlief and others in 1875 and 1876. Woodlief bought the interests of these other purchasers, and has been in possession ever since, having cleared the land and made other valuable improvements. During all of these years no claim whatever was made by Purefoy, and he candidly testifies that when he left the land he "did not intend to have anything more to do with it." Thus for a period of

about twelve years, until the filing of Purefoy's answer in 1885, has this defendant and those under whom he claims been in possession of the land without actual notice and without any attempt whatever being made to enforce the contract. It is but fair to assume that if Holden had not brought this suit for the balance of the purchase-money Woodlief would never have been disturbed by Purefoy; and can it be that any act of recognition of the contract by Holden, subsequent to his sale of the land, can affect the rights of one who purchased from him? Eliminating from the case, then, the act of Holden in bringing this suit, let us see whether, even as against him, the defendant Purefoy would have been entitled to specific performance.

Without attempting to repeat the numerous authorities upon the general subject, it is sufficient to state, what has been so often declared, that specific performance is not a matter of strict right, (170) but is, within the discretion of the court, to be exercised under certain well-established principles of equity; and one of these principles is that long delay, accompanied by acts inconsistent with a purpose of performing a contract, will, if not waived by the vendor, preclude the vendee from specific performance. *Falls v. Carpenter, supra; Francis v. Love,* 56 N. C., 321; *Love v. Welch,* 97 N. C., 200.

The following from 2 Story Eq. Jur., sec. 771, is quoted with approval by this Court in *Love v. Welch, supra,* and is of peculiar application to the present case: "In general (says the eminent author) it may be stated that to entitle a party to a specific performance he must show that he has been in no default in not having performed the agreement and that he has taken all proper steps towards the performance on his part. If he has been guilty of gross *laches,* or if he applies for relief after a long lapse of time, *unexplained by equitable circumstances,* his bill will be dismissed."

"A party cannot call upon a Court of Equity for specific performance," said *Lord Alvanly,* "unless he has shown himself ready, desirous, prompt and eager," or, to use the language of *Lord Cranworth,* "Specific performance is relief which this Court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit." Fry Spec. Perf., 320. "A Court of Equity will not interfere to decree a specific performance where the party seeking it has been guilty of gross *laches* or long voluntary delay, and in the meantime there has been a material change of circumstances." *McNeil v. Magee,* 5 Mason, 244. Now, if we apply these principles to the facts before us, it is too plain for argument that specific performance should not be decreed. Granting that time is not generally, in equity, the essence of a contract, and that where there has been only delay, there must be some demand or some act amounting to notice to the vendee that the default (171)

in the payment will be insisted upon, we have here the very strongest evidence of this in the action of Holden in suing for the purchase-money, his attempted sale under execution, and the resumption by him of the possession and dealing with the land as his own. But there is more here than mere delay; for Purefoy, having control of the land, actually leaves the same with the purpose of having nothing more to do with it. We have, then, not simple delay only, but a most significant *act,* as well as an *admitted intention* of abandoning the property.

In *Francis v. Love, supra,* the Court refused specific performance upon the mere delay of payment for six years. The Court say: "From 1848 to the filing of the bill is six years, during which the plaintiff makes no effort to enforce his rights; on the contrary, he leaves the State and does not return until 1854, just before the bill is filed. The defendant was well justified in believing that the plaintiff had abandoned his contract, and that he was at liberty to proceed in improving the land. It would be doing injustice to the defendant, after such delay on the part of the plaintiff, and after he had dealt with the land as if discharged from his contract, to permit the plaintiff to come forward and insist upon a specific performance."

So far from explaining his inconsistent acts and long delay by "equitable circumstances," as required by Story, *supra,* Purefoy explicitly informs us, as we have stated, that when he left the land he did not intend to have anything more to do with it, and his long acquiescence in the possession of Woodlief and those under whom he claims, is not only consistent with, but in entire corroboration of, this purpose. If it be true that Woodlief purchased with constructive notice, still if the contract could not have been specifically enforced against a resisting
(172) vendor, it is difficult to understand how it can be enforced against one who honestly purchased of him.

It now remains to be determined whether the land in the hands of Woodlief can be impressed with any charge growing out of an equitable adjustment by way of a return of the purchase-money, as upon rescission. Conceding that the registration of the contract, before the act of 1885, was constructive notice, and that Woodlief would have been affected with notice of any facts which he might have learned upon proper inquiry (and this is the proper rule in such cases—*Bryan v. Hodges,* 107 N. C., 492), let us inquire what information he had or could have acquired at the time of his purchase. He finds Holden, the legal owner, in undisturbed possession of the land for two or three years after the attempted sale by the sheriff and the departure of Purefoy. He finds Holden exercising acts of ownership and selling parts of the property to various parties, and thus asserting, by the most unequivocal acts, that the contract was abandoned. He would have learned that Purefoy, after

controlling the land for three or four years, had left the same and had made no claim to it since his departure for another part of the State. Here is an actual abandonment of occupancy by the vendee, and the reëntry and assertion of unconditional ownership by the vendor. If Woodlief had pursued his inquiries further and sought Purefoy, he would have been told, if the latter's own statement is to be believed, that although he (Purefoy) had agreed to purchase the land, he had left it in 1873, had nothing to do with it since, "and did not intend to have anything more to do with it." This is the information he would have obtained; and if, upon this statement of Purefoy, he had purchased and paid for the land, it cannot, we think, for a moment be doubted that Purefoy would have been estopped from asserting any claim against the said purchaser. We think that we are well warranted in thus assuming that at the time of Woodlief's purchase there had been no change of purpose on the part of Purefoy, as his conduct for years after- (173) wards clearly corroborates his declared intention of abandonment, and he has offered no testimony whatever to the contrary. The case, however, is stronger than this; for, after his purchase, Woodlief entered, cleared the land and made valuable improvements. Purefoy is presumed to have known of this, and, being aware of the occupancy of Woodlief, he makes no objection; and now, after this long period of silence and default, he is awakened from his twelve years slumber by the wrongful suit of Holden, and, instead of simply defending himself against the same, he treats it as a recognition of the contract, and thus, between the two—Holden endeavoring to enforce a demand founded upon a transaction which he, with the long acquiescence of Purefoy, had most unequivocally treated as abandoned, and Purefoy asserting a defense based entirely upon such improper demand—this innocent purchaser for value, who has been misled by the conduct of the said parties, is sought to be crushed and destroyed. It is very plain that neither Holden nor Purefoy could have enforced the contract as against each other. This being so, it would be grossly inequitable to permit them to revive it, to the prejudice of a meritorious purchaser. "A parol waiver or rescission executed by the parties, or followed by change of circumstances rendering it inequitable to enforce the contract, is consequently a sufficient answer to a bill for specific performance (*Lauer v. Lee,* 6 Wright, 165; *Bowzer v. Kramer,* 6 P. F. Smith, 132) especially, if third persons have given value in a well-founded belief that the contract was at an end. *Boice v. McCuller,* 3 W. & S., 429; *Workman v. Guthrie,* 5 Carey, 495; *Holt v. Rogers,* 8 Peters, 420." Under the circumstances of this case (among which we emphasize the resumption of possession, the long delay, and acquiescence of the vendee, as well as his admitted intentions), we think it would be grossly inequitable to charge the land

(174) in the hands of Woodlief with any claim whatsoever. This conclusion is further supported by the fact that it nowhere appears that Holden is insolvent and unable to meet any demand which the vendee might have asserted against him, as upon a rescission of the contract. Upon a careful perusal of the entire record, we think that the judgment of the court should be

Affirmed.

Cited: Beattie v. R. R., post, 439; *Gillis v. R. R., post,* 447; *Carter v. Rountree,* 109 N. C., 31; *Taylor v. Taylor,* 112 N. C., 30; *Wool v. Bond,* 118 N. C., 2; *Whitehead v. Hale, ib.,* 604; *Gorrell v. Alspaugh,* 120 N. C., 368; *Hemmings v. Doss,* 125 N. C., 402; *Robinett v. Hamby,* 132 N. C., 356; *Avery v. Stewart,* 134 N. C., 293; *May v. Getty,* 140 N. C., 316; *Redding v. Vogt, ib.,* 568; *Hairston v. Bescherer,* 141 N. C., 209; *Parker v. Ins. Co.,* 143 N. C., 342; *Lewis v. Gay,* 151 N. C., 170; *Palmer v. Lowder,* 167 N. C., 333; *Faust v. Rohr, ib.,* 361; *Thompson v. Clapp,* 180 N. C., 248.

STATE EX REL. AUGUSTUS MAGGETT v. E. E. ROBERTS ET AL.

Penalty—Joinder of Actions—Jurisdiction—Parties—Pleading—Register of Deeds—In Forma Pauperis—Security for Costs.

1. In an application to prosecute an action *in forma pauperis* it is not necessary the affidavit should state that the applicant did not own real estate which he might mortgage to secure costs.

2. An action against a register of deeds to recover the penalties imposed for a failure to comply with the provisions of the statute in relation to issuing marriage licenses must be prosecuted in the name of the person who sues therefor, and not in the name of the State.

3. Notwithstanding the penalties imposed does not exceed $200 (and if only one was sought to be recovered a justice of the peace would have jurisdiction), a plaintiff may unite several causes of action for several penalties against same party, in same complaint, and if the aggregate amount thereof exceeds $200 the Superior Court will have jurisdiction.

4. The penalty given by section 1819, The Code, is as applicable to a failure to record the license, or its substance, when issued, as to a failure to record the return thereof.

5. In an action to recover the penalty given against registers of deeds for issuing marriage license in violation of section 1816, The Code, it is essential that the complaint should allege that the register issued the license *knowingly or without reasonable inquiry.*

MAGGETT *v.* ROBERTS

APPEAL from *Womack, J.*, at January Term, 1890, of NORTH- (175) AMPTON.

This action was begun in the Superior Court, in the name of the State on the relation of Maggett v. Roberts, the register of deeds of said county and his sureties upon his official bond.

The complaint alleged three several and distinct causes of action, to wit, the first cause of action for the penalty of $200 given by The Code, sec. 1819, for not recording the substance of the license issued by him for the marriage of William Parker and Mary Sykes; the second cause of action for the like penalty of $200, under the same section, for not recording the substance of the license for the marriage of John Harris and Cinda Garner; and the third cause of action for the penalty of $200, under The Code, sec. 1816, for issuing license for the marriage of Roxana Lassiter to Henry Futrell without the consent of her mother, the said Roxana being under the age of 18 years and residing with her mother, her father being unknown. The relator, upon proper affidavit and certificate, was allowed to sue *in forma pauperis.*

The defendant demurred and assigned as grounds of the demurrer:

1. That the action was improperly brought in the name of the State.

2. That there was a misjoinder of causes of action, in that three penalties concerning three different causes of action are sued for in one action.

3. For that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege that a return was made on the marriage license alleged to have been issued for the marriage of William Parker and Mary Sykes, and of John Harris and Cinda Garner, to the defendant Roberts during his term of office, or when any such return was made, and fails to state that any return of either of said mar-
riage licenses was ever made to the defendant Roberts whilst he (176) was register of deeds, and that it fails to allege that the defendant Roberts knew or had reasonable grounds to know that there was any impediment in the way of the marriage of Henry Futrell and Roxana Lassiter, or that he knew or had reason to know that Roxana was under 18 years of age, or that the said Roberts failed to use due diligence to ascertain the age of the said Roxana; for that it appears on the face of the complaint that the marriage of the two couples first above mentioned took place after the expiration of the term of office of the defendant Roberts.

4. That the action was improperly brought upon the official bond of the register.

The court sustained the last-named ground of demurrer and overruled the others.

The plaintiff was thereupon allowed by the court to amend by striking out the State as a party, and by striking out all reference to the official

bond in the complaint, and by entering a *nol. pros.* as to the sureties. To this order the defendant excepted.

The defendant moved that the plaintiff be required to give a prosecution bond. This the court declined, and defendant excepted. From the judgment upon the hearing of the demurrer, the refusal to require prosecution bond, and the order permitting plaintiffs' amendments, all of the defendants appealed to the Supreme Court.

R. B. Peebles for plaintiff.
B. S. Gay for defendants.

CLARK, J. The amendment rested in the discretion of the trial judge, and is not reviewable. *Brown v. Mitchell,* 102 N. C., 347. In that case the same amendments as in the present case were allowed to be
(177) made, and after verdict. The Court say: "If the action had been originally begun and prosecuted against the sheriff individually, and not against him and the sureties on his official bond, it is obvious that the defense would have been the same, and the same issues would have arisen. The nature of the action has not been so changed as to surprise the defendant by making it necessary to establish any fact not already material under the issues submitted to the jury. The judge could, in his discretion, refuse the motion to amend, or grant it with or without terms. The Code, secs. 272, 273; *Carpenter v. Huffsteller,* 87 N. C., 273; *Reynolds v. Smathers,* 87 N. C., 24."

The exception to the refusal to require the plaintiff to give a prosecution bond is based upon the ground that the affidavit upon which leave to sue *in forma pauperis* was granted did not allege that the plaintiff did not have real estate which he could mortgage to secure the costs. The affidavit is in the form required by the statute (The Code, sec. 210), and it does not exact such allegation.

The first ground of demurrer was improperly overruled (*Norman v. Dunbar,* 53 N. C., 319; *Middleton v. R. R.,* 95 N. C., 167), but the error is cured by the subsequent amendment.

The second ground of demurrer was properly overruled. The Code, sec. 267 (2), allows the joinder of such causes of action. And, although by the amendment the action is no longer for the penalty of the bond, but is for three separate penalties, as to which, if brought separately, a magistrate would have jurisdiction, the action being *ex contractu* (*Katzenstein v. R. R.,* 84 N. C., 688), still, as the statute allows them to be united in the same action, and the aggregated sum demanded is $600, the Superior Court has jurisdiction. *Moore v. Nowell,* 94 N. C., 265; Estee Code Pleadings, sec. 1609.

The third ground of demurrer was also properly overruled, as to the first and second causes of action. The penalty given by section 1819 is in the alternative, either for the failure to record the (178) substance of the license issued or for failure to record the substance of the return. The plaintiff sues for the first, and no allegation as to the failure to record the return is necessary, nor was it material that the marriages authorized by the licenses were not celebrated till after the expiration of the defendant's term of office. The demurrer, however, should have been sustained as to the third cause of action, in that the complaint fails to allege that the defendant issued the license to a person under 18 years of age "knowingly or without reasonable inquiry." This is essential, under provisions of The Code, sec. 1816, to constitute the third cause of action. *Bowles v. Cochran,* 93 N. C., 398. And in failing to sustain the demurrer in that respect there was

Error.

Cited: Bray v. Creekmore, 109 N. C., 51; *Walker v. Adams, ib.,* 483; *Martin v. Goode,* 111 N. C., 289; *Joyner v. Roberts,* 112 N. C., 114; *Maggett v. Roberts, ib.,* 71, 75; *Forte v. Boone,* 114 N. C., 177; *Burrell v. Hughes,* 116 N. C., 437; *Sutton v. Phillips, ib.,* 506; *Tillery v. Candler,* 118 N. C., 889; *Carter v. R. R.,* 126 N. C., 443, 444; *Sloan v. R. R., ib.,* 490; *R. R. v. Hardware Co.,* 135 N. C., 77; *Laney v. Mackey,* 144 N. C., 632.

JAMES JONES ET AL. v. SAMUEL HOGGARD ET AL.

Descent—Husband and Wife—Statute.

A man and woman, both slaves, cohabited as husband and wife for several years, but separated prior to emancipation. Several children were born while this relation existed. After the separation the woman entered into a similar relation with another slave, which continued until after the end of the war, when the parties duly acknowledged and had recorded the fact of cohabitation, as provided by chapter 40, Laws 1865-6. Two children were born of this union before 1866, one of whom died after his parents, unmarried and intestate. The father died in 1873 seized of lands, and the mother in 1876, also seized of other lands: *Held,* (1) that by virtue of the act of 1866 the children of the last union were legitimate and inherited the lands of which their father died seized; (2) that they also inherited the lands of which their mother died seized, to the exclusion of her children born of the first union; (3) upon the death of one of the legitimate children his estate descended to the other as his next collateral relation; (4) the statute 1879 (The Code, sec. 1281, Rule 13) operated only prospectively and could not divest any estate theretofore acquired. *Tucker v. Bellamy,* 98 N. C., 33, approved.

(179) ACTION to recover land, tried at May Term, 1890, of BERTIE, before *Armfield, J.*

The facts agreed upon were as follows:

1. Some years prior to the war, Stephen Ruffin and Sylvia Ruffin, a slave man and woman, cohabited together as man and wife, and the plaintiffs Martha and Kate Jones, Edmund and Stephen Pugh, and Lucy Watson, and the defendant Margaret Sanderlin, were born during the cohabitation; and after the birth of the youngest of these children the cohabitation ceased by the voluntary moving away of one of the parties, and was never resumed.

2. After said separation, and prior to the war, the said Sylvia contracted the relation of man and wife with one Alonzo Hoggard, a slave man, and this relation continued until the death of Alonzo Hoggard, Sr., in 1873. Of this cohabitation, and before 1866, two children were born—Samuel S. Hoggard, one of the defendants, and Alonzo Hoggard, Jr., who died before the commencement of this action.

3. Immediately after the passage of the act of 10 March, 1866, ch. 40, "Alonzo Hoggard, Sr., and Sylvia, in strict compliance with the act, and being then persons within its meaning, made all of the acknowledgments required by the act, and went before the officer therein designated and acknowledged the fact of this cohabitation and the time of its commencement, which was recorded in a book kept for that purpose."

4. Alonzo, senior, died in 1873 seized and possessed of the property mentioned and leaving Samuel S. Hoggard and Alonzo, junior, his only heirs at law.

5. Sylvia Hoggard died in 1876 seized and possessed of the Bryan warehouse and leaving surviving her children born of Stephen Ruffin, and Samuel H. Hoggard and Alonzo, junior, children of Alonzo, senior.

6. Alonzo Hoggard, Jr., died unmarried, without issue, and intestate. No date is given.

7. Samuel S. Hoggard has been for ten years in the sole and (180) exclusive possession of both lots, and refuses to allow the plaintiff to occupy or enjoy any part of the same.

Upon these facts the plaintiffs ask to be let into possession as cotenants in common with the defendants, which defendant Samuel S. Hoggard resists, claiming sole seizin in himself of said lots.

The court, being of opinion that the plaintiffs were not entitled to share in the estate of Alonzo Hoggard, Sr., nor of Sylvia Hoggard, so adjudged, and the plaintiffs appealed; but being of opinion that they were entitled to share in the estate of Alonzo Hoggard, Jr., so adjudged, and the defendants appealed.

R. B. Peebles for plaintiffs.

F. D. Winston for defendants.

PLAINTIFFS' APPEAL

CLARK, J. Alonzo Hoggard, Sr., and Sylvia came within the provisions of chapter 40, Acts 1866, as they were then cohabiting together as man and wife, and continued to do so after the passage of the act. Their children, Samuel S. Hoggard and Alonzo Hoggard, Jr., were legitimate by virtue of that statute, and could inherit from their parents and from one another. *S. v. Harris,* 63 N. C., 1; *S. v. Adams,* 65 N. C., 537; *S. v. Whitford,* 86 N. C., 636; *Long v. Barnes,* 87 N. C., 329.

When Alonzo Hoggard, Sr., died, in 1873, his real estate descended to them, as did also the real estate of Sylvia when she died, in 1876. At that date they were her sole legitimate children. The inheritance then vested in them could not be divested by the subsequent act of 1879 (now The Code, sec. 1281, Rule 13). The contention of the plaintiffs that the act of 1879 was retroactive and entitled them to share in their mother's estate was properly overruled. The act could be pros- (181) pective and "operative in the future only." *Woodard v. Blue,* 103 N. C., 109.

DEFENDANTS' APPEAL.

Alonzo Hoggard, Jr., having died intestate and without lineal descendants, the real estate inherited by him from his father descended to his brother, Samuel S. Hoggard, who was his next collateral relation capable of inheriting, of the blood of his father. The Code, sec. 1281, Rule 4; *Bell v. Dozier,* 12 N. C., 333; *McMichael v. Moore,* 56 N. C., 471. As to the real estate descended to said Alonzo Hoggard, Jr., from his mother, if his death occurred prior to the act of 1879 (The Code, sec. 1281, Rule 13), the plaintiffs were then still illegitimate, and, being incapable of inheriting collaterally (The Code, sec. 1281, Rule 9), the estate passed solely to the defendant Samuel S. Hoggard. The burden was on the plaintiffs to show that the death of Alonzo Hoggard, Jr., took place subsequent to the act of 1879. The complaint alleges his death in 1882. This is denied in the answer. The "facts agreed" are silent on this point, except what may be inferred from the statement that the defendant Samuel S. Hoggard, when the case agreed was signed (in 1890) had been in possession of all the real estate left by Alonzo Hoggard, Jr., for ten years. Conceding, however, for the argument, that Alonzo Hoggard, Jr., died since the act of 1879, it does not support the plaintiffs' contention. That act (The Code, sec. 1281, Rule 13) provides: "The children of colored parents, born any time prior to 1 January, 1868, of persons living together as man and wife, are hereby declared legitimate children of such parents, or either one of them, with all the rights of heirs at law and next of kin, *with respect to the estate or*

estates of any such parents or either one of them." The right of inheriting thus conferred "does not extend beyond parents and children (182) and the estates of such parents" (*Tucker v. Bellamy* 98 N. C., 33), and the parents' inheritance cast upon the defendant and his brother could not be divested by the subsequent act. Upon the facts agreed, the plaintiffs and the defendant Margaret Sanderlin were entitled to share in no part of the estate of their mother, Sylvia, nor in the estate of Alonzo Hoggard, Jr.

Error.

Cited: Tucker v. Tucker, post, 238; *S. v. Melton,* 120 N. C., 595; *Bettis v. Avery,* 140 N. C., 187; *Love v. Love,* 179 N. C., 118.

WILLIAM C. ROUSE ET AL. v. JOHN C. BOWERS AND B. J. ARENDELL.

Assignment—Fraud—Notice—Trustees and Assignees—Judgment.

1. To avoid an assignment for fraud, it is not necessary that the assignee should have participated in or had knowledge of the fraudulent purposes of the assignors.

2. Assignees and trustees, acting in good faith under a conveyance afterwards declared fraudulent and void by judicial decree, will be protected from liability. It is erroneous to enter personal judgment against them upon a verdict establishing the fraudulent intent of their vendors.

APPEAL from *Womack, J.,* at June Term, 1890, of DURHAM.

The defendants tendered the following issues:

1. Was the deed of assignment mentioned in the complaint made with intent to hinder, delay and defraud the creditors of Bowers & Arendell?

2. Did the defendant B. W. Matthews have knowledge at the time of any such intent?

3. What was the value of the property assigned?

His Honor submitted the third issue as tendered by the defendants, and declined to submit the first and second issues so tendered, (183) and the defendants excepted to the refusal to submit the issues tendered by them, and also to the issue submitted by the court, which was:

"Was the deed of assignment of Bowers & Arendell, mentioned in the complaint, made with the intention to hinder, delay or defraud the creditors of Bowers & Arendell?"

His Honor charged the jury that if they should find that the deed was made with a fraudulent intent, it being a voluntary conveyance for the alleged benefit of creditors, it was immaterial whether the defendant Matthews knew of or participated in the fraudulent intent; to which charge the defendants excepted.

There was a verdict for the plaintiffs, and the plaintiffs tendered the judgment set out in the record, to which the defendant Matthews objected, because the word "trustee" was omitted after the name of B. W. Matthews in the judgment, and that the judgment should be against him as trustee and not against him personally. The judgment was signed by the court, and the defendants excepted.

From judgment rendered the defendants appealed.

J. S. Manning and W. W. Fuller for plaintiffs.
J. W. Graham and June Parker for defendants.

SHEPHERD, J. The disjunctive form of the first issue may be open to criticism, but as the charge of his Honor made the presence of a fraudulent intent a prerequisite to an affirmative finding, we cannot see how the defendants were prejudiced. The exceptions in this respect must therefore be overruled. Neither do we find any error in the refusal of the court to submit the second issue tendered by the defendants, as it is immaterial, in a case like this, whether the assignee knew of or participated in the fraudulent intent of the assignors. This is well established by the case of *Woodruff v. Bowles,* 104 N. C., 198, in which the subject is elaborately considered in the opinion of *Mr. Justice Avery.*

The same authority also sustains the charge of the court upon the question of intent. We have very carefully considered the (184) other exceptions taken during the course of the trial, and as they involve but the plain application of well-established principles, it will be sufficient to say that we are of the opinion that they are without merit and should be overruled. We think, however, that there was error in the judgment as to the defendant Matthews. This defendant occupied the position of trustee, and there is no finding that he knew of the fraudulent purpose of his assignor. Indeed, the issue presented by him, involving this very question, was rejected at the instance of the plaintiffs. All that appears is the value of the property and the admission of said defendant that he took it in charge under the terms of the trust. We do not understand how a personal judgment could have been rendered upon these facts alone. For aught that we know, the stock of goods may have been honestly sold under the terms of the trust for less than its value at the time of the assignment, and the assignee may have exhausted the proceeds in the payment of the debts and charges as

directed in the deed of assignment. Now, if all this was done before the commencement of this action, or before notice of the fraud, the assignee would have been protected; yet a personal judgment for the whole amount due the plaintiffs was rendered without any inquiry in respect to these important particulars. The views which we have indicated are supported by Burwell in his work on Assignments, 461. He says: "It is a further and important rule under this head that assignees and trustees, acting in good faith under an assignment or other instrument which is afterwards declared void by judicial decree, will be protected from liability, and their acts under such instrument will be ratified and confirmed. Thus, in New York it has been repeatedly held that assignees acting under a fraudulent assignment will not be held accountable for proceeds of the assigned property which they have actually paid
(185) over to *bona fide* creditors of the assignors, in pursuance of the assignment, before any other creditors have obtained a lien." For the above reasons, the judgment should be set aside and further proceedings be had looking to an adjustment of the rights of the parties.

Judgment modified.

Cited: S. c., 111 N. C., 363.

W. P. COLE v. JOHN LAWS.

Register of Deeds—Marriage—Penalty—Deputy.

A register of deeds cannot delegate to another the duty of making the required reasonable inquiry into the legal competency to marry of persons applying for a license.

ACTION tried at March Term, 1890, of ORANGE, *Armfield, J.,* to recover the penalty for illegally issuing a marriage license.

Only so much of the testimony as relates to the point decided is reported. See same case, 104 N. C., 651.

The plaintiff introduced the marriage license, which was in the usual form, and testified: "Mollie Cole is my daughter. She lacked ten days of being 15 years old when she was married. I never consented to the marriage, in writing or otherwise. She has always lived with me."

Plaintiff rested, and defendant testified: "I am register of deeds and have been forty to forty-five years. Merritt Cheek was my deputy at Chapel Hill, 12 miles from Hillsboro. Cheek was a special deputy to

issue marriage license, and for no other purpose. He was a justice of the peace. When I appointed him, and several times afterwards, I gave him particular instructions and called his attention to the law, and instructed him to issue no license without complying with the (186) law as to inquiry. I signed the license in blank and gave it to him with a number of others signed in blank. It is filled up in his handwriting, and it is his name and handwriting signed to the certificate of marriage. My instructions were as to all licenses, and not as to this one specially. I was not present when this one was filled up, and did not know of it until after the marriage. Cheek performed no other duties than to issue license."

From the judgment rendered on a verdict for the plaintiff the defendant appealed.

John Manning for plaintiff.
John W. Graham and A. W. Graham for defendant.

SHEPHERD, J. The defendant is the Register of Deeds of Orange County, and as such is charged with the very important duty of issuing marriage licenses. It is to be assumed that he was elected to the said office in view of his intelligence, discretion and general fitness for the position, and as to the discharge of the particular duty in question. The public have a right to require of him the active exercise of these qualities. The law provides that he shall make reasonable inquiry as to the age of persons desiring a license to marry, and that if, without such reasonable inquiry, he issues such license without the consent of the father, etc., where either of the persons is under the age of 18, he shall "forfeit and pay $200 to any person who shall sue for the same." The Code, sec. 1816. Did the defendant make such reasonable inquiry in the present case? According to his own testimony, he made no inquiry whatever, and the license was issued by another person, who, as "special deputy to issue marriage licenses," and who resided 12 miles from the county-seat, was authorized to fill up blank licenses signed by the defendant and issue the same. Surely this is not a performance of the duty which the law imposes upon him, and we are clearly of the (187) opinion that upon these facts he has incurred the penalty sued for. This being our view of the law, the exception addressed to the ruling of his Honor on the question as to whether the "special deputy" made reasonable inquiry becomes immaterial, and if there was error it would be harmless, and therefore not a ground for a new trial.

Affirmed.

Cited: Maggett v. Roberts, 112 N. C., 73.

JOHN H. BOON v. J. S. MURPHY.

Trial—Judge's Charge—Exceptions—Negligence—Physicians—Malpractice.

1. The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto.
2. If a party desires the entire testimony, or any specific part thereof, recapitulated to the jury, he should make the request in apt time and before verdict.
3. An appellant may assign error for misdirection to the jury, for the first time, in the preparation of his case on appeal.
4. In an action against a physician for malpractice, the court charged the jury that "ordinary skill" was the skill which a surgeon would, under the circumstances of the case, reasonably use in treating the case, and left the facts to the jury: *Held*, that the failure to give more explicit instructions, in the absence of a prayer to that effect, was not such error as would warrant a new trial.

ACTION for damages for alleged malpractice of defendant (a physician), tried before *MacRae, J.*, at September Term, 1890, of ALAMANCE.

There was no exception to the testimony and no request for (188) specific instructions. The presiding judge did not repeat the testimony, nor did he recapitulate it further than will appear by the charge, nor was there any request that the judge should recapitulate the evidence, either before the charge was read to the jury or afterwards. The court charged as follows:

"This action is brought for the purpose of recovering damages for the alleged negligence or unskillful treatment of the plaintiff by defendant. It is admitted, or proven, that the defendant is a physician and surgeon; that he was called to attend the plaintiff; that he did attend him for some time; that another physician was called in, and then others, and finally they amputated his leg. His contention is that the necessity for this amputation arose by reason of improper and unskillful treatment of him by the defendant and by the neglect of defendant to attend his patient when it was necessary for him to do so. And the testimony offered by the plaintiff is for the purpose of satisfying you that the defendant did not use ordinary skill—the skill which a surgeon would, under the circumstances of the case, reasonably use in treating the case—and that after undertaking the plaintiff's case he did not visit him as often as he ought to have done, and finally that he abandoned the case, and the result was that while it was a case that ought to have been cured by reasonable attention, yet by reason of the want of skill in ascertain-

ing the cause of the plaintiff's suffering, in the first instance, and by neglect to pay that attention to the case which it required, the necessity for amputation arose.

"On the other hand, the testimony offered by the defendant is for the purpose of satisfying you that when he was called in he made careful examination of the parts afflicted and obtained all the information he could from the plaintiff and his wife; that he applied the proper remedies to the parts, and prescribed the proper medicine and treatment; that he did all that appeared to be reasonably necessary to (189) be done, and gave all proper directions for the nurse, and that, although he was told that he need not come again unless he was sent for, he continued his visits until he deemed it unnecessary to give further personal attention to the patient; that the process of healing was going on favorably; that the trouble seemed originally to arise from a burn, and that he was so informed, and that the affection of the knee arose from necrosis, caused by the vicious state of plaintiff's constitution, and not from any accident to the knee, as described by the plaintiff—something which neither his skill nor attention could have seen or averted while he was attending the case. Now, the question for you is, whether there was an accidental fall against the door and fracture of the knee-pan, whether there was a burn by long exposure to the heat of the stove while the plaintiff was in a drunken condition, or whether there was a disease of the bone, or death of the bone arising from the plaintiff's habits of living, or whether all or either of these causes combined to affect the plaintiff. Did the defendant, when he was called in and took charge of plaintiff's case, use the ordinary skill of a surgeon and physician in managing the case, or did he fail to use reasonable care in the discharge of his duty, or did he neglect to visit the plaintiff as often or as long as he reasonably ought to have done, and was it by reason of such failure to use ordinary skill and neglect to attend to the case, or from other cause, that the necessity for the amputation, if there was a necessity, arose? The burden of proof is upon the plaintiff. He must satisfy you, by a preponderance of evidence, of the truth of his charge. If he has done so, you should respond in the affirmative; if not, in the negative. If you have found that the plaintiff was not injured by the unskillful treatment or negligence of defendant, or if you have not been satisfied of the fact, your response shall be 'No,' and you need not trouble yourself about the second issue. But if you respond to the first issue 'Yes'—if you find that the plaintiff was injured by the (190) unskillful treatment or negligence of defendant, you will proceed to ascertain and say what is the amount of his damages. You may consider his physical suffering, his mental anguish, if there were such suffering and anguish; his actual expense, his present inability to provide for

himself and his family, as compared with his ability before his leg was amputated to make these provisions; and you will put these things together and estimate the damage—reasonable compensation for these things, not exemplary damages, or smart money."

Verdict for plaintiff.

Defendant excepted, after verdict, to the charge of his Honor and assigned as error—

1. For that his Honor did not, in charging the jury, state in a plain and correct manner, or at all, the evidence given in the case and declare and explain the law arising thereon.

2. For that his Honor failed to charge the jury as to what constitutes ordinary skill and ordinary care and diligence on the part of a physician and surgeon, and to state in an orderly manner the contention and evidence of the plaintiff, and the law arising upon the same with respect thereto, and to state in an orderly manner the contention and evidence of the defendant, and the law arising upon the same in respect thereto.

Judgment for plaintiff. Appeal by defendant.

John W. Graham for plaintiff.
J. A. Long for defendant.

CLARK, J., after stating the case: As to the exception that the judge did not repeat the testimony nor recapitulate it beyond the summary of it which appears in the charge, the precedents are ample that this is not error, unless the appellant had requested the recital in full of (191) the testimony or of such parts as he deemed material, and which had been omitted by the court. The law is so stated by *Taylor, C. J.*, in *S. v. Morris,* 10 N. C., 388, and approved by *Henderson, C. J.*, and *Ruffin, J.*, in *S. v. Lipsey,* 14 N. C., 486, where it is again held "the judge is not bound to charge on all the facts, that being a matter left to his discretion." In *S. v. Haney,* 19 N. C., 390, it is held by *Gaston, J.*, citing *S. v. Lipsey,* that the "judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate and to explain the law applicable to the case, and this particularly when he is not called upon by counsel to give a more full charge." The construction placed by these eminent judges upon the act of 1796 (now The Code, sec. 413) has been recognized and followed by numerous cases. The jury being the judges of the facts, the object of the recapitulation is to so place the facts before the jury that the judge can "declare and explain the law arising thereon," which is his province. When the facts are simple, or the judge "directs the attention of the jury to the principal questions they have to investigate," as here, by stating the respective

contentions of the parties, the failure to recapitulate the evidence is not error. If either party wishes fuller instructions, he should ask for them, and if any material evidence is omitted he should call it to the attention of the court. To permit a party to ask for a new trial because of an omission of the judge to recite all the details of prolix testimony, or for an omission to charge in every possible aspect of the case, would tend not so much to make a trial a full and fair determination of the controversy as a contest of ingenuity between counsel. The proper course is for counsel to ask, before the charge, for instructions on the points of law he deems material, and to direct the attention of the judge, after hearing the charge, to any omission of important evidence which he may have made. The appellant should present his views on these matters (192) in apt and proper time and not "speculate upon the verdict." If he is silent when he should speak, he ought not to be heard when he should be silent. It is too late certainly after verdict to raise the objection that the judge did not charge upon a particular aspect of the case. *Morgan v. Lewis,* 95 N. C., 296; *King v. Blackwell,* 96 N. C., 322; *Willey v. R. R.,* 96 N. C., 408, and cases there cited; or omitted to recapitulate any part of the evidence, *S. v. Grady,* 83 N. C., 643, and cases cited; *S. v. Reynolds,* 87 N. C., 544. Nor do we think the judge failed to declare and explain the law applicable to the evidence. If it was not as full as the appellant desired, it was his own fault that he did not, in apt time, ask for special instructions. *S. v. Bailey,* 100 N. C., 528, and cases there cited.

The second exception embraces the two different grounds, first, because the court did not charge the jury "as to what constitutes ordinary skill and ordinary care and diligence on the part of a physician and surgeon." The case of *Woodward v. Hancock,* 52 N. C., 384, relied on by the appellant, is not in point, because, in the present case, the judge did not, as in that case, leave it to the jury to determine what was "ordinary skill," but told them it was "the skill which a surgeon would, under the circumstances of the case, reasonably use in treating the case," and left the facts only as to what was done by the physician, to the jury.

Besides, the authorities already cited are to the effect that, if fuller instructions on this point could have been given and would have been beneficial to the appellant, it was his duty to have presented his views in the form of a prayer for instructions, embodying the rule of law which he deemed applicable. Failing to do so, he cannot be heard to complain after verdict. *Morgan v. Smith,* 77 N. C., 38.

A misinstruction or misdirection in the charge, however, can be specified and excepted to for the first time by appellant when stating his case on appeal. The Code, sec. 412 (3); *Lowe v. Elliott,* 107 N. C., 718. (193)

The latter part of this exception, that the court "did not state in an orderly manner the contention and evidence of the defendant and the law arising thereon," we think is without merit. We find nothing in the charge of which the appellant can complain. We learn from the argument that this exception was based upon what was said in *S. v. Boyle,* 104 N. C., 800. But in that case there was a specific prayer for instruction, which is absent here, and this difference has already been pointed out in *S. v. Pritchett,* 106 N. C., 667, and *S. v. Brady,* 107 N. C., 822.

Affirmed.

Cited: Posey v. Patton, 109 N. C., 457; *Emry v. R. R., ib.,* 599, 602; *Lewis v. Foard,* 112 N. C., 403; *S. v. Jackson, ib.,* 854; *S. v. Ussery,* 118 N. C., 1180; *Nelson v. Ins. Co.,* 120 N. C., 306; *Patterson v. Mills,* 121 N. C., 269; *McCracken v. Smathers,* 122 N. C., 805; *S. v. Kinsauls,* 126 N. C., 1097; *Simmons v. Davenport,* 140 N. C., 411; *Pardon v. Paschal,* 142 N. C., 539; *Baker v. R. R.,* 144 N. C., 41; *S. v. Yellowday,* 152 N. C., 797; *Long v. Austin,* 153 N. C., 512; *Smith v. Tel. Co.,* 167 N. C., 256; *Webb v. Rosemond,* 172 N. C., 851; *S. v. Cline,* 179 N. C., 705, 706, 707; *S. v. Willoughby,* 180 N. C., 677.

WRIGHT WHITMAN AND WIFE v. SALLY ANN SHINGLETON.

Deed—Delivery—Evidence—Presumption.

1. The fact that a deed was in possession of the grantee, accompanied by proof that it was signed by the grantor, is evidence from which the jury may presume a delivery.

2. The presumption of delivery arising from possession of the deed by the grantee may be rebutted by proof that such possession was obtained without the consent or contrary to the intention of the grantor.

APPEAL at November Term, 1890, of DUPLIN, from *Brown, J.*

The opinion contains a statement of the material facts.

H. R. Kornegay for plaintiff.
W. R. Allen for defendant.

(194) SHEPHERD, J. His Honor instructed the jury that there was no evidence from which they could infer a delivery of the deed from Gregory Price to the defendant, and this is the sole question presented for review.

It was in evidence that, some time after the death of the grantor, the defendant, the grantee, was in possession of the deed, and left it with the witness Smith to have it recorded. The deed was lost or misplaced by the said witness, but its contents were proved. It was in the usual form, and conveyed the land in question to the defendant in fee, and "it was specified in it," says a witness, "that she was to take care of him (the grantor) the remainder of his life, and then give him a Christian burial." It was also in evidence that these conditions were fully performed by the defendant. The deed was witnessed by J. F. Maxwell and John Maxwell, the last named being now dead. The former testified simply that he witnessed the instrument, and there was no testimony of any other circumstances attending its execution. "The delivery of a deed is a question of fact. The law has prescribed no particular form in which it shall be made. When the question rests upon the attendant circumstances and the intention of the parties, the fact of their existence and their effect are peculiarly within the province of the jury. It is error, then, for a judge to tell the jury that there is no evidence of a delivery, when any circumstances are proved from which it may be inferred; no matter how slight or inconclusive they may be, the party relying upon them has a right to have them submitted to a jury." *Floyd v. Taylor,* 34 N. C., 47.

The deed in question was in possession of the grantee, and such possession, with proof of the signing by the grantor, is evidence from which the jury may presume a delivery. *Springs v. Williams,* 29 N. C., 384; *Blume v. Bowman,* 24 N. C., 338; *Devereux v. McMahon, ante,* 134. The law is laid down in Tiedeman on Real Property (813), as follows: "If the deed is found in the possession of the grantee, (195) a delivery and acceptance are presumed. But, like other legal presumptions, it is liable to be rebutted by proof that the possession of it was obtained without the intention of the grantor to make a delivery, or without his consent, and parol evidence is admissible to establish this fact." This is supported by abundant authority.

In *Clayton v. Liverman,* 20 N. C., 379, cited by counsel, the circumstances attending the execution were fully disclosed, and these not constituting a delivery, or, at least, leaving it in doubt, it was held that the presumption raised by the mere production of the deed by the grantee after the death of the makers, was rebutted because it appeared that he lived with the makers, was their manager and agent until their deaths, and then took possession of all of their property and effects.

There is no such explanation of the possession in this case as will warrant us in holding that the presumption is rebutted, and that there is no evidence to go to the jury. We have only the fact that the defendant was living with the grantor, and there is nothing to show that

she exercised any control over his business, or took charge of any of his effects after his death. Doubtless his Honor was under the impression that there should have been distinct and affirmative evidence of delivery at the time of the signing of the deed. The subscribing witness was silent as to this, but, conceding that the deed was not delivered at that time, it could, nevertheless, have been delivered subsequently (*Clayton v. Liverman, supra*), and without the presence of the subscribing witnesses. *Gaskill v. King,* 34 N. C., 211.

The fact that the deed was in possession of the grantor several years afterwards at the trial before the justice of the peace, is not inconsistent with a previous delivery. He may have retained it in his possession after the delivery (Smith on Contracts, 56, Notes), or he may (196) have obtained it of the grantee for the purposes of that particular occasion. Indeed, the fact that he put it in evidence on the trial of himself and the grantee for fornication and adultery, was a circumstance to be considered in favor of delivery, as his apparent object was to show that he was living with the grantee not unlawfully, but under the condition of the deed, to the effect that she was to support him.

Considering the whole testimony, we think there was evidence of delivery, and that it should have been passed upon by the jury.

Error.

Cited: Herndon v. Ins. Co., 110 N. C., 284; *Perkins v. Thompson,* 123 N. C., 178; *Tarlton v. Griggs,* 131 N. C., 221.

STATE EX REL. STACY VAN AMRINGE v. JOHN D. TAYLOR.

Election—Officer de facto.

1. It is essential to the validity of an election that it shall be held under some proper authority, and conducted substantially in the manner prescribed by law.

2. To constitute an officer *de facto* it is requisite that there be some colorable election or appointment to, and induction into, the office.

3. One who usurps an office may act for such a length of time or under such circumstances as to raise a presumption of his right to act, in which event his acts are valid as to the public and third persons.

4. Where it appeared that a duly appointed registrar of voters appointed a clerk to assist him, but who fraudulently got possession of the registration books and refused to surrender them, and proceeded, in defiance of the demands and protest of the registrar, to appoint judges of election, open polls, receive, canvass and make returns: *Held*, that the clerk was a mere usurper, and the election was void.

ACTION, tried at January Term, 1890, of NEW HANOVER, before *McIver, J.*

The relator alleges in his complaint that he was duly elected clerk of the Superior Court of the county of New Hanover at (197) the regular election held in that county in November of 1890; that, nevertheless, the county canvassing board of that county falsely and wrongfully ascertained and declared that the defendant, who was his competitor at the said election, was duly elected to said office, and afterwards he was inducted into and now holds and exercises and receives the fees and emoluments thereof, and refuses to surrender the same, etc.; that the said board so ascertained by refusing to count the vote cast at Cape Fear precinct in said county, which, if the same had been counted, as it ought to have been, would have given him a just and clear majority of the whole number of votes cast in said county, etc. He demands judgment that he was so duly elected, that defendant was not, that he be inducted into office, etc.

The defendant denies that plaintiff was so elected clerk; alleges that he was; admits that if the vote which purported to be cast at the said Cape Fear precinct had been lawful and had been counted by the said canvassing board, then the relator would have been elected; but he alleges that the said election at said precinct was absolutely void, because it was not held by a registrar and judges of election according to law, etc.

On the trial the court submitted to the jury this issue: "Was the plaintiff relator, S. Van Amringe, duly elected to the office of clerk of the Superior Court of New Hanover County on the 4th day of November, 1890, and is he entitled to be inducted into said office?"

There was a verdict and judgment for the defendant, and the relator appealed to this Court, assigning as grounds of error—

2. The refusal of the court to submit issues offered by the relator.

4. Charging that if Thomas obtained the registration books fraudulently, under promise to return them, and assumed to act (198) as registrar, he was an intruder and had no authority, and could perform no lawful official act, and in consequence the election held by him and his appointees was void.

5. In charging that if they found that Cowan continued to act as registrar and employed Thomas, a clerk, to assist him, and that Thomas while sustaining this relation fraudulently obtained, etc., as set out in above section No. 4.

D. L. Russell for plaintiff.
George Rountree and M. Bellamy for defendant.

MERRIMON, C. J. The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government. Hence, if a person assume to be a registrar of elections and four others likewise assume to be judges of election, and purport and undertake to hold an election on election day, in an election precinct, and take and count the votes cast at it honestly, such action and proceeding would be no election, nor would it be accepted and treated as such by authority.

An essential element of a valid election is that it shall be held (199) by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly, it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this State must be observed and prevail, certainly in their substance. Otherwise, the election will be void and so treated. Therefore, the contention that if the election in question was simply conducted fairly and honestly it was valid, is unfounded.

The court instructed the jury that Thomas was registrar *de facto* if they believed either of the two aspects of the evidence, and the election would hence be valid. As to this there was no exception. But the court said further: "If you find from the evidence that Cowan continued to act as registrar and employed Thomas as clerk to assist him, and that Thomas, whilst sustaining this relation to Cowan, fraudulently obtained possession of the books on the second Saturday preceding the election, with a promise to return them, and assumed to act as registrar, he was an intruder and had no authority and could perform no lawful official act, and in consequence the election held by him and his appointees was void, and your answer to the issue should be 'No.'" This is made the principal ground of assignment of error.

The instruction thus complained of, must be taken in connection with the whole of the instructions given, and in view of all the evidence pertinent. The evidence tended to prove that one Cowan was duly appointed

to be *registrar;* that he accepted the office, and acted as and claimed to be such, continuously, until the day of the election; that he did not resign, or profess to resign; that he did not appoint, or undertake to appoint, Thomas to be registrar; that he was employed and treated simply as his clerk; that Thomas fraudulently got the registration books from the registrar under the false promise to return the same; that he did not do so, but on the day of election expressly refused to surrender the registration books, and then assumed to be registrar, acted as (200) such, and undertook and purported to appoint three judges of election, who, with a judge regularly appointed, coöperated with him in holding the election. The evidence fully warranted the instruction, if it was correct in point of law.

It is difficult to define, in precise terms, what constitutes an officer *de facto* in all cases. Indeed, what may constitute such officer in one case, may not in another. A variety of facts and circumstances, tending to show authority of the person claiming and exercising it, go to constitute such officer, and upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts. There must be something, some consideration, evidence, facts, circumstances or conditions that reasonably lead those persons who, in the course of the administration and in the discharge of the duties of the office must, in some way, have relations or business with it, to recognize and treat the person claiming to be officer as the lawful incumbent. But, as was said by *Chief Justice Ruffin* in *Burke v. Elliott,* 26 N. C., 361, "The mere assumption of the office by performing one, or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto.* There must at least be some *colorable* election and induction into office *ab origine,* and so *long* an exercise of the office and *acquiescence* therein of the public authorities as to afford to the individual citizen a presumption strong that the party was duly appointed, and, therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority as an officer of the country."

What was thus said was afterwards approved in *Gilliam v. Reddick,* 26 N. C., 368; *Burton v. Patton,* 47 N. C., 124; *Comrs. v. McDaniel,* 52 N. C., 107; and in *Norfleet v. Staton,* 73 N. C., 546, (201) in which case *Mr. Justice Reade* said: "I scarcely think it necessary to cite authorities to show the distinction between mere usurpers and officers *de facto* and *de jure.* A usurper is one who takes possession without authority. His acts are utterly void, unless he *continues* to act *so long* a time or under such *circumstances* as to afford presumption of his right to act. And then his acts are valid as to the public

and third persons. But he has no defense in a direct proceeding against himself. A *de facto* officer is one who goes in under *color* of authority." *Keeler v. New Bern,* 61 N. C., 505.

In a late case (*S. v. Lewis,* 107 N. C.), *Justice Avery* cites with approval *S. v. Carroll,* 38 Conn., 449, in which *Chief Justice Butler* reviews very thoroughly and ably the whole subject of officers *de facto,* and reaches substantially this conclusion: "An officer *de facto* is one whose acts, though not those of an 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, when the duties of the office were exercised: first, without a known appointment or election, but under such circumstances of reputation or asquiescence 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; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some irregularity or defect in its exercise, such ineligibility, want of power or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

This summary points out to a very large extent, if not alto-
(202) gether, the nature and extent of the circumstances, conditions, the character of the evidence and the recognition by the public essential in varying pertinent cases to constitute an officer *de facto.* A mere intruder or usurper is not ordinarily, but may become, an officer *de facto* in some cases. This can happen only by the continued exercise of the office by him and the asquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when without *color* of authority he simply assumes to act, exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart them validity and efficiency. *Burke v. Elliott, supra; Norfleet v. Staton, supra; S. v. Carroll, supra;* McCreery on Elections, 217; Paine on Elections, sections 380, 381.

The citizen is justly chargeable with *laches,* does that which is in his own wrong and wrong to the public, when he recognizes, tolerates, encourages and sustains a mere usurper, one whom he knows or ought, under the circumstances, to know to be such. In such case, neither jus-

tice, necessity, nor public policy requires that the acts of the usurper shall be upheld as valid for any purpose. Indeed, these things, the spirit and purpose of government strongly suggest the contrary.

When, therefore, Thomas obtained from the registrar (Cowan) the registration books, fraudulently, under promise to return the same and assumed to act as registrar, he was simply an intruder, and had no authority and could perform no lawful official act as such, and the election which he and the supposed judges, his appointees, coöperating with him, held, was void. The instruction of the court to the jury excepted to was pertinent, and had reference to the evidence going to (203) prove that Thomas so fraudulently obtained the registration books and assumed to act as registrar, and the jury must have found that he did. The jury found that he was not registrar *de facto* by reason of *color* of appointment. They found also that he was a fraudulent intruder, but they did not find—nor was there evidence to warrant such finding—that he was an intruder under such circumstances and conditions as to constitute him registrar *de facto*. The evidence went to show that he had been the clerk of the registrar; that he did not claim to be or act as registrar until the day of election; that he had no such reputation; that the electors had not so recognized him, that no public authority had so recognized him at any time, and that, on the morning of the day of the election, in the presence of electors, the lawful registrar had publicly demanded that he surrender to him the registration books, to the end that he and the lawfully appointed judges of election might hold the election according to law, and he refused to do so. The evidence went to prove, and the jury found, that Thomas was a naked intruder, with no attending circumstances and conditions that rendered him registrar *de facto*. The electors had notice that Cowan was the lawful registrar; that he had been duly appointed; that he acted as such. There was no notice that he had resigned his office, nor had he done so. On the contrary, on the morning of the election he claimed his right and authority to hold the election. This was notice—important notice—that Thomas was an intruder, and the election was not such in contemplation of law. The electors ought not to have recognized the intruder. They did so in their own wrong. They ought to have demanded and required that the registrar and the lawful judges of election hold the election according to law. It was their duty to themselves and to the public to have done so, and failing in this for any cause, they ought not to have gone through an empty form that had no legal effect. They lost their (204) votes and their voice, in part, through their own *laches*.

The issue of fact submitted to the jury was broad and comprehensive. It embraced the whole of the matter at issue. The relator could readily, as he did, put in all pertinent evidence and avail himself of it before

the jury. He was not necessarily prejudiced by it, nor can we see, nor does it at all appear, that he was. The other exceptions are without merit.

Judgment affirmed.

Cited: Rodwell v. Rowland, 137 N. C., 650; *Whitehead v. Pittman,* 165 N. C., 90; *Casey v. Dare,* 168 N. C., 287; *Hill v. Skinner,* 169 N. C., 416, 417.

JOHN Q. BROWN v. JOHN J. RAINOR.

Habeas Corpus—Abatement—Cost.

In a *habeas corpus* proceeding, brought to secure the custody of infant children, the respondent (in whose favor judgment had been rendered below) died pending appeal: *Held,* (1) the proceeding abated, and could not be revived against the personal representative; (2) neither was entitled to judgment for costs.

PETITION for writ of *habeas corpus,* heard before *Graves, J.,* at Spring Term, 1891, of ONSLOW.

H. R. Kornegay for petitioner.
W. R. Allen for respondent.

MERRIMON, C. J. This is a summary proceeding, whereby the petitioner seeks, by writ of *habeas corpus,* to obtain possession of certain of his infant children in the possession of and detained by (as is alleged) the respondent, who was their grandfather. The judge at chambers gave judgment in favor of the respondent, and thereupon the petitioner appealed to this Court, as he might do. The Code, sec. 1662; *Mus-*
(205) *grove v. Kornegay,* 52 N. C., 71. Pending the appeal the respondent died, and this appears by suggestion and upon affidavits filed.

The petitioner asks that the administrator or executor of the respondent be made a party, and insists that, at all events, he is not chargeable with costs.

The proceeding is summary in its character, and in the nature of the matter has served its special purpose as far as practicable. The respondent having died is beyond the jurisdiction of the court for any purpose. Nor can it be sustained against his executor or administrator. There is no statute that so provides. They, as such, are not chargeable in contemplation of law with the possession or detention of the children, the possession of which the petitioner seeks to obtain. His remedy is by

another like proceeding directed against the person who may have possession of them now or hereafter. Ordinarily, the costs of a writ of *habeas corpus* proceeding may be awarded at the discretion of the court or judge. The Code, sec. 1860. But here the proceeding abates, and the court gives no judgment for costs. Each party is liable for his own costs, according to law in such cases. *Officers v. Taylor,* 12 N. C., 99.

Abates.

(206)

S. P. KIRKPATRICK ET AL. v. DAVID H. HOLMES ET AL.

Husband and Wife—Marriage—Trust.

1. Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way.

2. But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her.

ACTION tried before *MacRae, J.,* at August Term, 1890, of ORANGE.

The action was brought to recover possession of three tracts of land which plaintiffs claimed under a deed from the collector of internal revenue for the Fourth Collection District of North Carolina, upon a warrant of distraint against the property of the defendant David H. Holmes. The defendants filed no answer, and judgment by default was taken against them at March Term, 1888, of that court, but the judgment against the *feme* defendant was subsequently vacated by order of the judge holding the court of the district, and she was permitted to file her answer in which she claims that she, and not her husband, was the owner of that tract of land described in the complaint as the "Miles tract," containing 140 acres. There was no controversy as to the other tracts described in the complaint.

The plaintiffs offered in evidence a deed from the collector of internal revenue for the Fourth District of North Carolina to plaintiffs, dated 16 July, 1887, and the testimony of John U. Hart, one of the plaintiffs, to the effect that the 140-acre tract is known as the Miles tract, and sometimes as the "home tract"; that at the time this action (207) was brought the defendant David was in possession of said land, and had been, according to witness' recollection, since 1867 of 1868; that plaintiffs bought the land to save themselves something over $600

they had to pay out for D. H. Holmes, who was a distiller, the plaintiffs being his sureties, and that the still was on the home or Miles place. The defendant, Martha F. Holmes, was offered as a witness in her own behalf and testified that she was the wife of the other defendant and the daughter of John Moore; that she had owned a tract of land which she had gotten from her father, and which she had acquired after her marriage; that she and her husband sold that land to A. P. Cates; that witness was present when the trade was made, and received $500 for her land; that she sold it because she liked the Miles place better, as it was nearer to Bingham School, where she could educate her children and where she could sell her produce; that she bought the Miles land; her husband acted as her agent; she was to give $500 for it; that a bond for title was given to her husband by G. W. Tate, agent for Miles' children; that the witness' husband bought the Miles land for her; that he did not pay for it in full when he bought it, but finally paid for it.

There was much other testimony offered by both parties in respect to this alleged purchase for the wife, and its date.

The defendant offered the following prayer for instructions, which was declined, and the defendant excepted:

"If the jury are satisfied that the money derived from the sale of the Moore tract went to the purchase of the Miles land, the defendant is entitled to recover the Miles land."

Upon this point the presiding judge charged the jury, that if the deed was made and executed in pursuance of an arrangement between D. H. Holmes and his wife made in 1874, or at the time of the purchase of the Miles land and the giving of the bond for title, and if Mrs.
(208) Holmes' land was sold by her and her husband for the purpose of purchasing another tract, the Miles land, and it was then agreed between husband and wife that the money arising from the sale of her land should be invested for her in the Miles tract, and if the proceeds of the sale of her land were used in paying for the Miles tract, she was entitled in equity to have the deed made to herself; the husband had no interest, subject to execution, in the Miles land, and the plaintiff got no title to it, even though the bond for title was made to the husband, as the deed was not made to the wife until after this action was begun, and their response should be "No," as to the Miles tract; but if her land was sold and her husband received the purchase-money for it, without any special agreement between them that it should be invested in the purchase of the Miles tract and the deed be made to her, they having been married before 1868, the purchase-money of her land became personal property, and the property of her husband, if he took it into his possession; and even if it was used in purchasing this tract, and the bond for title made to the husband, and no deed made to her until after this

action was brought, she got no title to it, and the plaintiffs by virtue of their deed, are the owners and entitled to the possession of the tract described in the complaint.

J. W. Graham and A. W. Graham for plaintiffs.
J. C. L. Harris for defendants.

SHEPHERD, J. His Honor, among other things, charged the jury, in substance, that the marriage having been contracted before 1868 the proceeds of the sale of the wife's land became the property of the husband, and if he received it without any special agreement to invest it for her benefit in the Miles tract (the property purchased by him) she acquired no interest therein. This instruction, as well as the entire charge, would be correct if the land had been sold before (209) 1868 (*Hackett v. Shuford,* 86 N. C., 149), but such does not appear to be the case, as it is very apparent from the testimony that the sale was made after that date; and, this being so, we think there was error which entitles the defendant to a new trial.

It does not appear when the land was acquired by the wife. If she acquired it after 1868, the proceeds of the sale would be her separate estate (Cons., Art. X, sec. 6) and if it went into the hands of the husband and he invested it in land, taking the title in his own name, in the absence of any agreement to the contrary, a trust would have resulted to her. *Lyon v. Akin,* 78 N. C., 259; I Perry Trusts, sec. 127; Adams Eq., 33, note.

If she acquired the land before 1868, but the sale was after that date, the proceeds would likewise be her separate estate (*Morris v. Morris,* 94 N. C., 613) and whatever interest the husband may have had in the lands purchased with such funds by reason of his right of occupancy as tenant by the curtesy initiate in the original land, it could not, under the act of 1848 (Rev. Code, ch. 56) have been sold under execution.

In *Giles v. Hunter,* 103 N. C., 195, cited by plaintiff, the marriage and the conversion of the land into personalty were both before 1868, and the decision can, therefore, have no application to the facts before us.

Error.

Cited: Ross v. Hendrix, 110 N. C., 405; *Brisco v. Norris,* 112 N. C., 676; *Benbow v. Moore,* 114 N. C., 273; *Ray v. Long,* 128 N. C., 91; *S. c.,* 132 N. C., 892; *Hendren v. Hendren,* 153 N. C., 506.

(210)

ELLEN TURNER AND MARY A. TURNER v. T. R. WILLIAMS ET AL.

Possession—Deed—Color of Title.

In a deed conveying a tract of land the grantor reserved to himself the right to manage the entire farm and make such changes or improvements upon the buildings as he chose, so that it did not deprive the grantee of a home, and remained on the land, erecting buildings and collecting rents, a portion of which he paid to the grantee, who also resided on the premises: *Held*, (1) that such possession was not adverse to the grantee; (2) that the possession of the grantor being that of the grantee, it was insufficient, if continued for the statutory period, to ripen a color of title under an unregistered deed and maintain an action for the recovery of possession against a subsequent purchaser from the grantor.

APPEAL by plaintiffs from *MacRae, J.*, at Special (September, 1890) Term of ALAMANCE.

The case is stated in the opinion.

J. A. Long for plaintiffs.
Junius Parker for defendants.

AVERY, J. The action was brought for title and possession of land. The plaintiffs offered a deed executed by David Turner and wife on 4 March, 1878, conveying to them for life a tract of land described therein as "the lands of the late Charles Turner, on which they now live." The deed had not been registered, and the defendants objected to its introduction, and excepted to the ruling of the court that it was competent to show possession under it as color of title. An unregistered deed is admissible for the purpose of showing possession under it for the statutory period necessary to mature title. *Avent v. Arrington,* 105 N. C., 389; *Hunter v. Kelly,* 92 N. C., 285.

The grantor, David Turner, inserted a reservation in the deed (211) in the following words: "The said David Turner reserves to himself the right to manage the entire farm, make such changes or improvements upon the buildings as he may choose, so as it does not deprive the said Ellen and Mary (the grantees) of a home as provided herein."

The court charged the jury as follows:

"The plaintiffs offer an unregistered deed, which was admitted to enable them to show possession under it for seven years, if they could. I think, upon the plaintiffs' own testimony, they have failed to show possession of any part of the land, except the house, lot and garden,

which defendants admit they have the right to hold for their lives, and which, according to the testimony, is in possession of the plaintiffs, and, therefore, the unregistered deed cannot operate as color of title. You should then respond to the first issue, 'Yes,' to the house, lot and garden where the plaintiffs live, and to the second issue, 'No.' "

The exception to this instruction raises the only point for our consideration on this appeal.

It was in evidence and admitted by the parties that David Turner did build a house on the place about ten or twelve years before the trial (between 1878 and 1880). The defendant Williams bought the Charles Turner farm from David Turner in 1888, and moved immediately into the house built by Turner on the land, and since that time has withheld the possession of the whole tract, except the house, lot and garden from the plaintiffs.

One of the plaintiffs, Mary Turner, testified that she had lived on the land and received rents from David Turner from the date of the unregistered deed up to the time when he sold the place to the defendant, and that her brother David had collected the rents and paid them over to plaintiffs during that period. It is true that there was contradictory testimony offered by the defendant; but if David Turner paid rent to the plaintiffs, his possession was not adverse to them, but their (212) possession was adverse to the whole world, and extended, constructively, to the boundaries of the tract of land known as "the lands of the late Charles Turner, on which they live." *McLean v. Smith,* 106 N. C., 172. It would seem, too, that if David Turner did not, in fact, pay them rent, his occupation would not be considered adverse, because in the deed he had reserved the right as remainderman to manage the entire farm, make improvements upon the buildings, and, in short, to do anything to the land or buildings that would not deprive them of a *home as provided herein.* The home for which provision was made covered the lands of the late Charles Turner, on which plaintiffs lived, if the boundaries could be identified and established. While the plaintiffs were guilty of *laches* in failing to offer the conveyance through which David Turner claimed as the purchaser of Charles Turner's land, or the conveyance through which Charles Turner claimed, and to offer parol evidence to show that the land claimed by them was within the description of the boundaries of such deed (even if a survey had been necessary to locate the lines) it does appear in evidence, wherever the outside limits of the tract may be, that the house built by David Turner and occupied by the defendant afterwards, is situate upon it, and, therefore, if the plaintiffs were the owners of the Charles Turner lands when the action was brought, the defendant was a trespasser. *Mobley v. Griffin,* 104 N. C., 112.

Both parties claim under David Turner and, therefore, it was not necessary to show title out of the State, and if the possession of David Turner was in subordination and not adverse to that of the plaintiffs, their title to the Charles Turner lands would have ripened by possession within seven years, and they had occupied it, claiming under the deed, ten years before Williams entered. *Bonds v. Smith,* 106 N. C., 553; *Ruffin v. Overby,* 105 N. C., 78.

(213) As the testimony tended to show that the house occupied by Williams was on that tract the judge erred in instructing the jury that the plaintiff could not recover possession of that house also. Unless the boundaries should, on a future trial, be identified, we cannot see how they can expect, in any event, to recover rents for the land claimed to be within the boundaries of their deed, but not shown to be included.

There is error, and a new trial must be granted.

Error.

R. S. HUNTER ET AL. V. J. L. SCOTT, ADMR. OF CORNELIA HUNTER ET AL.

Contract—Insurance.

In an application for insurance, the "wife and her children" of the applicant were designated as the beneficiaries, but in the policy issuing thereon the wife *and her personal representatives and assigns* were named as the beneficiaries; the policy was received and acted on by the insurer and insured without objection: *Held,* that the policy constituted the contract of the parties.

JUDGMENT upon case agreed at Fall Term, 1890, of ALAMANCE, *MacRae, J.*

The action was by the children of Cornelia Hunter, deceased, against her administrator and others claiming as assignees, to recover the amount collected by the administrator on a policy of insurance issued by the Valley Mutual Life Association of Virginia.

Judgment was given for defendants, and plaintiffs appealed.

The other material facts are stated in the opinion.

J. A. Long for plaintiff.

J. W. Graham and Junius Parker for defendant.

(214) CLARK, J. The application for insurance specified as the proposed beneficiaries the wife of the applicant, "for herself and children." The policy as issued designated the wife and "her personal

representatives and assigns" as the beneficiaries. The policy was received by the insured without objection, was acted upon by both parties, and the premiums regularly paid thereon.

The only question presented is whether the beneficiaries of the policy are those named in the policy itself, or those named in the application.

If A writes a letter to B, making an itemized proposal, and B replies, accepting the proposal, but, in reciting the items, varies one of them, it is clear that as to such item the two minds are not agreed, and there is no completed contract. But if A receives B's reply as the contract, accepts it, acts on it, and pays money in pursuance of its terms, the application as modified by the reply will constitute the contract between the parties. Construing the two papers together, the item in the application, not accepted in the reply, was not agreed on, while the modification of it in the reply, accepted without objection by the applicant and acted upon by both parties, was assented to, and became as much an integral part of the contract as if stated in the original proposal. This is so plain that no citation of authority is necessary. It is not alleged in the complaint, nor stated among the "facts agreed," that by mistake, accident or inadvertence the policy does not correctly state the contract between the parties, and even if this had been alleged, the correction could not be made, to the prejudice of *bona fide* assignees for value without notice.

Affirmed.

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(215)

B. M. HARRISON ET AL. v. DAVID RAY AND JUDA A. RAY.

Husband and Wife—Survivorship—Tenants in Common—Partition—Descent—Estoppel.

1. Under a deed or devise of land to husband and wife, the vendees or devisees take an estate in entirety, and upon the death of one of them the other takes the whole estate by right of survivorship.

2. Upon an actual partition of lands among tenants in common, the tenants take their respective shares or allotments by descent and not by purchase.

3. Where a partition was made by consent, and the tenants mutually conveyed, by deed, to each other the several allotments: *Held*, (1) the deeds conveyed no real estate, but simply ascertained by metes and bounds the interest of each and destroyed the unity of possession; and (2) the deeds did not operate as an estoppel, except so far as they established the extent of the interest of each tenant in his ancestor's lands.

APPEAL from *MacRae, J.,* at February Term, 1890, of WAKE.

Oakley Harrison and his brothers and sisters divided the lands, which had been conveyed to them by their father, by deeds of partition among themselves without legal proceedings. The deed for Oakley Harrison's share was made to him and Juda, his wife, who, since his death, has intermarried with the defendant Ray. The plaintiffs, who are Oakley Harrison's children by his first wife, allege that the name of said Juda was inserted in the deed by mistake and inadvertence of the draftsman. The defendants allege that the deed was drawn to Oakley Harrison and said Juda by the direction of Oakley Harrison, who accepted the deed and caused it to be registered. The court submitted as the first issue whether the name of Juda, the wife of Oakley Harrison, was inserted in the deed by mistake. This issue was found against the plaintiffs,
(216) who then moved for judgment *non obstante veredicto* and excepted to the refusal of the motion. They also excepted because the court instructed the jury that if they found for the defendants upon the first issue, they should not find as to the second issue that the plaintiffs were the owners and entitled to the possession of the land. Plaintiffs appealed from judgment rendered.

J. H. Fleming for plaintiffs.
Fuller & Snow (by brief) for defendants.

CLARK, J. When realty is devised or conveyed to husband and wife, they take by entirety, and, upon the death of one, the whole belongs to the other by right of survivorship. 2 Bl., 182; *Long v. Barnes,* 87 N. C., 329; *Simonton v. Cornelius,* 98 N. C., 433. The act abolishing survivorship in joint tenancies, act 1784, ch. 204 (The Code, sec. 1326), does not apply to such cases. *Motley v. Whitemore,* 19 N. C., 537; *Todd v. Zachary,* 45 N. C., 286; *Woodford v. Higly,* 60 N. C., 237. Indeed, it is held that a conveyance to husband and wife has a fifth unity added to the four common-law unities recognized in joint tenancy, *i.e.,* unity of person. *Topping v. Saddler,* 50 N. C., 357; Freeman on Cotenancy and Part., sec. 64.

But in the present case the deed to Oakley Harrison and wife operated merely as a partition of the lands and conveyed no estate to them. The land in controversy was the share of Oakley Harrison in the lands inherited by him and his brothers and sisters. This tract was ascertained to be his share by the consent partition, which was had in lieu of legal proceedings to appoint commissioners to mark it off and assign it. It is not claimed that Juda, the wife, had any interest in the land so that anything should have been assigned her, but it is contended that by Oakley Harrison's direction the deed was drawn to him and his wife jointly.

Suppose this to be so. The grantors were not conveying any (217) additional estate or interest to Oakley Harrison. He had bought nothing and they were not making him a present of anything. The deed only assigned to him in severalty and by metes and bounds what was already his. The grantors conveyed no part of their shares. They had no interest in the share embraced in the deed to Oakley Harrison, and could convey no interest therein to him or any one else. It was his by the conveyance from his father. He received no title nor estate by virtue of the deed from his brothers and sisters, nor could his wife. His direction to the other heirs (if given) to convey to himself and wife could not have the effect to make the deed a conveyance of anything to his wife, when it was not such as to himself. The title being already in him, the deed merely designated his share by metes and bounds, and allotted it to be held in severalty. No title passed by the deed, nor by any of the deeds. "Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take the allotment by purchase, but is as much seized of it by descent from the common ancestor as of the undivided share before partition. Allnatt on Partition, 124. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty, but such deed confers no new title or additional estate in the land. 2 Bl. Com., 186. Hence it is that, in partition, whatever the form of the deed, there is an implied warranty of title by each tenant to all the others. *Huntley v. Cline,* 93 N. C., 458.

Had the deed from the brothers and sisters conveyed any new and distinct estate in the land allotted to Oakley Harrison, he certainly already had an interest therein. This was not conveyed to his wife, and such share would have been held by him and wife neither by a unity of interest, unity of title, nor unity of time, which three unities are as essential to a joint tenancy as the fourth unity (of possession), which alone they would have had.

There is no estoppel on the plaintiffs by virtue of Oakley (218) Harrison having received and caused the deed to be registered; for, as we have seen, his title was not derived by the deed of partition, but by the deed from his father. The deed of partition is only an estoppel as between the plaintiffs and the brothers and sisters of Oakley Harrison, as establishing the extent of his share of his father's lands thus set apart and allotted in severalty.

In this view of the matter we are supported by the very recent case of *Yancey v. Ratford,* 86 Va., 638 (March, 1890), which is well considered and exactly in point. To the same effect is *Dooley v. Baynes,* 86 Va., 144.

The issue submitted was immaterial. Upon the admission in the answer, judgment should have been entered in favor of the plaintiffs *non obstante veredicto. Moye v. Petway,* 76 N. C., 327; *Ward v. Phillips,* 89 N. C., 215; *Walker v. Scott,* 106 N. C., 56.

Reversed.

Cited: Bruce v. Nicholson, 109 N. C., 204; *Fort v. Allen,* 110 N. C., 192; *Carson v. Carson,* 122 N. C., 648; *Harrington v. Rawls,* 131 N. C., 40; *Ray v. Long,* 132 N. C., 896; *Carter v. White,* 134 N. C., 474, 480; *Harrington v. Rawls,* 136 N. C., 66; *Sprinkle v. Spainhour,* 149 N. C., 224; *Buchanan v. Harrington,* 152 N. C., 335; *Jones v. Myatt,* 153 N. C., 230; *Beacom v. Amos,* 161 N. C., 364; *Speas v. Woodhouse,* 162 N. C., 68; *Weston v. Lumber Co., ib.,* 171, 199; *Freeman v. Belfer,* 173 N. C., 582; *Stallings v. Walker,* 176 N. C., 323; *Moore v. Trust Co.,* 178 N. C., 124; *Bailey v. Mitchell,* 179 N. C., 103.

(219)

T. M. BAKER v. JONATHAN GARRIS, EXECUTOR OF JULIA J. V. GARRIS.

Married Women—Contract—Coverture—Evidence—Estoppel—Pleading.

1. A complaint alleging that G., wife of the defendant (her executor), executed, for a valuable consideration, her note, under seal, to the plaintiff, and that no part thereof had been paid, but containing no allegation that the contract was one she was competent to make, or any circumstances showing the indebtedness was chargeable upon her separate estate, does not state facts sufficient to constitute a cause of action. (*Merrimon, C. J.,* dissenting.)

2. The objection that the complaint does not constitute a cause of action may be made by written demurrer, or *ore tenus,* at any time, and cannot be waived.

3. Oral testimony is not admissible to show the grounds upon which a court proceeded in rendering judgment upon a demurrer.

4. An executor of his deceased wife may plead her coverture in bar of an action to recover a debt against her estate.

5. Where the fact of coverture does not appear in the complaint, it must be pleaded to be made available as a defense.

6. A judgment overruling a demurrer to a complaint for that it did not state facts sufficient to constitute a cause of action, and allowing defendant to

plead, being simply an interlocutory order, is not an estoppel upon defendant to set up the same matter in some other subsequent proper method.

APPEAL at September Term, 1890, of WAYNE, *Boykin, J.*

The complaint alleges:

1. That on 1 January, 1886, Julia J. V. Garris, wife of the defendant, for a valuable consideration, executed and delivered her promissory note, under seal, to the plaintiff, wherein she promised to pay the plaintiff, on 1 January, 1888, the sum of $400, with interest at 8 per cent per annum from said 1 January, 1886, and that no part of said indebtedness has been paid.

2. That in 1887 said Julia J. V. Garris died, possessed of real and personal estate, leaving a will, in which her husband, the defendant, was appointed executor of the same, who qualified as such executor in August, 1887, and entered on his duties as such executor, taking said property into his possession, and omits and refuses to pay said debt.

Wherefore, plaintiff demands judgment against defendant for $400, with interest at 8 per cent from 1 January, 1886, and for costs.

The defendant demurred, assigning as ground of demurrer:

"2. That the said Julia J. V. Garris, being a married woman at the time of the execution and delivery of said sealed note, the same was void and not binding on her or her personal representative."

The court overruled the demurrer and granted the defendant (220) leave to answer the complaint. He excepted and took an appeal to this Court, but did not prosecute the same. Afterwards he answered, alleging that at the time of the execution of the said alleged note the defendant's testatrix was a married woman; that the consideration of the said alleged note was not for her benefit nor for the benefit of her separate estate; that the payment of said alleged note was not charged, either expressly or by implication, on her separate estate, nor was it executed with the written consent of her husband; that said alleged note was not given for her necessary personal expenses, nor for the support of her family, nor to enable her to pay her debts existing before her marriage.

The plaintiff replied to the answer: "That in the complaint in this action it was alleged that the testatrix of the defendant was a married woman at the time of the execution of said note, and the defendant demurred to said complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, in that it appeared from said complaint that the testatrix of the defendant was a married woman at the time of signing said note; that said demurrer was heard and a judgment was rendered in this cause overruling said demurrer, and the plain-

tiff avers that said judgment was rendered upon the sole ground that the defense of coverture was not available to the defendant, and that the plaintiff pleads said judgment as an estoppel."

The court gave judgment as follows:

"This cause coming on to be heard, and the defendant having admitted in open court the execution of the note declared on in the complaint, and that no part of the same has been paid, it is therefore considered and adjudged that the plaintiff, T. M. Baker, recover of the defendant, Jonathan Garris, executor of J. J. V. Garris, the sum of $538.84, with
(221) interest at 8 per cent per annum on $400 until paid, and for costs."

The defendant appealed.

On the trial "the plaintiff offered to prove by parol that the judgment of his Honor at October Term, 1888, overruling the demurrer, 'was rendered upon the sole ground that the defense of coverture was not available to the defendant.' The defendant objected to this evidence, but it was admitted by the court, and the defendant excepted. It was then admitted by the defendant, subject to said execution, that said judgment was rendered on the sole ground alleged by the plaintiff."

The defendant moved in this Court to dismiss the action, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

W. T. Faircloth for plaintiff.
C. B. Aycock for defendant.

SHEPHERD, J. The defendant moves in this Court to dismiss the action, for that the complaint does not state facts sufficient to constitute a cause of action. It appears on the face of the complaint that the defendant's testatrix, a married woman, executed her simple promissory note to the plaintiff in the sum of $400, and that she died "possessed of real and personal estate, leaving a will, in which the defendant was appointed executor." There is an entire absence of any allegation showing that the contract was such as she was by statute competent to make, nor is there the slightest intimation of any circumstances showing that the indebtedness was charged or is chargeable upon her separate estate. Indeed, there is no pretense whatever of such a charge, and the prayer is for a judgment *in personam.*

It is very clear that, under the numerous decisions of this
(222) Court, from *Pippen v. Wesson,* 74 N. C., 437, down to *Flaum v. Wallace,* 103 N. C., 296, and subsequent cases, that the complaint is fatally defective, in that it does not set forth a cause of action. It is argued, however, that in certain exceptional instances (as in the case of

a free trader) a married woman may make a legal contract, and therefore the court ought to assume that the contract sued upon is one of that peculiar character. This position is so utterly subversive of every principle of legal presumption that it would seem unnecessary to cite any authority in its refutation. As, however, it appears to be seriously pressed, it may not be improper to make some observations upon the subject.

Very soon after the adoption of the present Constitution, and the passage of what is known as the "Married Woman's Act" (chapter 42 of The Code), it became the duty of this Court to determine the character of the statutory separate estate of a *feme covert,* and the manner in which it could be charged with her executory contracts. In a few of the States where similar statutes had been passed, it was held that their effect was to remove the common-law disability of coverture, and to enable the wife to contract in all cases as if she were a *feme sole,* except where expressly prohibited. In a majority of the States the opposite view was taken, and this view, after much deliberation, was adopted by our Court in *Pippen v. Wesson, supra.* This case settled the fundamental principles of the law of married women in North Carolina in reference to the constitutional and statutory provisions above mentioned, and its authority, so far from being questioned, has been uniformly recognized and approved by the repeated decisions of the Court. The doctrine of the case is well stated by *Ruffin, J.,* in his carefully considered opinion in *Dougherty v. Sprinkle,* 88 N. C., 300, in which that learned justice discusses the manner in which the engagements of married women may be enforced. He says: "Nor was there any change wrought in this particular by the alterations made in our court system under the (223) Constitution of 1868, or by the adoption of the statute known as the Married Woman's Act. It was in reference to these very alterations and the effect of the statute that the Court declared, in *Pippen v. Wesson,* and *Huntley v. Whitner,* 77 N. C., 392, that no deviation from the common law had been produced thereby, as respects either the power of a *feme covert* to contract, the nature of her contract, or the remedy to enforce it; that, as a contract merely, her promise is still as void as it ever was, with no power in any court to proceed to judgment against her *in personam;* that it was only through the equitable powers of the court that satisfaction of her engagements could be enforced as against her separate estate. . . . The nature of the pleadings is substantially the same as under the former system of our courts, and it is essential, in order to establish a right to a special judgment against her separate estate, that the complaint should show not only that she has such estate, but that her promises are such as, by the statute, she is rendered competent to make. It was for want of just such allegations, and because

the complaint demanded a personal judgment against the *feme* defendant, in *Pippen v. Wesson,* that the demurrer was sustained and the action was dismissed."

In *Pippen v. Wesson* the plaintiff sued upon a promissory note signed by the husband and wife, and the coverture appeared upon the face of the complaint. There was, as in our case, no allegation showing that the contract was of such a character as to fall within the exceptions of the statute, nor did there appear any circumstances by which the separate estate was chargeable. The *feme* defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the Court, after stating that the complaint should have contained the essential allegations above mentioned, proceeds as fol-
(224) lows: "In the case of obligors *pleni juris* this would be immaterial. But where one of them has only a limited capacity to contract, the contract must be shown to be within her capacity. One who contracts by virtue of a power, statutory or otherwise, and who, except by such power, is incapable of contracting, must pursue the power, or her contract will be void."

The demurrer was sustained, and thus we have a case directly in point against the contention of the plaintiff. After this express decision upon the very question before us, it is quite difficult to understand how this Court is at liberty to go to the extraordinary length of presuming the existence of the very circumstances which it has, in the most unequivocal terms, declared essential to be alleged. The cases cited from New York, even if they could be recognized as controlling authorities in this State, do not support the position of the plaintiff. In those cases the coverture did not appear upon the face of the complaint, and, therefore, was not demurrable. Where the question, however, did arise, the Court of Appeals of the State (before the act of 1884, removing the disability of coverture except as to contracts between husband and wife) ruled precisely as this Court did in *Pippen v. Wesson.* In *Broome v. Taylor,* 76 N. Y., 564, the Court said: "If this complaint had not shown that the defendant Helen was a married woman, it would have been good against her; and in that case, in order to avail herself of the defense of coverture, it would have been necessary for her to set it up in her answer. But the complaint shows that the bond is the obligation of a married woman, and there is no allegation showing that it was given for any purpose that would make it binding upon her. As to her, the bond is *prima facie* a nullity, and hence the complaint does not show a cause of action against her." In view of these authorities, it cannot, we think, for a moment be questioned that the complaint in this case does not state a cause of action. The proposition is so very plain that nothing but the earnest contention to the contrary would seem to justify this
(225) somewhat extended discussion in its support.

It is further insisted, on the authority of *Vick v. Pope,* 81 N. C., 25; *Newhart v. Peters,* 80 N. C., 166; *Nicholson v. Cox,* 83 N. C., 48, and *Johnston v. Cochrane,* 84 N. C., 446, that coverture must be pleaded. This is undoubtedly true, for where the disability does not appear upon the face of the complaint, the plea must, of course, be by way of answer, as otherwise the fact of coverture can never be known.

In the present case the disability appears from the complaint, and the plea of coverture, even had it been necessary, has, from the beginning, been insisted upon by way of demurrer. We suppose that it will hardly be contended that a demurrer in such a case is not a pleading within the principle of the above-mentioned cases. The Code, secs. 238, 239; Estes' Pleadings, 3068; *Oliphant v. Whitney,* 34 Cal., 25; *Furniss v. Ellis,* 2 Breck. & Marsh., 14. Now, if no cause of action be stated, it is well settled that this objection and the objection to the jurisdiction may be made either by written demurrer or demurrer *ore tenus.* "As to the two exceptions specified, there can be," says *Merrimon, J.,* "no waiver, and in these respects objections may be made at any time. In such cases there is an absence of anything to which the jurisdiction of the court can attach." *Love v. Commissioners,* 64 N. C., 706; *Tucker v. Baker,* 86 N. C., 1; *Johnson v. Finch,* 93 N. C., 205. In the face of this very plain declaration of the Court, it is insisted that the defendant *can* waive the objection, and that he *cannot* make it at any time. The manner in which this strange result is reached is said to be by way of estoppel, growing out of a ruling at some previous term, in which the court overruled a demurrer and gave the defendant leave to answer over. The demurrer was written, and the ground assigned was that, as the defendant's testatrix was a married woman at the time of the execution of the note, the same was void and that the plaintiff could not recover. The defendant did not appeal, but answered, setting up the coverture. It is said that this *interlocutory* judgment amounts (226) to an adjudication, and, therefore, the motion cannot now be insisted upon. In support of this position, we are referred to such cases as *Jones v. Thorne,* 80 N. C., 72; *Sanderson v. Daily,* 83 N. C., 67; *Mabry v. Henry, ib.,* 298; *Roulhac v. Brown,* 87 N. C., 1; *Pasour v. Lineberger,* 90 N. C., 159, and *Wingo v. Hooper,* 98 N. C., 482. In these cases certain interlocutory orders—such as the appointment of receivers, motions to vacate attachments, orders of arrest, and the like—were held to be *res judicata* unless affidavits were presented showing additional facts subsequently transpiring. Provisional adjudications of this character are mere incidents to an action, the ultimate rights of the parties being tried upon issues of law or fact raised by the pleadings. Such orders are entirely independent of the general rules of pleading, and it is plain that the cases cited have no application to the question

under consideration. The case of *Wilson v. Lineberger,* 82 N. C., 412, however, seems to be more in point, but, upon an examination of the opinion, we cannot regard it as authority in the present case. There the parties demurred, it is said, "for want of equity," and after a trial before the jury and a report upon a reference for an account—four terms having elapsed—the defendant moved that the action be dismissed for the same cause. This the court declined, and the defendant appealed. There were several reasons why the order of the court should not have been disturbed, one of which is, that while the power of the judge to thus summarily dispose of actions is well recognized, and its exercise in very clear cases commended, the practice generally is discouraged (*Wilson v. Sykes,* 84 N. C., 215), and this Court will not entertain an appeal from a refusal to dismiss. *McBryde v. Patterson,* 78 N. C., 412. This reason was in itself sufficient to have disposed of the appeal, and is, indeed, mentioned by the Court. But, apart from this, in view
(227) of the repeated decisions of this Court that a motion to dismiss upon the grounds mentioned *cannot be waived* and may be taken at *any time,* we cannot give the effect contended for to such a merely interlocutory ruling as in this case.

Again, we have held that it is the duty of this Court to inspect the whole record and to pronounce such judgment as in law should be rendered. *Thornton v. Brady,* 100 N. C., 38. Now, if a complaint does not state a cause of action, this rule must be applied, and this could not be done if the expressions used in *Wilson's case* are to be followed in all instances. It is very evident that the rule there stated had reference to the practice in the Superior Court alone, and was not intended to apply to motions made in this Court, where the power is universally recognized and acted upon, and this without reference to the ruling below.

It is said that the Court should not dismiss the action upon motion, but that the defect should be taken advantage of by demurrer. If we are not to reject the overwhelming weight of authority to the effect that this complaint does not state facts sufficient to constitute a cause of action, and that the objection cannot be waived and may be made by written demurrer or demurrer *ore tenus* (*Tucker v. Baker,* 86 N. C., 1; *Pescud v. Hawkins,* 71 N. C., 299), then it must follow that the suggestion is unfounded. Such a demurrer, written or *ore tenus,* is as strong a plea of coverture as can well be imagined, and it matters not at what stage of the action it is made nor what other pleas may have been filed. It is very true that if no demurrer had been interposed and the case had been tried upon its merits, the evidence sustaining issues embodying the essential circumstances, the court below (The Code, sec. 273), and even this Court, upon motion, might have allowed an amendment conforming the pleadings to the facts proved, and refused to dismiss. But nothing

of the kind appears here. In fact, the case has never been tried (228) upon its merits, but upon the alleged legal insufficiency of the complaint, and there is, therefore, nothing to show the actual existence of the circumstances necessary to charge the estate.

While this disposes of the appeal, we will add that we are clearly of the opinion that oral testimony is not admissible to show the grounds upon which the preceding judge placed his ruling. The demurrer was in writing, and we cannot look beyond it and the judgment.

The principle which admits such testimony in aid of a record pleaded as an estoppel, where such record fails to disclose the precise point on which the case was decided (as in *Yates v. Yates,* 81 N. C., 397), has no application to rulings upon written demurrers.

We will also remark that we do not concur in the proposition of the intelligent counsel that an executor cannot plead the coverture of his testatrix. This would be practically charging her estate with debts for which she was not liable in her lifetime. *Newhart v. Peters,* 80 N. C., 167, simply decides that this plea cannot be interposed by one who has no interest in the subject-matter of the suit and who cannot be affected by its result. The action must be dismissed.

MERRIMON, C. J., dissenting: I think this Court ought not to dismiss this action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. The complaint did state a cause of action, and the court might and would have given judgment for the plaintiff if the defendant had not pleaded, or in case he failed to plead, the coverture of his testatrix at the time she executed the note sued upon. It is settled that the plaintiff may have judgment against a married woman upon a note or alleged indebtedness of any kind executed or incurred while she was such married woman, unless she pleads her coverture. That is a defense she may or may not avail herself of, and she must plead it. *Vick v. Pope,* 81 N. C., 22; *Neville v. Pope,* 95 N. C., 346; *Newhart v. Peters,* 80 N. C., 166; *Nicholson v. Cox,* (229) 83 N. C., 48; *Johnston v. Cochrane,* 84 N. C., 446.

Hence, if a married woman should simply plead in a proper case that she did not execute the note sued upon, or that she had paid the same, or that it was barred by the statute of limitations, and the plea should be determined against her, the plaintiff would clearly be entitled to judgment, as she did not plead her coverture. And if on the trial of such plea, either party should assign error as to some ruling of the court, and after the final judgment adverse to him or her, he or she should appeal to this Court, the latter could not *ex mero motu,* or upon motion of the *feme* defendant, dismiss the action upon the ground that the complaint

failed to state facts sufficient to constitute a cause of action, because it did sufficiently state a cause of action in the absence of the defense of coverture properly pleaded.

In this case, for the reasons stated above, the court below could not have dismissed the action for the cause last above mentioned if the defendant had not availed himself of the defense of the coverture of his testatrix by demurrer or answer, and for the like reason, upon appeal in such case, this Court could not, upon motion, dismiss the action.

A mere motion to dismiss the action in such case is not sufficient, because, in the absence of the coverture pleaded, the complaint would be sufficient to entitle the plaintiff to judgment.

In this case the defendant pleaded by his answer the coverture of his testatrix. On the trial he assigned error as to certain rulings of the court below, and, after final judgment adverse to him, he appealed to this Court. This Court should consider and dispose of the assignments of error. It cannot properly grant the motion to dismiss the action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, because, simply upon its face, it does state a cause of action. Such motion will be allowed only when no
(230) cause of action is stated, and when the court has not jurisdiction. The Code, sec. 242. The case of *Pippen v. Wesson,* 74 N. C., 437, does not sustain the action of this Court in this case. In that case the defendant demurred, and the court sustained the demurrer and gave judgment for the defendant. It did not grant a motion to dismiss the action, nor did this Court. On appeal, the latter Court simply affirmed the judgment of the court below.

CLARK, J., concurs in the dissent.

Per Curiam. Action dismissed.

Cited: Leatherwood v. Fulbright, 109 N. C., 684; *Loughran v. Giles,* 110 N. C., 427; *Armstrong v. Best,* 112 N. C., 60; *Draper v. Allen,* 114 N. C., 52; *Green v. Ballard,* 116 N. C., 147; *Bank v. Howell,* 118 N. C., 274; *Moore v. Wolfe,* 122 N. C., 715; *Ball v. Paquin,* 140 N. C., 85; *S. v. Robinson,* 143 N. C., 622; *Bank v. Granite Co.,* 153 N. C., 45; *Clothing Co. v. Hay,* 163 N. C., 499.

*W. A. BLOUNT v. JULIA WASHINGTON ET AL.

Parol Trust—Statute of Frauds—Evidence—Consideration—Contract.

1. A parol declaration by a vendee, made after the execution of the deed, absolute on its face, is not sufficient to raise a trust in favor of the vendor or any one by his direction.

2. Even if such declaration was made contemporaneous with the deed, it would be essential to establish it by some proof outside of, or in corroboration of, that of the vendor.

3. A parol promise, made by a vendee after the execution of the deed, to convey to such persons as the vendor might direct, is void under the statute of frauds; and where the contract is denied, the courts will not enforce it, although it is shown that a consideration passed.

APPEAL at November Term, 1890, of LENOIR, from *Armfield, J.*

The plaintiff, in his complaint, in substance, alleged that in 1875 he owned a tract of land known as "Vernon"; that at the request of John C. Washington, he, by deed, absolute on its face, conveyed (231) it to the defendant Julia; that at and before the making of this deed, said John, on behalf of said Julia, agreed with plaintiff that out of the rents and profits of said land the defendant Julia should pay off the mortgage then upon said land, and should convey or devise it to the wife and children of plaintiff, subject to a life estate for defendant Julia and her husband, John; that the $125 recited in the deed was a mere nominal consideration, but the true consideration was the contract and agreements above stated.

W. A. Blount (the plaintiff in the case), being on the stand, offered to prove by his own testimony that the deed was made and agreed to between Mr. Washington and himself, and that the contract or condition alleged in the complaint was agreed on between Mr. Washington and himself, and that Mrs. Washington afterwards came into the room, accepted the deed and paid the purchase-money, if any was paid, and that afterwards Mrs. Washington was informed of said conditions, and she assented to the same.

To this testimony the defendant objected. Objection sustained, and plaintiff excepted. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed.

It was admitted that the property in controversy formerly belonged to the late John C. Washington; that it was mortgaged to James A. Bryan, executor of James W. Bryan, for about $25,000; that while this

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

mortgage was due and unpaid, executions issued against the said John C. Washington amounting in the aggregate to many thousand dollars; that the equity of redemption was sold under these executions some time in 1873, and purchased by the plaintiff, Blount, for the sum of $125; that in September, 1876, the said John C. Washington and wife mortgaged one-half of said lands (the Bryan mortgage being still unpaid, and unpaid now) to the defendant Knox, and again, in May, 1885,
(232) mortgaged the whole to secure the indebtedness of said John C. to her; that John C. Washington died in 1887.

Defendant Knox had no notice of any equity of any kind, as claimed by the plaintiff.

W. B. Rodman, Jr., for plaintiff.

H. R. Bryan (by brief) and George Rountree for defendant Knox.

AVERY, J., after stating the facts: The deed being absolute upon its face, if the plaintiff seeks in this action to set up a trust in favor of his wife and children to compel the defendant, Mrs. Julia Washington, to convey to them, subject to her life estate, proof that she declared orally, after the deed to her was executed by Blount, that she assented to a previous parol agreement between her husband and Blount, and would convey or devise the land in controversy according to its terms, would be insufficient to raise a trust in favor of the wife or children, and, consequently, to give the plaintiff a standing in court. *Pittman v. Pittman,* 107 N. C., 159; *Smiley v. Pearce,* 98 N. C., 185.

If the plaintiff had proposed to prove that the declaration of trust was contemporaneous with the execution of the conveyance, it would have been essential to have shown some outside fact corroborative of the plaintiff's testimony, and there was no proposition (if that would have been sufficient) to connect it with other evidence. *Shields v. Whitaker,* 82 N. C., 516; *Harding v. Long,* 103 N. C., 1; *Smiley v. Pearce, supra; Williams v. Hodges,* 95 N. C., 32; *Egerton v. Jones,* 102 N. C., 278.

But while the plaintiff's counsel admits that the contract, being in parol, is voidable and cannot be enforced without the assent or despite the objection of Mrs. Washington, as a general rule, he insists that the testimony offered, if found by the jury to be true, would bring this case within the principle laid down in *Burns v. McGregor,* 90 N. C.,
(233) 222, and approved in *Hodge v. Powell,* 96 N. C., 64; *Walker v. Brooks,* 99 N. C., 207, and *Boyd v. Turpin,* 94 N. C., 138. The defendant Washington is standing strictly on the defensive. She is asking simply to be left undisturbed in the enjoyment of whatever right or interest she still retains in the land. Her objection to the testimony is equivalent to a demurrer to its sufficiency, if admitted.

If it be admitted that the plaintiff would testify that she came into the room where he and her husband were conversing, when the former delivered to her the deed for the land, and she, in return, paid him whatever consideration passed, and that, subsequent to this transaction, she was informed of the agreement between her husband and plaintiff that she should devise or convey the land, subject to the estate of herself and husband for their lives, still the objection that the alleged parol contract, being denied, cannot be enforced, is, it seems, insurmountable. *Holler v. Richards,* 102 N. C., 545; *Bonham v. Craig,* 80 N. C., 224; *Fortescue v. Crawford,* 105 N. C., 30. It is impossible to disguise the fact that the demand of the plaintiff is founded exclusively upon a parol promise to convey or devise, made after conveyance had been delivered to her for a consideration, and, therefore, the agreement which he seeks to enforce is not supported by any consideration, and is void under the statute of frauds. Plaintiff's counsel seems to concede that there is no ground for declaring Mrs. Washington a trustee for the wife or children of the plaintiff, or for his benefit.

We cannot concur in the view that the doctrine established in *Burns v. McGregor, supra,* has any application here. It was the folly or misfortune of the plaintiff that the agreement between the defendant Washington and himself was not embodied in the conveyance to her, or some deed made contemporaneously by her, and his *laches* in this respect is not avoided or excused because the husband of the defendant induced him, by promises on her behalf, to execute and deliver the deed. (234) She paid a consideration and took the deed without contemporaneous promise. She could not, even upon the payment of a consideration to her afterwards, by a mere verbal promise, ratify and give validity to a void parol agreement made by him, whatever she might have accomplished by a writing in proper form recognizing his agency and confirming his contract. But if the plaintiff had subsequently conveyed to her another tract of land, reciting in the deed that the consideration moving him to its execution was her parol promise to reconvey or devise the remainder in fee after the estate for the joint lives of herself and husband in the place known as Vernon to his wife and children, and it had been made to appear, as in our case, that she had encumbered Vernon by mortgaging it to secure a large debt, an application to a Court of Equity to compel her to reconvey the land last conveyed to her or to relieve Vernon of encumbrance, and execute a deed for the remainder in fee in it to plaintiff's wife and children, would perhaps present a case analogous to those relied on.

It does not appear that Mrs. Washington is retaining the fruits of an agreement which she cannot be compelled on account of coverture to perform, nor that she is holding property which appears from any deed

or writing (valid under the statute of frauds) to have passed to her as a consideration for performing some verbal agreement on her part, which she now proposes to repudiate and shield herself from carrying it out by setting up the statute of frauds or the disability of coverture as a bar to its enforcement. Mrs. Washington holds now the equity of redemption in Vernon plantation, having conveyed it by mortgage deed to secure the debt due to Mrs. Knox. She came into the room where her husband and plaintiff were engaged in conversation and accepted a deed for the place, paying a consideration, which may have been only $125, and totally inadequate, so far as the value is concerned. But the (235) transaction was complete, and the land passed to her discharged of any equity of the plaintiff growing out of the understanding with her husband, and her verbal promise subsequently made could no more pass to the plaintiff a right to demand in equity a reconveyance to him, than it could operate as a declaration of trust in favor of his wife and children. If the plaintiff could establish his right in equity to demand of Mrs. Washington a reconveyance of the remainder, it would still devolve upon him to show that Mrs. Knox had notice of his claim before she loaned her money and took the lien upon the land to secure her. But we think that there was no error in the ruling of the court below, and, therefore, the judgment of nonsuit must stand, so far as we can see from the evidence. It may be that there was additional evidence as to the agency of the husband that would present a new phase of the case.

Affirmed.

Cited: Cobb v. Edwards, 117 N. C., 247.

HENRY TUCKER v. FLORA TUCKER.

Homestead—Tenant for Life—Statute—Forfeiture—Descent.

1. A widow who has a homestead allotted her in the lands of her deceased husband in lieu of dower is a tenant for life thereof, within the purview of the statutes, which provide that when "a person seized . . . as tenant for life" shall not, within one year after sale for taxes, redeem the lands sold, shall forfeit to the person next in title his or her right in the premises.

2. Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, are not legitimated by ch. 73, Laws 1879 (C. S., 1654, Rule 13), except to the extent of inherit-

ing from their parents. Yet such persons have the rights of illegitimates between themselves, under C. S., 1654, Rules 9 and 10. Hence, when there are two brothers coming under this description, and one dies, leaving no issue or mother, the other brother inherits and is next in title.

ACTION for recovery of real estate, tried before *Graves, J.*, at (236) April Term, 1890, of NEW HANOVER.

The case was submitted upon facts agreed, from which it appeared that William Tucker died in 1880, seized of land in controversy, leaving the plaintiff, his only brother, leaving no children, and the defendant, his widow. By proper proceedings, the premises were allotted to the widow as her homestead in lieu of dower. In 1886 she listed the land for taxes, but failing to pay the same the land was regularly sold, after due advertisement, 7 January, 1887, and was bought by one Maria Fuller, who was the adopted daughter of the defendant. The defendant failed to redeem the land, and on 5 January, 1889, the plaintiff, claiming to be the person next in title to said land, paid the tax, penalty, and cost to the clerk of New Hanover Superior Court, the same having been previously tendered by him to Maria Fuller, who declined to accept it. It is further admitted that the defendant is in possession, and that the plaintiff is a colored man, formerly a slave, as was also the husband of the defendant. Their mother and father lived as man and wife prior to 1868, and died before the abolition of slavery. Upon these facts the court rendered judgment in favor of defendant, and plaintiff appealed.

No counsel for plaintiff.
T. W. Strange for defendant.

CLARK, J. The statute (Laws 1885, ch. 177, sec. 59) provides that when the person "seized as tenant by curtesy or dower, as tenant for life, or in right of his wife," of land which is sold for taxes thereon "shall not within one year after such sale redeem the same according to (237) law, such person shall forfeit to the person or persons next in title to such lands in remainder or reversion" his estate in said land, and that such person next in title may redeem it within one year after forfeiture. This section is reënacted *verbatim* in Laws 1887, ch. 137, sec. 121.

The allotment of the premises to the defendant as her homestead by virtue of the Constitution, Art. X, sec. 5, was an extension and prolongation of the seizin and homestead right of her husband "during her widowhood." For that period she held it, was "tenant" or "holder" of it, protected against sale of it for his debts, and with the right to enjoy

the "rents and profits"; indeed, in this respect she enjoys the homestead more fully than her deceased husband could have done, for the rents and profits cannot be subjected to payment of his debts, as would be the case if he were living (*Bank v. Green,* 78 N. C., 247), but "inure to her benefit." Such right of occupancy of the premises, with the absolute right to the rents and profits during widowhood, while technically not in all respects a tenancy for life (*Jones v. Britton,* 102 N. C., 166), is at least such within the purview and meaning of this statute. 2 Bl., 131. It cannot be that the premises are exempt from taxation during her occupancy, since the Constitution expressly provides that the homestead is subject to sale for taxes. Art. X, sec. 2. Nor can it be thought that the fee is subject to sale for nonpayment of taxes by the widow. *Macay, ex parte,* 84 N. C., 63. Indeed, the statute above cited (section 42) provides that the sheriff's deed shall convey only the estate which the *delinquent* had in the land. It is not a reasonable construction of the statute that the remainderman should be held to payment of the taxes for the indefinite period of the life of the widow, who meantime enjoys the rents and profits, under penalty of losing his ultimate right (238) to the fee. The reasonable and just construction is that the widow, who possesses the premises and enjoys the rents and profits thereof "during widowhood," comes within the class of "tenants for life" designated by the statute, and when she permitted her interest to be sold for nonpayment of taxes and failed to redeem, instead of the premises going out of the family the law permitted the remainderman, the "next in title," to redeem it, as he elected to do, within the prescribed time.

The defendant, therefore, comes within the words of the statute and was subject to forfeiture of her estate by permitting the land to be sold for taxes and failing to redeem it.

It is, however, contended that the plaintiff was not "the next in title," citing *Tucker v. Bellamy,* 89 N. C., 31, and *Jones v. Hoggard,* at this term. The Code, sec. 1281, Rule 13, legitimating the children born prior to 1868 of colored parents who lived together as man and wife, confers the right of inheriting upon the children only as to their parents' estates, and not collaterally. Prior to that act, such children had only the rights of other illegitimates, and, by section 1281, Rules 9 and 10, could only inherit from their mother, when there was no legitimate child, and from one another. The act of 1879 (The Code, sec. 1281, Rule 13) did not abridge the rights given by Rules 9 and 10, but extended them by conferring upon parties designated therein the right of succeeding to the father and also to the mother in all cases. It follows, therefore, that the husband of the defendant and the plaintiff were, in the eye of the law, as to each other, vested with the rights of illegitimates, and, upon the death of William Tucker, the estate descended to the plaintiff, subject to the dower and homestead rights of the widow.

This case differs from the two cases above cited. In *Tucker v. Bellamy, supra,* the Court held that the act of 1879, Rule 13, *supra,* did not authorize the children legitimated by it "to inherit from collateral kindred, such as uncles and aunts." It may be noted that this did not conflict with Rule 10, for, though that rule allows illegiti- (239) mate children to be legitimate as between themselves and their representatives, this contemplates that such representatives shall be themselves legitimate representatives of the illegitimate child. In *Tucker v. Bellamy* the plaintiffs were the illegitimate representatives (being born in slavery) of the illegitimate brother who died in slavery when incapable of inheriting, and, therefore, the estate of the aunt could not pass to them unless authorized by Rule 13, which, the Court held, conferred no rights to inherit upon collaterals. Rule 13 made them legitimate, it is true, as to their father's estate, but they did not claim the estate of their father, but of their aunt. In the present case, by virtue of emancipation and the Constitution, the plaintiff has the same civil rights as any other illegitimate, and, under Rule 10, can succeed to the estate of his illegitimate brother. Rule 13 has no application to this case.

Jones v. Hoggard, ante, 178, is also materially different. In that case the decedent left a legitimate brother, who was the defendant, and several illegitimate brothers and sisters, the plaintiffs, who were only legitimated by Rule 13. The Court held that this last rule only conferred the right of inheriting from the parents, and not from the brother. The decedent and the defendant in that case being legitimate brothers, Rule 10 did not apply to plaintiffs, as here. In the present case the plaintiff and his brother were, of necessity, either legitimates or illegitimates. If legitimates, then the plaintiff was, of course, next in title; if illegitimates, there being no legitimate brother or sister, the plaintiff was equally next in title.

Error.

Cited: S. c., 110 N. C., 334; *Wilmington v. Sprunt,* 114 N. C., 312; *Smith v. Proctor,* 139 N. C., 323; *Bettis v. Avery,* 140 N. C., 190; *Love v. Love,* 179 N. C., 118.

(240)

I. C. AND A. H. MUSE v. THE LONDON ASSURANCE CORPORATION.

Time—"Month"—"Year"—Insurance—Contract—Statute of Limitations.

1. The words "twelve months," in the absence of any legislative definition of the word "month" and the word "year," will be interpreted to mean twelve *calendar* months.

2. A stipulation in a policy of insurance that the insured shall bring his action for any loss "within twelve months next after the loss shall occur" is not in contravention of the general policy of the statutes of limitations, nor with the special statute of this State (The Code, sec. 3076) which limits the powers of insurance companies to make such stipulations or conditions to a "period less than one year from the time" of the loss.

MOTION before *Graves, J.*, at October Term, 1890, of MOORE.

The defendant moved for judgment upon the face of the pleadings. From the pleadings it appears that the defendant made a contract to insure the storehouse of the plaintiffs, situate in the town of Cameron, North Carolina, and on 7 June, 1885, received $36 as premium, and delivered to the plaintiffs its policy of insurance; that on 31 August, 1885, the said storehouse was totally destroyed by fire; that the plaintiffs have demanded the sum of $1,000 for the loss, and the defendant refused to pay it; that a difference arose between the defendant and plaintiffs as to the amount of damages sustained by the plaintiffs, for which defendant is liable, and the parties submitted to arbitration, and the arbitrators awarded the sum of $793.35 to the plaintiffs.

The policy of insurance contains this stipulation:

"It is furthermore expressly provided and agreed that no suit
(241) or action against this corporation for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this corporation after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The sum awarded to plaintiffs has not been paid.

In November, 1885, the plaintiffs instituted this suit in the Superior Court of Moore County upon the policy of insurance, and, upon motion of the defendant, that action was removed for trial to the Circuit Court

of the United States for the Western District of North Carolina and pended there until October, 1887, when a nonsuit was taken and entered of record.

On 11 October, 1887, the plaintiffs commenced a suit for the same cause of action in the Superior Court of Moore County.

This action is upon the policy of insurance, and not for the sum awarded by the arbitrators.

The Code, sec. 3076, provides: "No person licensed to do insurance business under this chapter shall limit the term within which any suit shall be brought against such person to a period less than one year from the time when the loss insured against shall occur."

The court denied the motion, and the defendant appealed.

J. C. Black and A. W. Haywood for plaintiffs.
John W. Hinsdale for defendant.

AVERY, J. It seems to be established that a provision in a (242) policy that the insured may bring suit within twelve months after the loss, and not later, being in the nature of a condition precedent, is not in contravention of the policy of the statutes of limitation, and will be upheld by the courts. May Insurance, sec. 478; *O'Laughlin v. Ins. Co.,* 11 Fed., 280; *Fullom v. Ins. Co.,* 7 Gray, 61; *Williams v. Ins. Co.,* 27 Vt., 99; *Riddlebarger v. Ins. Co.,* 7 Wall., 386; *Gray v. Ins. Co.,* 1 Blackford, 280. The weight of authority sustains the position, also, that "the rights of the parties in such cases are fixed by the contract," and that the contract must be construed as requiring that the action which is prosecuted to judgment (not a suit begun previously) must be brought within twelve months after the loss occurs, unless the conduct of the insurer has been such as to amount to a waiver of the benefit of the condition. *Riddlebarger's case, supra; Arthur v. Ins. Co.,* 78 N. Y., 462; *McFarland v. Ins. Co.,* 6 W. Va., 437, and 2 Phillips Insurance, sec. 1983.

The condition that the suit shall be instituted, if at all, within a year after the loss has been sustained, is reasonable and valid, in part at least, because the tendency of speedy investigations, while the evidence is fresh, is to prevent fraudulent practices. 4 Waitt on Act. and Def., 86. But such stipulations, operating as forfeitures, are construed strictly, and comparatively slight evidences of waiver have been held sufficient to prevent their enforcement. *Ripley v. Ins. Co.,* 29 Barb., 552; *Ames v. Ins. Co.,* 14 N. Y., 253. There was nothing, however, in the conduct of the company or its agents that was calculated to mislead the plaintiff as to its purposes and induce him to postpone instituting the action, nor was there evidence of evading service, or of any act showing a pur-

pose on the part of the company to prevent or delay the bringing of the suit after the plaintiff determined to take more active steps. We think, therefore, that there was not, under the most liberal view of the
(243) law on that subject, sufficient evidence to go to the jury as tending to show a waiver. *Ins. Co. v. Hall,* 12 Mich., 211; *Ripley's* and *Arthur's cases, supra.*

So far, our views coincide fully with those expressed by the learned judge who presided in the court below.

But we do not concur in the construction given by him to section 3076 of The Code and in the consequent conclusion that the stipulation in the policy was void because it was in conflict with that statute. If, instead of prohibiting licensed insurance companies from stipulating that actions should begin within a shorter period than one year, the Legislature had, by appending an additional subsection under section 156 of The Code, prescribed one year as the limit for bringing the action for a loss sustained by the assured, there would have been good ground for the contention that the right of action would still subsist for a year after "nonsuit, reversal, or arrest of judgment," under the provisions of section 166 of The Code. But his Honor's ruling rests entirely upon the idea that the stipulation that no action should be sustainable unless it should be "commenced within twelve months next after the loss shall occur," was, in effect, a limitation of the time within which suit might be brought "to a period less than one year," and was void because in contravention of an express provision of the law. Twelve months, in the absence of a legislative definition of the word "month," must be interpreted, according to the ordinary popular understanding, as meaning twelve calendar (not lunar) months. 2 Rapalje Law Dic.; *Cross v. Fowler,* 21 Cal., 396; Bouvier Law Dic.; *S. and L. Society v. Thompson,* 37 Cal., 347; *Mitchell v. Woodson,* 37 Miss., 567; *Sprague v. Norway,* 31 Cal., 174; *Kimball v. Lawson,* 2 Vt., 142; *Williamson v. Farmer,* 1 Bailey (S. C.), 611; *Brewer v. Harris,* 5 Grattan, 285; *Commissioners v. Chambers,* 4 Dall. (Penn.), 133.

The courts of this country have very generally adopted a different rule of construction from that which obtained in England before
(244) the Revolution, because the popular sense of the word "month" was, in America, a calendar, not a lunar, month. *Kimball v. Lawson, supra.* On the other hand, the word "year" is interpreted to mean twelve calendar months. See definitions of the word; 2 Abbott Law Dic.; 2 Rapalje Law Dic.; 2 Bouvier Law Dic.

We understand his Honor, however, to hold that "within one year" is necessarily "less than one year," and, therefore, the stipulation is in conflict with the statute. While his construction of the language of the policy is more than plausible, we do not concur in it. The law was

enacted to prohibit persons or corporations engaged in the business of insuring lives or property from inserting in policies issued a provision that an action for a loss could not be maintained unless it should be instituted before the expiration of six or ten months, or of any period less than one year, or twelve months. The stipulation in this case did not fix the limit at less than one year, but precisely at twelve months, which was equivalent to a year. An agreement that the time for bringing the action should be limited to two years, or to any intermediate period down to and including one year, would have been valid. The inhibition of the statute extended only to stipulating for a time of limitation less than a year. We think that upon the face of the pleadings, and upon the facts admitted, it was apparent that the plaintiff could not maintain this action, and the defendant was entitled to judgment for costs.

Reversed.

Cited: Dibbrell v. Ins. Co., 110 N. C., 206, 208, 209, 212; *Lowe v. Accident Assn.,* 115 N. C., 19; *Gerringer v. Ins. Co.,* 133 N. C., 414; *Parker v. Ins. Co.,* 143 N. C., 344; *Modlin v. Ins. Co.,* 151 N. C., 45; *Trull v. R. R., ib.,* 549; *Heilig v. Ins. Co.,* 152 N. C., 360; *Holly v. Assurance Co.,* 170 N. C., 5; *Faulk v. Mystic Circle,* 171 N. C., 302; *Tatham v. Ins. Co.,* 181 N. C., 434.

(245)

J. W. HOLLINGSWORTH v. W. H. TOMLINSON ET AL.

Contract—Interest—Usury—Evidence—Principal and Surety—Exoneration.

1. Receipt of interest in advance of the time it would accrue is *prima facie* evidence of a binding contract to forbear and delay the time of payment of the principal, and no action can be maintained for such principal during the period covered by the agreement, unless the right to sue has been reserved; and, in the absence of rebutting proofs, the *prima facie* case becomes conclusive.

2. The receipt of interest in advance, although upon an usurious rate, will support a contract to forbear, and, if made without the assent or knowledge of the surety to the obligation, will exonerate him from liability.

APPEAL from a justice's judgment on a note for $175 due ninety days after 5 November, 1886, with interest at 8 per cent, tried before *MacRae, J.,* at November Term, 1890, of CUMBERLAND.

The execution of the note was admitted, and also that the defendant Rosenthal and McQueen's estate were sureties only, Tomlinson being principal on the note.

The following issue was submitted by consent of counsel:

"Was there an arrangement between the plaintiff and the principal debtor, Tomlinson, unknown to and not agreed to by the sureties, by which the sureties are released from their obligation upon the note?"

The burden of proof being upon the defendants, they offered the defendant Tomlinson, who testified that he is the principal debtor on the note and got the money from the plaintiff; that when he borrowed this money from plaintiff he was to pay a pretty good interest—17 or 18 per cent.

As long as he paid the interest, nothing was said. When the (246) note became due, there was nothing said about the principal. As long as he was able to continue the payment of interest, it seemed all right with the plaintiff. He would not swear positively that he had any definite conversation with plaintiff about it. The main thing that passed between him and plaintiff was his paying him this big interest and borrowing the money from him. It was under an understanding between plaintiff and him that he paid the 17 or 18 per cent interest. He did not know anything about the date of payment of interest. He paid him interest in advance, at the maturity of the note and when the endorsement was made upon the note. He could not remember how long he paid interest, but he did until he got so he could not pay. He paid interest on it a good long time after it was due.

Neither of the sureties knew anything about his paying this 18 per cent interest.

This action was begun on 15 March, 1889.

George Rosenthal testified, for defendants, that he is surety on this note; that he never knew of any arrangement between Mr. Tomlinson and the plaintiff about the payment of interest and the principal not being called for; that he never assented to it. A month or so before this action was brought, plaintiff came and told witness: "Here, I have got your endorsement." Witness said: "What endorsement?" Plaintiff then told witness about these notes. At that time this endorsement was on the note: "Interest paid up to 5 May, 1888." Witness said: "What made you keep these notes until McQueen was dead and Tomlinson not able to pay?" He made no reply, except "I have got your endorsement."

The plaintiff offered no evidence.

The presiding judge instructed the jury that there was no evidence that there was any agreement between plaintiff and the principal debtor, Tomlinson, by which the sureties were released.

Defendants excepted to all of the charge. The jury, under (247) instructions, responded to the issue, "No."

Judgment for plaintiffs, and defendants appealed.

George M. Rose for plaintiff.
T. H. Sutton for defendants.

SHEPHERD, J. The only issue submitted to the jury was as follows: "Was there any arrangement between the plaintiff and the principal debtor, Tomlinson, unknown to and not agreed to by the sureties, by which the sureties are released from their obligation upon the note?"

His Honor held that there was no evidence of any such agreement, and the issue was answered in the negative.

It is true that the witness Tomlinson (the principal in the note) did not testify in express terms that there was an agreement to forbear for any definite time, but, considering the whole testimony, we think that there was sufficient evidence to have warranted an affirmative finding of the issue. The note matured on 5 February, 1887, and Tomlinson testified that at that time he paid the plaintiff interest in advance, when an endorsement was made upon the note. The endorsement is as follows: "Interest paid up to 5 May, 1888."

"The general rule is, that the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which the interest has been paid, unless the right to sue be reserved by the agreement of the parties. The payment of the interest in advance is not of itself a contract to delay, but is evidence of such contract; and while this evidence may be rebutted, yet, in the absence of any rebutting evidence, it becomes conclusive." Brandt on Suretyship, 305. The fact that, when the interest was paid, nothing was said about the principal, does not of itself rebut the (248) "*prima facie* evidence of the binding contract" of forbearance; for such a contract "need not be in express terms, nor proved by direct evidence. . . . It is sufficient if a mutual understanding and intention to that effect are proved. If the parties act upon the terms of an implied agreement to that effect, it will be sufficient." Brandt, *supra,* 304.

The testimony as to the dealings between the plaintiff and the principal debtor, so far from rebutting, very strongly sustains the *prima facie* evidence of an agreement to forbear, resulting from the payment of the interest in advance. His Honor was, perhaps, influenced in his ruling by the case of *Bank v. Lineberger,* 83 N. C., 454, in which it was held that usurious interest, either promised or actually paid, would not support a

contract of forbearance. The ruling in that case was modified in *Carter v. Duncan,* 84 N. C., 676, the attention of the Court not having been called to *Scott v. Harris,* 76 N. C., 205, and other previous decisions. So it is now well settled that "the exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid." *Forbes v. Sheppard,* 98 N. C., 111. For the foregoing reasons, we think there should be a

New trial.

Cited: Scott v. Fisher, 110 N. C., 313; *Fleming v. Barden,* 126 N. C., 455; *S. c.,* 127 N. C., 216; *Smith v. Parker,* 131 N. C., 471; *Revell v. Thrash,* 132 N. C., 805.

(249)

THOMAS J. SMITH v. R. W. HICKS.

Reference—Exceptions—Trial by Jury—Waiver.

1. An order referring a cause to a referee, "under The Code, to determine all issues of law and fact, and make report," neither party objecting, is not a compulsory reference, and is a waiver of trial by jury.

2. Upon exceptions to the finding of fact by a referee, under a consent reference, the court may review such finding and overrule or modify it; but it is error to submit an issue thereon to a jury *as a matter of right* to the party excepting.

3. An order of reference, by consent, will not ordinarily be stricken out without the consent of both parties thereto.

APPEAL at November Term, 1890, of CUMBERLAND, from *MacRae, J.*

The action involved the taking of an account. At May Term of the Superior Court of 1889 the court entered this order of reference, neither party objecting:

"This case coming on to be heard, it is considered and adjudged by the court that this cause be referred to Neill W. Ray, Esq., under The Code, to determine all issues of law and fact, and make report to this court."

At a subsequent term the referee filed his report, whereby it appears that he found from the evidence the amount of the debt due from the plaintiff to the defendant, and the mortgage of property to secure the same, etc. At the same term the plaintiff filed an exception to the report of the referee, as follows: "For that the referee finds that the note and mortgage from plaintiff to defendant were not satisfied by the

sale and delivery of the still and fixtures by the defendant to W. B. Owen, whereas he ought to have found that the said note and mortgage were satisfied by said sale and delivery." To which finding the plaintiff excepts and asks that an issue may be submitted to the jury to determine whether the sale and delivery of the still and fixtures by the defendant to W. B. Owen were in satisfaction of the note and mortgage from plaintiff to defendant.

At a subsequent term the defendant moved to confirm the report, and the plaintiff insisted upon his exception and the submission of his suggested issue to a jury. The court thereupon entered this order:

"This cause being heard, on motion to confirm the report, the plaintiff insists that the reference is compulsory, and the court, upon hearing the order, is of opinion that the reference is under The (250) Code, and not a consent reference." So announced, and the defendant excepted.

At a subsequent term the court submitted to the jury this issue: "Was the debt and mortgage satisfied by a sale of the still to Owen?" To this defendant objected and excepted. The jury responded to the issue, "Yes."

Much evidence was produced on the trial, and there were divers exceptions, both to evidence and to instructions given to the jury, and others upon the ground that the court refused to give special instructions asked for by him, but these need not be reported, except the following:

1. That the court did not confirm the report and findings of the referee and render judgment accordingly in favor of the defendant.

2. That the court submitted an issue to the jury after an issue agreed upon by the plaintiff and defendant had been passed upon by the referee and decided in favor of the defendant.

3. That the court decided that the reference was not a consent reference.

4. That the issue submitted to the jury was based upon plaintiff's exception to the report of the referee, and was calculated to mislead; and instead thereof, the issue, if any, should have been the same as passed upon by the referee.

Upon the verdict of the jury the court sustained the exception to the report of the referee, and required that the same be made to conform to the verdict. The court itself did not review the findings of fact by the referee, but founded its action simply upon the verdict of the jury.

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

R. P. Buxton for plaintiff.
H. McD. Robinson for defendant.

(251) MERRIMON, C. J. The defendant's counsel insisted, on the argument here, that the reference was made by the court with the consent of the parties, and, therefore, the court itself should have reviewed the findings of fact by the referee and approved, modified, or reversed the same, and should not have submitted the issue of fact to the jury. We are of that opinion, and, therefore, the first exception must be sustained.

The nature of the action was such as to require an account to be taken. To that end, the court made the order of reference in the presence of the parties and their counsel. In the absence of objection, the reasonable and just implication and inference was that they assented to and sanctioned it. That they did, and that such a reference is made by consent, is clearly settled by numerous decisions of this Court. Moreover, such consent is in effect a waiver of the right to a trial by jury. The parties thus consented that the referee might find the facts, subject to the right and duty of the court in a proper case to supervise such findings. *Armfield v. Brown,* 70 N. C., 27; *Atkinson v. Whitehead,* 77 N. C., 418; *White v. Utley,* 86 N. C., 415; *Grant v. Hughes,* 96 N. C., 177; *Nissen v. Mining Co.,* 104 N. C., 309; *Morrisey v. Swinson, ib.,* 555; *Battle v. Mayo,* 102 N. C., 434, and there are other like cases.

The defendant objected to submitting the issue of fact to the jury. The court ought not to have compelled him to submit to the trial by jury, because, as the parties assented to the reference, the order in that respect would not ordinarily be stricken out or materially modified without the consent of both parties. *Perry v. Tupper,* 77 N. C., 413; *Fleming v. Roberts, ib.,* 415; *White v. Utley, supra; Patrick v. R. R.,* 101 N. C., 602; *Morrisey v. Swinson, supra.*

The plaintiff's counsel insisted, on the argument, that if the plaintiff was not entitled to a trial by jury (as he insisted he was) because of the reference, still the court might submit the issue of fact to the (252) jury with a view to aid itself in the exercise of its supervising control over the findings of fact by the referee. If it be granted that in some cases the court might, for such purposes, submit issues of fact to a jury, it did not, nor did it purport to do so in this case. It proceeded erroneously on the ground that the reference was *compulsory,* and, therefore, the plaintiff was entitled to a trial by jury; it hence framed what it deemed an appropriate issue, submitted the same to a jury, and upon their verdict founded its judgment, without itself reviewing the findings of fact by the referee in any respect or at all. The prime error of the court consisted in treating the order of reference as compulsory. It should have held that it was assented to by the parties, and proceeded to review the findings of fact by the referee and sustained or overruled, in whole or in part, the exception, and given judgment accordingly.

Error.

Cited: Blalock v. Mfg. Co., 110 N. C., 107; *Deaver v. Jones,* 114 N. C., 652; *Driller Co. v. Worth,* 117 N. C., 518; *Kerr v. Hicks,* 129 N. C., 144; *Baggett v. Wilson,* 152 N. C., 182; *Lance v. Russell,* 157 N. C., 453.

E. F. MOORE v. JOSEPH RAY.

Contract—When Right of Action Accrues—Demand.

A chattel mortgage contained a stipulation that if the mortgagor failed to pay the debt secured, "*on or before maturity,*" the mortgagee might take possession of the mortgaged property and sell: *Held,* (1) that the mortgagor had the entire day of maturity within which to make payment, and that an action begun by the mortgagee upon that day for the recovery of the property, although he had previously demanded the possession, was premature; (2) that if the contract had provided that the mortgagee might take possession *at maturity,* in case of default, yet, to enable him to commence his action on that day, he must allege and prove that he had previously on that day made demand, not only for the possession of the property included in the mortgage, but for the payment of the debt.

CLAIM AND DELIVERY, tried at November Term, 1890, of CUM- (253) BERLAND, before *MacRae, J.*

Appeal by defendant.

The facts are stated in the opinion.

George M. Rose for plaintiff.
T. H. Sutton for defendant.

AVERY, J. We think the summons was issued before the plaintiff's right of action accrued, and, of course, if it appeared that he had no standing in court, then he cannot maintain his suit now.

The plaintiff, E. F. Moore, claimed the property as mortgagee in several chattel mortgages executed by the defendant Ray to him on 12 April, 1888, to secure the payment of notes which would become due 1 November, 1888. The property was conveyed upon a special trust, which was expressed in each of the mortgages as follows: "That if I fail to pay said debt and interest *on or before maturity,* then he may take into his possession and sell said property and crop, or so much thereof as may be necessary, by auction, for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me."

The plaintiff, Moore, caused summons to be issued on 1 November, 1888, the day on which the notes fell due, and seized the mortgaged crops conveyed. After execution of the notes, and before the suit was brought, they were assigned to the Peoples National Bank of Fayetteville by Moore, and discounted by the bank. In the complaint it is alleged that the plaintiff, Moore, had demanded the possession of the property, but there was neither allegation nor proof that a demand was made on 1 November, 1888, and before the issue of the summons
(254) on the same day, for payment of the notes executed by the defendant, and shown to be, on that day, held by the bank as assignee.

It was error to instruct the jury that if they believed the plaintiff was the owner of the mortgages described in the complaint, and that said mortgages had not been paid on 1 November, 1888, he was entitled to the possession of the property. It is evident that the parties intended to stipulate, and did agree, that the plaintiff should have the right to take possession of the property after default in payment of the notes, and also after the expiration of the day when the notes should fall due. The plaintiff, under the mortgages, had power to seize and sell on failure to pay the notes, with interest, "on or before maturity," and this special provision of the trust cannot be fairly interpreted to mean the same as the words "at maturity," usually employed in such instruments. The general rule as to negotiable instruments, payable at a particular place, as well as at a fixed time, is, that if payment be demanded and refused, or if no one be found to answer at the place of payment on the day of maturity, the bill or note may be treated as dishonored, notice may be given, and the drawee or endorser held liable; but, in the absence of such demand or default in appearing at the place of payment, the maker or accepter has the privilege of paying at any time during the day, and even though in the course of the day he should refuse payment, if he subsequently, before its expiration, pay the amount due, he discharges the debt, and the dishonor becomes of no avail. 2 Daniel Neg. Inst., sec. 1235.

It was obviously the intention of the parties to place payments made *on* the day of maturity on the same footing with those made *before,* between the execution and the first of November. By the special agreement of the parties, the property could no more be seized on that day than at any time between 12 April and 1 November. But if the right to take possession of and sell had, by the terms of the trust,
(255) accrued "at maturity," it would have been necessary to allege and prove, not simply a demand and refusal of the possession of the mortgaged property, but also refusal to pay the amount due on the notes on demand made during the day and before issuing summons.

The judge below should have instructed the jury that, upon the pleading and evidence, the plaintiff could not recover. It is not necessary that we should decide other questions discussed by counsel in this Court. There was error in the charge of the court, for which a new trial must be granted.

Error.

J. M. MALLARD ET AL. v. J. L. PATTERSON, ADMR. OF ANN PATTERSON.

Administration—Distribution—Creditor's Bill—Pleading.

1. It is the duty of an administrator to pay all the debts against his intestate before he distributes any portion of the estate to the next of kin, provided such debts are presented to him for payment within twelve months next after publication of notice to creditors, as required by C. S., 99; but, as against claims presented after that period, he will not be chargeable with any distribution he may have made, in good faith, to the next of kin.

2. It is discretionary with the court to allow a pleading to be filed after the period within which it should have been filed, and to attach conditions or limitations to the matters which may be set up in such pleading.

CREDITOR'S BILL, in IREDELL, heard upon exceptions to report, before *Bynum, J.*, at November Term, 1890.

It appears that Ann Patterson died intestate in the county of Iredell before 4 October, 1875, and on that day the defendant was appointed and qualified as administrator of her estate, and gave notice to all persons having claims against the estate to exhibit the same (256) to him within twelve months, etc., as required by the statute (The Code, sec. 1421; now C. S., 99).

The defendant brought an action against certain parties, which was not determined until after the lapse of several years, and then adversely to him. In the meantime he had failed to wind up and administer the estate in his hands according to law. Within twelve months next after he gave notice to creditors to present their claims, he paid to certain of the next of kin of the intestate considerable sums of money on account of their respective distributive shares, and took their receipts for the same.

On 3 February, 1883, the plaintiffs brought this special proceeding in behalf of themselves and all other creditors of the said intestate to compel the defendant to an account of his administration and to pay the creditors what might be payable to them, respectively. The defendant was duly served with a summons of 19 February, 1883. On 3 March,

1883, the plaintiffs filed their complaint, alleging a cause of action and the indebtedness of the intestate to them, respectively, for divers sums of money. Thereupon the clerk advertised for all creditors of the intestate to appear before him, on or before the time designated, and file evidence of their claims, etc. Afterwards, on 9 April, 1883, the defendant moved to dismiss the proceeding because the advertisement was not regular and was insufficient. The motion was denied, and fresh advertisement made. The defendant did not then answer the complaint, but the court gave time to answer until 21 May, 1883.

Afterwards a further advertisement was made for creditors to present their claims on or before 7 September, 1889. Notice was also served upon the defendant to appear before the clerk on the same day to exhibit, on oath, a list of all claims against his intestate's estate, etc.

(257) Afterwards, on 1 October, 1889, upon affidavit filed, the defendant moved to be allowed to file his verified answer to the complaint. The complaint was verified when filed. An answer, unverified, was found among the papers, but, when it was filed, did not appear. After contention of the parties, the clerk allowed the defendant to file an answer in which he might "set up only meritorious pleas, to wit, allowed him to set up only pleas of payment, counterclaims, or set-offs which he might have," but he was not allowed to plead the statute of limitations. The defendant excepted.

Afterwards the clerk examined claims presented by creditors of the intestate, heard evidence, etc., etc., filed his report of account stated, etc. To this report the defendant filed divers exceptions, which were not sustained. The clerk gave judgment for the plaintiffs, and the defendant appealed to the judge of the court in term-time.

The court, in term-time, overruled all the defendant's exceptions, found the facts to be as found by the clerk, and affirmed his rulings, and gave judgment upon the report for the plaintiffs, and the defendant, having excepted, appealed.

W. M. Robbins for plaintiffs.
Armfield & Turner (by brief) for defendant.

MERRIMON, C. J., after stating the case: This proceeding has been greatly delayed and neglected by the parties, particularly so by the defendant, and possibly to his prejudice in respects not remediable here. We can only deal with errors assigned, or such as appear upon the face of the record proper.

The plaintiffs, in the orderly course of procedure, filed their verified complaint, alleging sufficiently a cause of action. The defendant was allowed time to file his answer. This he did not do promptly. An

answer appears among the papers—when this was placed among (258) them does not appear—and it was not verified. It was, therefore, no sufficient pleading, and could not be treated as such, certainly in the face of objection. *Alford v. McCormac,* 90 N. C., 151. After the lapse of five years or more, the defendant asked to be allowed to verify this answer, or to file a new one properly verified. Clearly, he was not entitled to do so, as of right. It was discretionary with the court to allow or disallow his application, or grant the same, with limitations. The court allowed him to answer, alleging "meritorious" defenses, but not to avail himself of the statute of limitations. This the court might do, and its exercise of discretion in such respect is not reviewable in this Court.

The first four exceptions to the account stated by the clerk relate to his refusal to allow the defendant credit for certain sums of money paid by him to certain of the next of kin of his intestate within twelve months next after his first publication of notice to creditors of his intestate to present their claims to him, etc.

Regularly, the administrator should pay all debts due creditors before he distributes the estate, or any part of it, to the next of kin of his intestate. He fails to do so at his peril, unless the claim was not presented to him until after the lapse of twelve months next after the first publication of notice given by him to creditors to present their claims as required by the statute (Code, 1421, now C. S., 45). In the latter case, in an action upon such claim, he will not be chargeable with such sums of money as he may have paid in satisfaction of distributive shares. The statute (Code, 1428, now C. S., 101) so expressly provides. In this case not a single claim sued upon, or the subject of this proceeding, was, so far as appears, presented to the defendant within twelve months from the first publication of the general notice to creditors to present their claims to the defendant, and the sums of money paid by him to distributees were all paid years before this proceeding began. The statute just cited provides that, in such case, "the executor, administrator, or collector shall not be chargeable for any assets that he may have paid in (259) satisfaction of any debts, legacies, or distributive shares before such action was commenced." The purpose is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same, as to claims not presented within twelve months after the first publication of general notice to creditors, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons.

It may be that, if an administrator should, with knowledge of existing debts against his intestate's estate, collusively so pay or distribute assets to creditors or distributees, he would not be relieved from liability

as to debts not so presented, but, so far as we can see, no fraud or collusion is imputed to the defendant in this case. We are, therefore, of opinion that the defendant ought not to have been charged with the several sums of money he paid to the distributees.

We have examined the other exceptions, and think that they are without merit. It will serve no useful purpose to advert to them further.

There is error. The account must be corrected in accordance with this opinion, and the judgment accordingly modified, and, as so modified, affirmed.

Error. Judgment modified.

Cited: Griffin v. Light Co., 111 N. C., 438; *McMillan v. Baxley,* 112 N. C., 583; *Kruger v. Bank,* 123 N. C., 17; *Cantwell v. Herring,* 127 N. C., 82; *Best v. Mortgage Co.,* 131 N. C., 71.

(260)

J. H. SCROGGS, ADMR. OF A. R. SIMONTON, v. J. H. STEVENSON, ADMR. OF J. F. ALEXANDER, ET AL.

Res Judicata—Practice—Excepting.

Where the Supreme Court passes *seriatim* upon a number of exceptions to a report, sustaining some and overruling others, the court below should proceed in accordance with the respective rulings, notwithstanding the record of the entry in this Court should be that the judgment below was "affirmed." Such record is not such a judgment as needs to be amended in this Court, and such entry is not *res judicata.*

MOTION before *Bynum, J.,* at November Term, 1890, of IREDELL.

Among the exceptions heard by *Judge Avery,* and which *Judge MacRae* refused to rehear at previous terms, are the following, numbered 3 and 4. (See case reported, 100 N. C., 354.)

"3. That the judge of probate has deducted from the general fund due the legatees the full amount of advancements made to J. B. Simonton, which exceeds his distributive share in said estate, and, instead of dividing the whole distributive share amongst all the legatees except said J. B. Simonton's heirs, he has deducted the said advancements of $1,353.33, and also the full amount of the distributive share of said J. B. Simonton from the general fund.

"4. It having been shown to the judge of probate that J. B. Simonton's advancements exceed his distributive share, and this fact appearing

from his report, he should have divided the general fund of $7,752.51 into five equal shares, and to have excluded the distributees of J. B. Simonton from any *pro rata* of said estate."

The defendant M. V. McElwee, executrix of M. M. Alexander, being of the opinion that the Supreme Court had sustained the two above exceptions of the testatrix, made the following motion: (261)

"Defendant M. V. McElwee, executrix of M. M. Alexander, moves the court that J. B. Simonton's share in the fund for distribution in the estate of A. R. Simonton be excluded from the account, inasmuch as he has been advanced largely in excess of his share, and that the division be confined to the other distributees in said estate in accordance with the decision of the Supreme Court rendered at February Term, 1888, and that said report be re-referred to J. H. Hill, clerk Superior Court, with instructions to reform said report in accordance with said decision."

His Honor, being of opinion the matter in these exceptions was *res judicata,* and that the Supreme Court had affirmed the actions of the former judges, overruled said motion, and the defendant McElwee excepted and appealed.

Armfield & Turner (by brief) for defendant.
D. M. Furches for Simonton's heirs.

CLARK, J. The only question presented by this appeal is, "Did this Court, at February Term, 1888, sustain exceptions 3 and 4 of M. M. Alexander to the report of J. B. Connelly?"

An examination of the opinion in 100 N. C., on p. 359, shows that the Court (*Smith, C. J.*) sustained those exceptions in clear and unmistakable language. The court below should, therefore, have allowed defendant's motion for a re-reference to correct the account in accordance with said opinion, the motion having been made in apt time. His Honor was probably misled by the words, "No error, affirmed," at the end of the opinion, which was a mere inadvertence, arising, doubtless, from the fact that there were many exceptions, which were all held against the appellant, save those two, and the case in the main was affirmed. This case differs somewhat from *Cook v. Moore,* 100 N. C., 294, and *Summerlin v. Cowles,* 107 N. C., 459, in which (262) there was a similar inadvertence in a case where the judgment here was in its nature final, and a motion was properly made and allowed in this Court to correct it. In the present case the Court ruled *seriatim* on several exceptions, sustaining two, overruling the others, and sending the case back for further action. The court below should have followed the decision of the Court, and not the formal conclusion;

and no motion here to correct was absolutely necessary, there being no final judgment, and the costs of the former appeal being properly adjudged.

Error.

Cited: S. v. Marsh, 134 N. C., 187; *Durham v. Cotton Mills,* 144 N. C., 715.

B. F. GRAVES, ADMR. OF A. HINES, v. M. B. HINES ET AL.

Dower—Homestead.

The decision in *Watts v. Leggett,* 66 N. C., 197, in respect to the assignment of dower to widow and allotment of homestead to heirs at law of deceased persons, is again affirmed.

SPECIAL PROCEEDING by the plaintiff for license to sell lands of his intestate to pay debts, heard at Fall Term, 1889, of SURRY, before *Gilmer, J.*

The clerk of the Superior Court of Surry made an order, giving the administrator license to sell all the lands of his intestate, subject to the widow's dower, and in no way recognizing or providing for the rights of the infant children, defendants, to have the homestead exemption allotted to them for their use, unless it appear from such order.

From this order the defendants appealed to the Superior Court.

The clerk of the Superior Court not having found the facts,
(263) when the matter came to be heard on appeal, the statement of facts was agreed to, as follows:

1. That A. Hines died in June, 1887, seized and possessed of the real estate described in the petition of the administrator in the manner hereinafter stated.

2. That he was indebted, as stated in the petition, and that the personal property is insufficient, as stated in the petition, and that a sale of so much of the real estate as is liable to be sold is necessary to pay debts.

3. That Hines was married in the year 1878; that he left him surviving his widow, aged 29 years, and children, to wit, Mary G., 8 years old; Margaret S., 5 years old, and Jesse F., 2 years old; all of whom are still living.

4. That he occupied and lived in a dwelling-house situate on the tract of land lying and being in the town of Mount Airy, adjoining the lands of R. S. Gilmer and others, containing, in all, about 29 acres, which he

had purchased, from 1879 to July, 1886; that in July, 1886, his wife, failing in health, left Mount Airy for treatment, and he, with his children, went to the home of his father-in-law, carrying with him part of his personal property and household goods, a part being left in said dwelling, and abode at the home of his father-in-law until his death, in June, 1887.

5. That prior to June, 1886, he bought lumber and brick, and selected a site for a residence on the Hamburg Mills property, which material he subsequently sold in 1886. The Hamburg Mills property had been conveyed in trust to J. C. Buxton and was encumbered to nearly its full value, and, being so encumbered, was, soon after his death, sold under the trust, and a surplus of $300 realized, out of which surplus the use of $100 was allotted to the widow as a part of her dower.

6. That the widow did not have a homestead in her own right, (264) and she applied for dower, which was allotted to her, embracing the dwelling-house on the land hereinbefore described, to wit, "a tract of land lying and being in the town of Mount Airy, and adjoining the lands of R. S. Gilmer and others, which allotment was worth, by estimate, $2,500, and which she is now in possession of."

7. That Hines did not have his homestead laid off in his lifetime; that during his lifetime the tract of land lying in the town of Mount Airy, and adjoining the lands of R. S. Gilmer and others, had been laid off into town lots, with streets running between, and certain of said lots having been sold, about *thirty-five* half-acre lots remained, outside of those covered by the dower allotted to the widow, all of which lots were estimated in value by the appraisers in laying off the dower.

8. The defendants, the infant children of the said Hines, claim that they are entitled to the homestead exemption, and that it may be allotted to them in lands *outside* of the lands covered by the dower.

Upon this statement of facts the court pronounced judgment, as follows:

"It appearing the widow, M. B. Hines, has had her dower duly assigned to her, and that the same is worth $3,000, it is, therefore, considered, ordered and adjudged by the court that the defendants, as minor heirs of A. Hines, deceased, are entitled to a homestead, upon proper application therefor, and that the same cannot be allotted and set apart to them out of the land not covered by the widow's dower; and it is, therefore, considered, ordered and adjudged that the prayer of the defendants, asking that homestead be allotted them from land not included and embraced in the said widow's dower, be and the same is disallowed."

From this judgment the defendants appealed and assigned as error: (265)

1. That the infant defendants are entitled to have their homestead exemption allotted to them in this proceeding, and are not required to make any other application therefor.

2. That the homestead exemption of the infant defendants must be allotted to them on the lands covered by the dower of the widow; that such homestead is not liable to be sold until the youngest of said defendants arrives at full age, and the court erred in directing a sale of the reversionary interest.

3. That the court erred in declaring the infant defendants were not entitled to have the homestead exemption in lands outside of the dower.

R. L. Haymore (by brief) for plaintiff.

S. P. Graves and John Devereux, Jr., for defendants.

Per Curiam: The very point in this case was passed upon in *Watts v. Leggett,* 66 N. C., 197, and decided adversely to the claims of the defendants. The view there taken by the Court has been long regarded as the settled law of this State, and has been frequently approved in subsequent decisions, notably in *McAfee v. Bettis,* 72 N. C., 28, and *Gregory v. Ellis,* 86 N. C., 579. In the latter case the opinion in *Watts v. Leggett* is quoted at some length by *Ashe, J.,* and entirely approved by the Court as to the particular point now in question. We have been much impressed with the able argument of the counsel for the defendants, but are of the opinion that it is better to adhere to the previous rulings of the Court, that there is nothing which imperatively demands their reversal.

Affirmed.

Cited: Morrisett v. Ferebee, 120 N. C., 8.

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(266)

J. M. MITCHELL v. PATSY TEDDER.

Appeal.

When the transcript of the record is not accompanied by a case on appeal (where such case is required), and no error appears in the record, the Supreme Court will, upon motion, or may, *ex mero motu,* affirm the judgment rendered below, unless good cause is shown for the apparent *laches* of the appellant.

APPEAL from WILKES, Fall Term, 1889, *Gilmer, J.*

W. W. Barber for plaintiff.
No counsel for defendant.

CLARK, J. When this case was before us at last term (107 N. C., 358) there was no "case settled on appeal," and we held that judgment below might be properly affirmed. But as no motion to that end had been made by the appellee, instead of entering such judgment *ex mero motu,* as might have been done, the case was remanded, to give the appellant another opportunity to have the case settled. This was four months since. When the cause was regularly called, in its order, at this term, it appeared that no "case settled" had yet been filed. There is no affidavit negativing *laches,* and no application for *certiorari* based thereon. *Pittman v. Kimberly,* 92 N. C., 562. Appellees have rights, as well as appellants, and among them is the right to an affirmance of the judgment of the court below, when the appellant displays such *laches* in presenting his case for review in this Court.

Nor are we inadvertent to the fact that this is an action in ejectment, in which the defendant was permitted to defend without giving bond, and has also appealed to this Court without security. The action was begun four years ago, and the plaintiff, who, by the verdict (267) of the jury and the judgment of the court below, was adjudged (over eighteen months ago) the owner and entitled to the possession of the premises, is kept out of the same and from enjoyment of the rents and profits, without any hope of recovering compensation for the detention of any of the costs and disbursements of so protracted a litigation. The appellant has no right to speculate upon the chances of further delay and the profitableness of negligence. There being no error on the face of the record, the motion of the appellee to affirm the judgment must be allowed.

Affirmed.

Cited: Johnston v. Whitehead, 109 N. C., 209; *Lovic v. Ins. Co., ib.,* 303.

MOSES CAREY v. W. J. CAREY ET AL.

Attorney and Client—Evidence—Issues.

1. The rule which excludes evidence of communications between attorney and clients as privileged does not extend to those cases where the witness was counsel for both parties, or to communications between the parties in the presence of counsel, or when made by one party to the attorney of the other.

2. A mortgagee is a competent witness to the fact of the payment of a debt and the cancellation of a mortgage to secure it, as against a deceased mortgagor, if it appears the witness has no interest in the controversy. (The opinion, on this point, in this case, 104 N. C., 175, overruled.)

3. If a party assent to the submission of an improper issue, he will not be permitted to make it the ground of exception.

APPEAL at November Term, 1890, of GRANVILLE, from *MacRae, J.*

Action to set up a trust in favor of plaintiff in a tract of land.

The plaintiff is the father of Simeon Carey, deceased, and the (268) defendants are the children and widow of the said Simeon. A deed in fee simple for the land was executed by one D. W. Wheeler and wife to said Simeon Carey, on 20 October, 1877. A mortgage on the same land was executed by Simeon to one K. T. Roycroft of same date. This mortgage has since been canceled of record by said Roycroft. The plaintiff alleges that he paid one-half of the purchase-money for the land; that the title was made to Simeon Carey for the whole thereof for temporary convenience of them both. The plaintiff seeks to have the defendants, heirs at law of said Simeon, declared trusteese as to one undivided half of the land for the benefit of the plaintiff.

Plaintiff asked that the first issue tendered be amended by the addition of the words, "or for the convenience of both parties as alleged." This was assented to by defendants, and the issues as framed were then as follows:

1. Was the name of Moses Carey omitted for the deed from D. W. Wheeler by mistake, or for convenience of both parties, as alleged?

2. Did Moses Carey pay any part of the purchase-money of the land? If so, how much?

3. Is the cause of action barred by the statute of limitations?

Upon the trial it was admitted by the defendants' counsel that the action was not barred by the statute of limitations; and it was admitted by plaintiff's counsel that the name of Moses Carey was not omitted from the deed from Wheeler through mistake.

K. T. Roycroft, to whom was made the mortgage from Simeon Carey, a witness for plaintiff, was asked by plaintiff's counsel, "Was the date of the cancellation of the mortgage to you from Simeon Carey, as appears of record, the true date of the last payment to you on the mortgage debt?"

Objected to by defendants. Objection sustained and plaintiff (269) excepted.

R. W. Winston, Esq., was then called as a witness for plaintiff. Plaintiff's counsel proposed to show by Mr. Winston that this action was brought by him, as counsel for both plaintiff and defendants, for the purpose of having the respective rights of the parties adjusted by the aid

of the court that upon some disagreement arising between the plaintiff and the defendant Jennie Carey, the pleadings which had been filed were withdrawn by leave of the court, and the plaintiff thereafter notified to employ other counsel; also, to show what transpired between the plaintiff and defendant Jennie Carey in reference to the settlement of the title to the land. Mr. Winston stated that he was representing the defendant Mrs. Carey, who was the guardian of her children, that he was not representing Moses Carey. He was proceeding to make other statements, when the court ruled all his testimony out, and plaintiff excepted.

There was a verdict upon the first issue for defendant, and from the judgment thereon rendered against the plaintiff, he appealed.

J. W. Hays for plaintiff.
A. W. Graham for defendant.

SHEPHERD, J. The plaintiff excepted to the exclusion of the testimony of the witness R. W. Winston. As it does not appear that the order permitting the withdrawal of the original pleadings was put in evidence, we are unable to see how any testimony tending to explain it was relevant or material. We are of the opinion, however, that the witness should have been permitted to testify as to "what transpired between the plaintiff and Jennie Carey in reference to the settlement of the title to the land." Jennie Carey was the widow of Simeon Carey, who had the legal title, and, as such widow, was an interested party to the action. She was also the general guardian of the infant heirs at law of (270) the said Simeon, and was defending their interest as such guardian. The declarations and admissions of such a party are generally competent (1 Greenleaf Ev., secs. 171, 179; Stephens Ev., 28; *Tredwell v. Graham,* 88 N. C., 208; *Adams v. Utley,* 87 N. C., 356) and there is nothing to show that the declarations sought to be proved were made by way of compromise. In *Thompson v. Austin,* 2 D. & Ry., 358, *Bayley, J.,* remarked: "That the essence of an offer to compromise was, that the party making it was willing to submit to a sacrifice, and to make concession." This is the true principle of the exclusion of such testimony, and it is incumbent upon the objecting party to distinctly show the excluding circumstances, and not leave them to be inferred from such general statement as appears in this case. This ground of objection, however, does not appear to be seriously insisted upon, but it is urged that the witness should not have been allowed to testify by reason of his relation as attorney to one or both of the parties. It is an elementary principle, "that whenever the relation of counsel or attorney and client exists, all communications made to the counsel or attorney, on the faith of such

relation, and in consequence of it, are privileged; and the counsel or attorney, if so disposed, would not be permitted to disclose them. . . . To the general rule as laid down, there are several qualifications, . . . as, where the witness was counsel for both the plaintiff and the defendant, as between them the matter was not, in its nature, private and confidential. *Michael v. Foil,* 100 N. C., 178, and cases cited. So it has been held in numerous adjudications that the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party to his counsel in the presence of the other party, or when made by one party to the attorney of the other party." *Hughes v.* (271) *Boone,* 102 N. C., 137.

The witness stated that at the time of the conversation or transaction he was counsel for the defendant only. Taking it either way, the matter was not privileged, according to the principles above stated.

We think that there was error in rejecting the testimony, and for this reason the plaintiff is entitled to a new trial.

2. The first issue was improperly framed. "It is misleading to embody in one issue two propositions as to which the jury might give different responses." *Emry v. R. R.,* 102 N. C., 225; *Manufacturing Co. v. Assurance Co.,* 106 N. C., 49. As, however, the plaintiff assented to the issue in this form, it is not a proper ground of exception.

3. The court excluded the testimony of Roycroft as to the date of the cancellation of the mortgage executed to him by Simeon Carey. In this ruling, his Honor but followed the opinion delivered in this case when it was before us upon a former occasion (104 N. C., 175); but the ruling in this particular was unnecessary to the disposition of the appeal, and, upon further consideration, we think that the testimony of the said witness should have been admitted. The land was purchased of D. W. Wheeler, who executed a deed to Simeon Carey. Simeon, it seems, borrowed money of the witness with which to pay Wheeler, and executed to witness a mortgage to secure the same. The mortgage has long since been discharged and canceled, and the witness had no interest in the controversy. Neither party derived title through or under him, and he was only an incumbrancer to the amount of the mortgage debt. *Bunn v. Todd,* 107 N. C., 266. There must be a

New trial.

Cited: Smith v. R. R., 114 N. C., 763.

ELLA E. WELFARE v. B. D. WELFARE ET AL.

Dower—Parties—Practice.

1. The court may permit a creditor of a person, who died seized and possessed of lands, to be made a party to a proceeding for dower and contest the claim of the widow.

2. The remedy against an excessive assignment of dower is by exceptions to the report of the jury, upon the hearing of which it is competent for the court to hear affidavits, with a view to ascertain the facts; and, ordinarily, the court before which such questions are heard is the sole judge whether a reassignment or successive reassignments shall be made.

PROCEEDING for dower, heard at February Term, 1891, of FORSYTH, before *Bynum, J.* (272)

This is a special proceeding, brought by the plaintiff against the defendants—other than the defendant creditors—who are the heirs at law of her late husband, who died intestate, to obtain dower in the lands specified in the petition. In the course of the proceeding it was adjudged that the plaintiff was entitled to dower, and an order was entered directing that a jury allot the same according to law.

The jury among other things in their report of allotment, say: "The commissioners in assessing the value and assigning dower to the widow, find a deficiency in the dower assigned to the amount of $60, which, as the proper amount according to the mortuary tables, recommended to be paid to the widow from the proceeds of the sales of the real estate not included in the dower."

After the jury had made their report assigning dower, J. E. Gilmer, for himself and other creditors moved the clerk to be allowed to become parties to the petition for the purpose of making a motion "to set aside the report filed by the jury allotting the dower." This motion was allowed by the clerk, and said Gilmer filed a petition in the cause and asked that the allotment of dower be set aside. (273)

The clerk, acting as and for the court, denied the motion of the defendants' creditors to set aside the report of the jury, and they appealed to the judge, who reversed the ruling of the clerk upon the ground that the dower was improperly allowed and the allotment was excessive. The clerk was directed to issue proper process to the end that a fresh jury might make a proper allotment, and accordingly process issued, etc.

The second jury allotted the same property. The defendant creditors of the deceased husband excepted to the report of the second jury upon the grounds that the allotment was excessive; that it was irregularly

made, and also that the jury relied upon the finding of the former jury. The clerk overruled these exceptions, and sustained the report of the jury. The defendant creditors again appealed to the judge, the material part of which is as follows:

The court is of opinion that the allotment should be set aside and a new allotment made, for the following reasons:

1. For that the court finds as a fact that the allotment was excessive.

2. For that *Judge Merrimon* has already adjudged that the allotment was excessive and improperly made.

The ruling of the clerk is, therefore, reversed, and it is ordered that the allotment of the dower be set aside and that a new allotment be made. The clerk will issue the proper process to the end that a new allotment of dower may be made, and the cause is remanded to the clerk for that purpose.

From this judgment the plaintiff appealed, assigning error as follows:

1. The findings of fact, upon affidavits, by the judge, and the basing his judgment upon the findings of fact by *Judge Merrimon.*

(274) 2. His conclusions of law thereon.

J. S. Grogan for plaintiff.

R. B. Glenn for defendants.

MERRIMON, C. J., after stating the case: The counsel for plaintiff insisted, on the argument here, that creditors of her late husband could not properly be made parties defendant in this proceeding; that they were improvidently made such, and had no right to accept or object to the allotment of dower by the jury, and hence, could not appeal from the order of the clerk overruling their exceptions. He further contended that these objections appeared upon the face of the record proper, and, therefore, the court ought not to have given the judgment complained of.

If it be granted that the plaintiff could avail herself of such objection here, in the absence of an appropriate assignment of error, we think such objection is not well founded. It is true that the statute regulating proceedings in applications for dower provides (The Code, sec. 2112) that "the heirs, devisees and other persons in possession or claiming estates in the lands *shall* be parties to such proceeding." But it does not provide, in terms or by implication, that only such persons shall or may be made parties. There is neither statutory provision, nor principle, nor settled practice that forbids or prevents parties having an interest in or affected by a special proceeding to obtain dower, to be made parties to the same, as in other cases. The provisions of The Code of Civil Procedure are applicable to such a proceeding, except as otherwise provided (The Code, sec. 278), and among these provisions, pertinent and applica-

ble, is that (section 184) which prescribes that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff," etc.

Now, obviously, the creditor of a deceased debtor whose per- (275) sonal estate is insufficient to pay his debts, has a substantial interest that justly prompts him to see that excessive dower is not allotted to the widow of such debtor. It may be that the heir's interest in the land is trifling, in fact, worth nothing, and he may be hostile to the creditor, and collude with the widow asking dower. Hence the law gives the creditor opportunity to be heard in opposition to excessive dower in the proceeding whereby the widow seeks to obtain dower, and this without regard to any other possible remedy he may have. It might be, that if a creditor could not thus have remedy, he would be remediless. He clearly has such interest as entitles him to be made a party defendant to the end he may justly prevent the allotment of excessive dower. *Moore, ex parte,* 64 N. C., 90; *Lowery v. Lowery, ib.,* 110; *Avery, ex parte, ib.,* 113; *Carney v. Whitehead, ib.,* 426.

It was, therefore, competent for the court to make the defendant creditors parties in a proper case, and in the absence of exception or objection, that they were not creditors whose interest might be affected adversely by excessive allotment of dower, it must be taken that they were properly made parties. No statute prescribes how objections to an excessive allotment of dower shall be made, but this is settled by rules of practice. It is said in *Stiner v. Cawthorn,* 20 N. C., 640, 501, that "the act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower, but the usages of our courts have defined it, to wit: 'That where the report of a jury is returned, exceptions may be thereunto taken by any one aggrieved, and the court will set aside the allotment and order a new allotment, if sufficient cause be shown'." As we have seen, a creditor may be one aggrieved. *Moore, ex parte, supra.*

The court below seems to have observed the settled rules of (276) practice. It was certainly competent for it to hear pertinent affidavits with a view to ascertain such facts as would enable it intelligently and fairly to determine that the allotment of dower by the jury was or was not excessive. It might hear any competent evidence for such purpose, and, ordinarily, it must be the sole judge of whether or not a reallotment shall be made.

The court also found the fact that the allotment was excessive, and the mere fact that a preceding judge had so found, could not render the findings of fact by a subsequent one void or at all affect its merits. It appears that both juries allotted the same property, and it may be that both judges found the like facts from substantially the same evidence. This they might do. If the allotment was excessive, as the court found

the fact to be so, then, as a matter of law, the court certainly had authority, and it was its duty, to direct another jury to make a reallotment. The court below, in the exercise of a sound discretion, must be the judge of how often, for just cause, it will direct a reallotment. An appeal lies from the order of the clerk to the judge. It is so expressly provided by the statute (The Code, sec. 252) which applies in special proceedings as well as in civil actions generally. *Brittain v. Mull,* 91 N. C., 498.

Affirmed.

Cited: Wilson v. Featherston, 118 N. C., 841.

D. BEAM ET AL. v. WILEY BRIDGERS ET AL.

Husband and Wife—Marriage—Contract—Trust.

While, under the former system, the wife's money became the property of the husband *jure mariti,* the latter may agree as between him and the wife to treat it as the wife's property; and where there is evidence to show an agreement to that effect, and that the husband invested it in land for her benefit and took the title in his name, there is a resulting trust.

(277) SPECIAL PROCEEDING for partition, tried before *Brown, J.,* at Fall Term, 1890, of RUTHERFORD.

The only issue submitted to the jury was as follows:

"Was the first 150-acre tract described in the complaint and conveyed by Anderson Bridgers to John Beam, 18 February, 1846, purchased by John Beam with the money of his wife Elizabeth, and at her request and for her?"

There was testimony tending to show that Mrs. Beam was possessed of certain money; that her husband voluntarily agreed to treat it as hers, and to waive his marital rights in respect to it by investing the same for her in the lands above mentioned. Neither John Beam nor his wife had any children.

The plaintiffs requested the court to charge, that under the testimony, the issue should be answered in the negative, and that the court should so charge. The court refused to give the instruction. There was a verdict against the plaintiffs, and they appealed.

M. H. Justice for plaintiffs.

J. A. Forney for defendants.

SHEPHERD, J. The only question presented for review is whether there was sufficient evidence to sustain an affirmative finding of the second issue. We think it very clear from the testimony of James and William Bridgers, that John Beam purchased the land in question with his wife's money at her request; that the purchase was intended for her benefit, and that such was the understanding and agreement of the parties. It may also be inferred that she intended that the title should be made to her. Indeed, the agreement was that the husband should purchase the land "for her," and the necessary implication is, that the title was to be taken in her name. It is a well-settled principle that where, on the purchase of property, the conveyance of the legal estate (278) is taken in the name of one person, but the purchase-money is paid by another at the same time or previously, and as a part of one transaction, a trust results in favor of him who supplies the purchase-money. Adams Eq., 33; Malone on Real Property, 509. The principle has frequently been applied where land is purchased with funds arising from the separate estate of the wife (*Cunningham v. Bell,* 83 N. C., 328; *Lyon v. Akin,* 78 N. C., 258) or with funds which, by agreement of the husband, are to be treated as such separate estate. *Hackett v. Shuford,* 86 N. C., 144, and the cases cited.

It is urged, however, that in our case the money with which the land was purchased was not the separate estate of the wife, and that the agreement of the husband to treat it as such being purely voluntary, and, therefore, of no effect, there was nothing to prevent the operation of the principle by which the money of the wife became the property of the husband *jure mariti.*

The argument derives some support from the intimation of the learned *Justice* who delivered the opinion in *Hackett's case, supra,* but it will appear from an examination of the Maryland case (alone cited by him) that the rights of creditors were involved, and that so far from any pecuniary consideration being necessary as between the parties, the contrary view was declared by the Supreme Court of that State. The case upon appeal does not very clearly show how the wife acquired or held the money in question, but, granting that it was subject to the marital rights of the husband, we think that, as between him and his wife, his agreement to treat it as her separate property would be recognized in equity in cases like this, especially where there were no children to be provided for, and the claim of the wife was more meritorious than that of the collateral heirs whom the husband was under no moral obligation to maintain. *Garner v. Garner,* 45 N. C., 1.

It is said by high authority that although the presumption is that the money of the wife during marriage becomes the husband's, such presumption is not conclusive, and the husband "may (279)

so treat it as to charge himself and his heirs, as trustees of the wife, with the duty of applying it to her separate use." *Taggart v. Talcott,* (2 Ed.) ch. 628; *Resor v. Resor,* 9 Ind., 349; *Temple v. Williams,* 39 N. C., 39; *Woodruff v. Bowles,* 104 N. C., 197.

It is well settled that a husband may, after marriage, make gifts and presents to his wife which will be supported in equity against himself and his representatives (*Lucas v. Lucas,* 1 Atk., 270; Atherly Mar. Set., 331; *Garner v. Garner, supra; Smith v. Smith,* 60 N. C., 581) and it seems to be also well established that a trust may be raised in favor of the wife by proof that her husband paid the purchase-money for her benefit and with his own funds. *Raybold v. Raybold,* 8 Harris, 308; *Pinney v. Fellows,* 13 Vt., 325; *Farley v. Blood,* 10 Foster, 354; *Dyer v. Dyer,* White & Tudor L. C. Eq., 341.

In consideration of the foregoing authorities, we see no reason why the agreement of the husband in this case may not be sustained as against the parties to this action; and this being so, it must follow that there was a resulting trust.

No error.

Cited: Taylor v. Sikes, post 729; *Beam v. Bridgers,* 111 N. C., 269.

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(280)

G. W. LONG ET AL. v. W. C. OXFORD, EXECUTOR.

Executors and Administrators—Judgment, when Conclusive—Statute of Limitations.

1. In a proceeding to sell land to make assets, a judgment previously obtained against the executor is conclusive against the heirs and devisees, unless fraud and collusion is alleged and shown, and the heir or devisee cannot plead the statute of limitations or other defense which might have been set up in the original action.

2. In such proceedings the realty is liable for costs, as well as for the balance of the judgment, unless the court which rendered the judgment taxed the cost against the executor (or administrator) personally, or against the plaintiff.

APPEAL from *Merrimon, J.,* at Spring Term, 1891, of ALEXANDER.

This was a special proceeding in the nature of a creditors' bill for the settlement of an estate, and to subject devised lands to the payment of debts.

On the hearing before the clerk, the plaintiff demurred to the answers filed, on the ground that they did not allege facts sufficient to constitute a valid defense. The clerk, sustaining the demurrer, gave judgment against the defendants, which judgment was confirmed by the judge in term, and the defendants appealed to the Supreme Court.

A. C. McIntosh (by brief) for plaintiffs.
R. B. Burke for defendant.

CLARK, J. The plaintiffs seek to subject the lands of Samuel H. Reid to the payment of a judgment heretofore obtained against the executor. The defendants, who are the executor himself and his wife (who is the sole devisee of Reid) attempt in their answers to set up the statute of limitations and other matters of defense which might have been pleaded in the original action. The plaintiffs demurred, on the ground that the answers did not set up any defense to the action which (281) could avail the defendants or either of them.

The court properly sustained the demurrer. "The heir (or devisee) is bound by the judgment against the administrator (or executor) unless he can show that it was obtained by collusion and fraud, and he is barred by it from setting up any statutory limitation or other matter which might have been pleaded by the administrator (or executor) as a bar to the action against him." *Proctor v. Proctor,* 105 N. C., 222; *Speer v. James,* 94 N. C., 417; *Smith v. Brown,* 101 N. C., 347. The answer of the devisee in the present case does not aver fraud or collusion. It is admitted that the personal assets are insufficient to pay the judgment.

The defendants, however, insisted that the land cannot be subjected to payment of the costs and is exempted therefrom by virtue of the former decision of this Court. It was competent for the court below in the former action to have taxed the executor personally with the costs of that action in the cases mentioned in The Code, 1429. When the appeal from the judgment in that action was before us (104 N. C., 408) the question presented was as to the right of the plaintiff to recover costs. The judgment below gave the plaintiff costs but did not tax the executor with them individually, and the judgment here merely affirmed the judgment below. The land is subject to pay the costs, as well as the balance of the judgment.

Affirmed.

Cited: Woodlief v. Bragg, post, 573; *Lee v. McKay,* 118 N. C., 523; *McNair v. Cooper,* 174 N. C., 568.

(282)

JOHN BANKS v. GAY MANUFACTURING COMPANY.

Pleading—Verification—Issue—Judgment by Default and Inquiry—Corporation—Continuance.

1. When a pleading by a corporation is required to be verified, the verification must be made by an *officer* thereof; a verification by an *agent* merely will not suffice. The Code, sec. 258.
2. When a verification of a pleading is allowed to be made by an agent, it should set forth his knowledge or grounds of belief, and why it is not made by the principal party.
3. After a judgment by default and inquiry in an action for malicious prosecution, the only issue for the jury is the amount of plaintiff's damages.
4. Granting or refusing a continuance is a matter of discretion, and not reviewable.

ACTION, for damages for malicious prosecution, tried before *Whitaker, J.*, at Spring Term, 1890, of GATES.

When the case was called for trial, the defendant offered to file an answer to the verified complaint, to which plaintiff objected because of defective verification. It was admitted that the defendant was a corporation, and that C. W. Dennis was an agent, but not an officer of the same. The verification was as follows:

"C. W. Dennis, agent for the said Gay Manufacturing Company, being duly sworn, maketh oath that the facts stated in the above answer are true of his own knowledge."

Upon objection to the verification, defendant moved for a continuance, in order to have the answer properly verified by an officer of the corporation. This motion was overruled, and the defendant excepted.

The defendant requested the court to submit to the jury this issue: "Did the defendant prosecute the plaintiff maliciously and without probable cause?"

This the court refused, and submitted only the issue: "What damage, if any, has the plaintiff sustained?" and the defendant excepted.

(283) Verdict and judgment for plaintiff. Defendant appealed.

W. M. Bond (by brief) for plaintiff.
No counsel contra.

CLARK, J. The Code, sec. 258, prescribes, "when a corporation is a party, the verification may be made by any officer thereof." The answer of the defendant company is sworn to by an agent merely, and

his Honor rightly held that the answer was not verified. The Code, sec. 217, permits a summons against a corporation to be served on an agent, but this was not extended to verification of pleadings by the corporation. There is an evident reason for the difference. Besides, if the answer of a corporation could be verified by an agent, the affidavit is not sufficient, in that it does not set forth "his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party." When the verification is by an officer of the company this is not required, for the officer speaks for and is the mouthpiece of the corporation (*Bank v. Hutchison,* 87 N. C., 22), but it is necessary to be set out in all cases where the verification is made by an agent or attorney.

The court in its discretion might have allowed the answer to be verified properly (The Code, sec. 274) and have granted a continuance for that purpose, as prayed by the defendant, but its refusal of the continuance is not reviewable. *S. v. Lindsey,* 78 N. C., 499; *S. v. Scott,* 80 N. C., 365.

There being a judgment by default and inquiry, the issue tendered by defendant was properly refused, and in lieu thereof there was submitted to the jury the issue, "What damages, if any, has plaintiff sustained?" The issue tendered by defendant was not raised, as there was no answer, and that matter was settled by the judgment by default.

The only inquiry was to the *quantum* of damages, which was submitted.

No error.

Cited: Griffin v. Light Co., 111 N. C., 438; *S. v. Jackson,* 112 N. C., 853; *McLeod v. Nimocks,* 122 N. C., 441; *Phifer v. Ins. Co.,* 123 N. C., 408; *Slinglieff v. Hall,* 124 N. C., 400; *Junge v. MacKnight,* 137 N. C., 289; *S. v. Dewey,* 139 N. C., 560; *Miller v. Curl,* 162 N. C., 4; *Armstrong v. Asbury,* 170 N. C., 162.

(284)

F. H. SMITH ET AL. v. M. SUMMERFIELD ET AL.

Creditors' Bill—Joined Causes of Action—Parties—Fraudulent Conveyance—Pleading—Redundancy and Uncertainty—Equitable Lien.

1. Several creditors may unite in an action against their common debtor to obtain judgment for their respective claims and set aside an alleged fraudulent conveyance of the debtor's property, and the parties so uniting may acquire a preference, by way of equitable lien, over other general creditors.

2. It is only when the court undertakes to wind up the affairs of a partnership and make a distribution of its assets that all the creditors are required to be made parties.

3. Redundancy, impertinence, argumentativeness, and uncertainty in pleading cannot be taken advantage of by the demurrer; the objection should be made by motion before answer or demurrer.

4. In an action by creditors to subject property to the satisfaction of their debts, it is not necessary they should seek to subject all the property of the debtors, or make parties those who claim any portion not sought to be reached.

5. An averment in a complaint that the plaintiff sold and delivered to the defendant goods of certain value, and the same has not been paid, is a sufficient statement of a cause of action.

ACTION, heard upon complaint and demurrer, at Spring Term, 1890, of WAYNE, by *MacRae, J.*

The plaintiffs, a number of trading firms and corporations, alleged that the defendants, a commercial firm, engaged in business at Goldsboro and Smithfield, N. C., were indebted to them respectively, in the various sums set out in the complaint, for goods, wares and merchandise, sold and delivered to said defendants, "no part of which had been paid"; that the defendants had fraudulently conspired to create a fictitious credit, whereby they had been enabled to purchase in the markets a large (285) and valuable stock of goods, and that having gained possession thereof, they, with the intent to defraud their creditors, had conveyed the same to assignees in trust, etc.

The complaint sets out with great particularity the facts upon which the action is based and the sources of plaintiffs' information, and demands judgment—

1. Against the defendants for the several sums alleged to be due to them, respectively.

2. That the various conveyances herein alleged to have been made by M. Summerfield and H. Dannenberg, or either of them, for the purpose of hindering, delaying and defrauding their creditors, be declared void as to the plaintiff creditors.

3. That the sums of money arising from the proceeds of the sale of goods and other sources by Sol. Weil, assignee, now in the hands of H. Weil & Bro., as alleged in the complaint, be paid into the court, to be applied to the liquidation of the debts due from M. Summerfield & Co. to the plaintiffs.

4. That Sol. Weil account for and pay into court all moneys in his hands as assignee of said Summerfield & Co., together with all sums that have been or ought to have been in his hands as such assignee, ex-

cept such as he may have properly paid out in legitimate expenses in executing said trust, to be applied to the liquidation of the debts due from M. Summerfield & Co. to the plaintiffs.

5. That P. T. Massey account for and pay into this court all moneys that have come into his hands or ought to have come into his hands as assignee of M. Summerfield & Co., except so much thereof as he may have paid out in legitimate expenses in executing said trust, to be applied to the discharge of the debts due from the defendants M. Summerfield & Co. to these plaintiffs.

6. For such other and further relief as they may be entitled to. (286)

7. For the costs of this action.

The defendants demurred for that:

1. The complaint does not upon its face purport to be a creditors' bill.

2. That there is a misjoinder of causes of action, the several plaintiffs having separate and distinct claims in no wise connected with each other.

3. That the complaint set forth evidence.

4. That it was argumentative.

5 and 6. That certain persons, who claimed property (not sought to be reached in this action) under conveyances from defendants, were not parties.

7. That copies of the alleged fraudulent conveyance referred to in the complaint were not attached to it.

The court overruled the demurrers, and the defendants appealed.

W. C. Munroe, C. B. Aycock and W. T. Faircloth for plaintiffs.
C. M. Busbee and E. W. Pou, Jr., for defendants.

SHEPHERD, J. 1. The first ground assigned as a cause of demurrer presents the question whether this action should not have been brought in the form of a general creditors' bill.

In *Hancock v. Wooten,* 107 N. C., 9, we attempted to distinguish a general creditors' from a judgment creditors' bill, and in the course of the discussion, in speaking of the former, we used the following language: "Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs 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; and *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 (287

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."

A glance at the complaint will disclose that the present action is not within the principle above stated. It is brought by several creditors for the purpose of obtaining judgments for their respective claims, and to set aside certain alleged fraudulent assignments made by the defendants. Such relief may be obtained in the same action (*Bank v. Harris,* 84 N. C., 206) and several creditors may unite as parties plaintiff and acquire a preference by way of equitable lien. *Hancock v. Wooten, supra.* The general creditors have no lien upon copartnership assets (*Allen v. Grissom,* 90 N. C., 90) and the court only requires all of them to be made parties, and decrees a *pro rata* distribution in cases of dissolution, when, at the instance of one or all of the partners, or of a purchaser under execution or otherwise of the interest of an individual partner, it undertakes to wind up the partnership affairs and ascertain the rights of such individual partners, or their successors in interest. As each partner has an equitable right to have the assets applied to the joint indebtedness, it is necessary that the claims of all of the creditors should be ascertained, and the creditors being thus before the court, an equitable distribution is made. This is not the nature of the present action. Under the former system a creditor of a copartnership could obtain a judgment at law and sell the copartnership property under execution. He could also institute a judgment creditors' bill to reach equitable assets, or to remove obstructions (such as fraudulent conveyances, etc.) interposed by the
(288) debtor to the subjection of legal assets. A judgment creditors' bill was generally said to be in the nature of an equitable *fi. fa.,* and we have seen that such an action may now be maintained without a precedent judgment, and that several creditors may unite in the same. Upon the authorities above mentioned, we are of the opinion that this action need not have been brought in the form of a general creditors' bill, and the demurrer in this respect must be overruled.

2. For the same reasons the second ground of demurrer, that there is a misjoinder of parties plaintiff, is without merit, and the demurrer in this particular must likewise be overruled.

3. The third and fourth grounds of demurrer are untenable. A demurrer does not lie except in the cases specifically mentioned in section 239 of The Code. *Dunn v. Barnes,* 73 N. C., 273. Redundancy and impertinence in pleading must be objected to by way of motion before answer or demurrer (*Best v. Clyde,* 86 N. C., 4) and the same is true as to argumentativeness, "indefiniteness or uncertainty, unless the uncertainty be such as to state no cause of action." Boone Code Pl., 54, 146.

4. The fifth and sixth grounds of demurrer are also untenable. It is alleged that one of the partners conveyed certain individual property to C. Summerfield and Isadore Summerfield. This property, of course, cannot be reached unless these persons are made parties, and until this is done it may be considered as out of the case. It is not necessary for the creditors, in an action of this character, to subject all of the property of a debtor (*Munroe v. Lewald,* 107 N. C., 655); they may proceed against a party only; and this being so, the presence of the persons named is entirely unnecessary to the determination of the controversy, in so far as it affects other property in which they have no interest. "In order to sustain a demurrer for defect of parties, it must appear that the party demurring has an interest in having the omitted parties joined, or that he is prejudiced by the nonjoinder." Boone, *supra,* (289) 51. Such is not the case here.

5. The seventh ground is also without merit. We know of no law requiring copies of the deeds of assignment to be attached to the complaint.

6. The motion to dismiss because the complaint does not state facts sufficient to constitute a cause of action is denied. The allegation that goods were sold and delivered of the value of a certain amount, and that the same has not been paid, is a sufficient averment of indebtedness in a case like the present.

Upon the whole complaint, we think there are facts constituting a cause of action.

Affirmed.

Cited: LeDuc v. Brandt, 110 N. C., 291; *Allen v. R. R.,* 120 N. C., 550; *Womack v. Carter,* 160 N. C., 291; *Hensley v. Furniture Co.,* 164 N. C., 152; *Wofford v. Hampton,* 173 N. C., 687.

(290)

CALVIN WALLER v. WILLIAM BOWLING.

Chattels—Tenants in Common—Conversion—Damages—Demand—Mortgages—Priority.

1. While a tenant in common of a chattel cannot maintain an action against his cotenant for conversion upon the ground merely that his demand for possession has been refused; yet, if the tenant in possession withholds the common property or exercises such dominion over it as amounts to a denial, or is inconsistent with the rights of his cotenant, an action in the nature of trover will lie.

2. If personal property subject to a mortgage is subsequently attached to land also under mortgage, with notice to the mortgagee, of the latter, the lien of the chattel mortgage takes precedence over that of the realty.

3. If one tenant in common of a chattel oust his cotenant of possession, the latter may, at his election, bring an action for the recovery of the specific property, if it can be found, and damages for its deterioration or for the conversion and value at the time of taking. After suit is brought for conversion, the defendant cannot relieve himself from liability by returning the property, unless the plaintiff agrees to receive it.

4. Where one cotenant was present, forbidding the other from removing the common property, no demand was necessary before bringing suit.

APPEAL at April Term, 1890, of GRANVILLE, from *Womack, J.*

Action to recover damages for unlawfully removing and converting to the defendant's own use certain machinery that had been placed in a mill run by water.

On 23 August, 1880, and for some years prior to that time, the plaintiff and defendant were owners in fee and tenants in common of the tract of land on which the mill was situate, each holding one undivided half. On said 23 August the defendant executed a contract, under seal, to convey his interest to one John T. McDonough on the payment of a note of the same date for the sum of $300, executed by said McDonough and wife. On 20 March, 1885, McDonough borrowed of the plaintiff the sum of $200, and executed his note therefor and purchased with said borrowed money the turbine wheel, shafts, pulleys, level, cog-wheel, etc., which are the subjects of this action, and executed, his wife joining, a mortgage conveying said machinery to secure the note due plaintiff, the machinery not then being in the mill.

On default in the payment of the $300 note for purchase-money of the land, the defendant, on 17 January, 1888, brought suit against McDonough to subject his interest in the land, and at April Term following of the Superior Court of Granville obtained a decree under the
(291) terms of which the interest of McDonough in the land were sold by a commissioner for the sum of fifty dollars, the defendant being the purchaser, and said sale was confirmed at the September Term, 1888, of said court.

The wheel and some other parts of the machinery were placed in the mill, after being conveyed, on 20 March, 1885, by mortgage deed to secure said note for $200 due to plaintiff, but before the sale under the decree aforesaid.

The plaintiff alleges that none of the machinery sued for had been placed in position in the mill until after the mortgage to him was executed.

The issues submitted were as follows:

1. Did the defendant unlawfully convert the property described in the complaint? "Yes."

2. If so, what damage has the plaintiff sustained thereby? "$215, and interest from 18 April, 1889, to date at 6 per cent."

First Exception.—In addition to the issues agreed upon, the defendant tendered the following, which the court declined to submit to the jury, and the defendant excepted: "Are the plaintiff and defendant tenants in common of the property alleged to have been converted?"

The plaintiff introduced a mortgage executed by John T. McDonough and wife to the plaintiff for the machinery described in the complaint, and also the note secured thereby for $200, $100 of which was due 20 March, 1886, and $100 of which was due 20 March, 1887, and endorsed thereon was a credit of $17.50, 23 November, 1887.

Second Exception.—The plaintiff was examined and testified: "I loaned McDonough money. He said he wanted to buy machinery. The machinery he gave the mortgage on was bought with this borrowed money. It consisted of a turbine wheel, cog-wheel, shafting, pulleys, etc., necessary to run the mill, and was worth at the time of the conversion $215. It was put in the mill. The defendant tore it (292) up. I saw him do it and forbid him. He said he was responsible and would carry it away. He took it away 18 April, 1889. The mortgage was made on the machinery before it was put in the mill. The mill-site was jointly owned by the defendant and myself. The mill hadn't been in operation for two years. I objected to his carrying it off that day. He said he was going to carry it off if he could. It was some months after the machinery was bought before it was put in the mill. My mortgage was registered first. The turbine is there now but not by my consent. I did not receive it. I don't know who brought it there."

There was other evidence for the plaintiff tending to show the manner of the removal of the property by the defendant, and that it was worth $215.

The defendant, being examined, testified: "I moved the machinery sued for from the mill, but did not injure it. I afterwards carried it back to the mill. I got the mud off it, and put three quarts of oil on it. No part of it is missing."

Third Exception.—The defendant proposed to show by the witness and by the records in the case of *Bowling v. McDonough,* lately pending in Granville Superior Court, that the interest of McDonough (one-half) in the mill-site was sold by order of court in said case and purchased by the defendant. Offered, first, in mitigation of damages, and second, to show *bona fides.* Objection by the plaintiff for the reason that the record does not show that the property sued for was the subject of said action, and because the plaintiff was not a party to said action. Objection sustained, and exception by defendant.

"The plaintiff forbid my taking the property. I took it up by force. It was not nailed down. The shafting was let into a box of casting. That was let in a sill on the ground. The box was either set on the sill or mortised in it."

(293) *Fourth Exception.*—The defendant asked the following instructions:

1. If the jury believe that the plaintiff and defendant are tenants in common of the property in dispute, the plaintiff cannot recover.

2. In this case, the plaintiff having made no demand on the defendant for the property in dispute, cannot recover at all in this action.

3. At most, the damages done the plaintiff in this action, according to his own evidence cannot exceed the actual damage done to the property by the defendant or his agents while the property was in the possession of said defendant.

4. There is no evidence in this case that the defendant has damaged the said property at all.

5. The jury can act only on the evidence in this case, and in no aspect can the jury find a verdict for the actual value of the property.

6. There has been no unlawful conversion of the property by the defendant under the evidence.

7. McDonough having made a payment of $170 on the mortgage, Bowling was an equitable tenant in common with Waller to the amount of the excess over and above the mortgage of said Waller in the mill property and the property removed.

All of the above instructions were refused, and the defendant excepted.

Fifth Exception.—The court charged the jury that if the jury believed that the defendant took the personal property sued for into his possession, the plaintiff being present forbidding, and carried the same away, exercising a dominion over the same in denial of and inconsistent with the rights of the plaintiff, it being the property of the plaintiff, as further charged, the jury will answer the first issue "Yes," and this notwithstanding the fact that there may have been the equitable

(294) tenancy in common contended for by the defendant. To which charge the defendant excepted.

Judgment for plaintiff, appeal by defendant.

L. C. Edwards, J. B. Batchelor and John Devereux, Jr., for plaintiff.
A. W. Graham for defendant.

AVERY, J., after stating the facts: The rule in reference to issues laid down by this Court in *Emery v. R. R.*, 102 N. C., 209, has been repeatedly approved since. *Lineberger v. Tidwell,* 104 N. C., 510; *Brown v. Mitchell,* 102 N. C., 367; *McAdoo v. R. R.,* 105 N. C., 151.

The defendant, in order to sustain his assignment of error, must show that the court has erred in refusing or failing, at his request, to present to the jury, through the medium of some issue submitted, a pertinent view of the law applicable to the testimony, whereby the jury may have been misled. *Bonds v. Smith,* 106 N. C., 564.

A tenant in common of a chattel cannot maintain an action of, or in the nature of, trover against his cotenant upon the ground merely that his demand for possession of the common property has been refused by the latter, unless he can show that the cotenant had subsequently consumed it or placed it beyond recovery by means of legal process. *Newby v. Harrell,* 99 N. C., 149; *Pitt v. Petway,* 34 N. C., 69; *Lucas v. Wasson,* 14 N. C., 398; Cooley Torts, 455; *Rippey v. Davis,* 15 Mich., 75.

But where the tenant in possession of personal chattels withholds the common property from his cotenant, or wrests it from him and exercises a dominion over it, either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion. *Shearin v. Rigsbee,* 97 N. C., 221; 2 Greenleaf, sec. 642; *University v. Bank,* 96 N. C., 284; Cooley Torts, *supra;* 2 Greenleaf Ev., 636*a; Grove v. Wise,* 39 Mich., 161. There is some conflict among the authorities, and it is difficult to draw or trace the shadowy line that marks the (295) limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion. But Schouler Personal Property, p. 200, after taking the extreme ground that at common law nothing short of the destruction of a chattel, or a conversion of the whole to his own use, or something equivalent, will render the owner in possession liable to his coöwners, says that mere dispossession of a cotenant might, "if accompanied *with other acts showing a hostile intent,*" amount to a conversion. It would seem that the violent wrenching of the machinery from the mill, when the plaintiff was present forbidding, was the strongest evidence of such intent.

In *Strickland v. Parker,* 54 Me., 263, the facts were that the purchaser at execution sale of an undivided interest in a tract of land, removed the superstructure of a marine railway located on the land, consisting of iron and wooden rails and sleepers, etc., and placed it upon another tract of land. The Court held that the property removed constituted a part of the land and passed with it, but that the cotenant of the purchaser might maintain trover against him for removing it. The Supreme Court of Michigan, in the case of *Grove v. Wise, supra,* held that even before condition broken, any person wrongfully interfering with a mortgagee's possession of a chattel under his mortgage deed, would subject himself to liability to damage in an action of trover brought against him by such mortgagee. The facts in that case were, that an undivided half interest

in a steam engine, boiler and some planing mill machinery had been mortgaged to the plaintiffs, and the defendant Wise, having previously owned the other half interest, had, subsequent to the date of the mortgage, bought at bankrupt sale the land on which the building containing the engine, boiler and machinery stood. The case is cited with
(296) approval both by Cooley and in the Notes to Greenleaf's Evidence.

It seems to be settled that where personal property, after being subjected to the lien of a mortgage, is attached to mortgaged land, it will be held to have passed to the mortgagee in the chattel mortgage as against the assignee or holder of the real estate mortgage, who had notice of the first mortgage when it was attached. Hermon Chat. Mort. sec. 138; *Sheldon v. Edwards,* 35 N. Y., 279; *Smith v. Benson,* Hill, 176. Where a steam mill was mortgaged, not including the land on which it stood, it was held by the Supreme Court of Iowa that subsequent purchasers of the mill and premises on which it stood, who had notice of the chattel mortgage, took title to the mill subject to it. *Gunter v. Alexander,* 15 Iowa, 470; Hermon, *supra,* sec. 138.

The general principle that exclusive possession of personal property by one tenant in common, and a denial of the rights of his cotenants, is a conversion for which trover will lie, is supported by numerous adjudications in the courts of other States. *Figuet v. Allison,* 8 Cooley (Mich.) 328; *Well v. Oliver,* 21 Pick., 563; *Winner v. Penniman,* 35 Md., 163; *Person v. Wilson,* 20 Minn., 189.

In *Stephens v. Koonce,* 103 N. C., 266, the defendant tendered to the plaintiff a judgment for the possession of a steam engine, boiler, sawmill, grist-mill, etc., removed from his land, and the costs of the action. The Court held that the defendant was not only liable for costs, notwithstanding such offer, but for the full value of the property converted, and interest allowed by the jury, and could not be compelled to take the property back. The general rule is, that where one of the owners of an undivided interest in a chattel exercises such dominion over the common property as is inconsistent with the rights of his coöwner, the latter may bring claim and delivery, if the property can be found, and recover the specific property, with damage for deterioration as well as deten-
(297) tion, or he may elect to sue for damages for the wrongful conversion and recover the value of the property at the time of the taking, and costs. *Stephens v. Koonce, supra; Rippey v. Davis,* 15 Mich., 75; *Hall v. Younts,* 87 N. C., 285. After suit has been brought for the conversion, the owner cannot be compelled to take the property back, but when he does allow it to be returned in damaged condition, its diminished value can be considered in mitigation of damages. 3 Sutherland on Damages, 530.

The rule as to the measure of damages would be different where fixtures, such as gas piping, are torn from a building and the building is thereby rendered unfit for occupation and use. There the measure of damages is the cost of restoring the building to its original state and the loss in its rental value while it was uninhabitable. *Willis v. Branch,* 94 N. C., 142.

It was not necessary that the plaintiff should make a formal demand for possession of the property before bringing the action, if, as both plaintiff and defendant testified, he was present forbidding when it was removed from the land. The law did not require him to act on the assumption that one who took it away in the face of his protest would return it at his request, or to accept it in full satisfaction of his damages, if there was a voluntary offer to return it.

The exceptions insisted on in this Court were the first, fourth and fifth. For the reasons given, we do not think that the judge erred in refusing the instruction asked, or substituting that given, or in the rulings excepted to.

No error.

Cited: Smith v. R. R., 114 N. C., 763; *Parker v. Brown,* 136 N. C., 289; *Cox v. Lighting Co.,* 151 N. C., 66; *Doyle v. Bush,* 171 N. C., 12.

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(298)

JOHN HOPKINS ET AL. V. ANN BOWERS ET AL.

Evidence—Witness.

1. With a view to show that the defendants were of negro blood within the prohibited degrees, and, therefore, illegitimate and incapable of inheriting from the deceased, a white person, under whom the plaintiffs also claimed, the latter introduced them before the jury for inspection, but did not further examine them as witnesses: *Held,* that this did not open the door to the defendants to testify to any communication or transaction with their deceased ancestor.

2. If, under such circumstances, the plaintiff had examined them as witnesses to any transactions with the deceased, they could be cross-examined only as to the same transactions.

ACTION, to recover real property, tried before *Armfield, J.,* at March Term, 1890, of ORANGE.

The plaintiffs were the nephews of one Nash Booth, claiming to be his heirs at law. The defendants claim to be his wife and legitimate

children. The plaintiffs insisted that the relationship was illegitimate because the defendant Ann Bowers, the mother of the other defendants, and claiming to have been the wife of said Booth, was of negro blood within the forbidden degree. The Code, sec. 1284. With a view of showing this the plaintiffs introduced all the defendants and exhibited them to the jury to prove their color, and called attention to their skin, their hair and the like, but asked them no questions. Defendants' counsel then asked leave to examine Ann. The plaintiffs objected, but the court permitted her to be sworn as a witness and examined. Plaintiffs excepted.

The witness testified that she was married to Nash Booth by a justice of the peace, and that they had lived together as man and wife twelve or fifteen years, and that the other defendants were children born of that union. The plaintiffs again excepted.

(299) There were sundry other exceptions, which need not be stated. Verdict and judgment for defendants; appeal by plaintiffs.

A. W. Graham for plaintiffs.
Jas. S. Manning for defendant.

CLARK, J., after stating the case: It is not necessary to consider whether the exhibition of the defendants to the jury made them witnesses of the plaintiffs so as to entitle the defendants' counsel to have them sworn and cross-examined. For, conceding it to be so, the only evidence given by the exhibition of the witness Ann to the jury at the instance of the plaintiffs was as to her color, her hair, etc., tending to show that she was of mixed blood. This was not evidence of any transaction or communication between her and the deceased. Those things existed, and would have been the same if she had never so much as seen Nash Booth, and as to them she was a competent witness, unaffected by The Code, sec. 590. *Norris v. Stewart,* 105 N. C., 455; *Bunn v. Todd,* 107 N. C., 266. It was, therefore, error to allow her counsel to examine her as to any transaction or communication with the deceased, under whom she and the other defendants claim. The Code. sec. 590. Besides, by that section, when the executor, etc., or person deriving title or interest is examined as to any transaction or communication with a person deceased, the opposite party is rendered competent to give evidence only "concerning the same transaction or communication." The door is not open to the opposite party generally, but only as to the particular transaction put in evidence. *Sumner v. Candler,* 92 N. C., 634; *Armfield v. Colvert,* 103 N. C., 147. *A fortiori,* when the plaintiff examines the defendant as to a matter not within the inhibition of section 590, the defendant is not thereby at liberty to disregard the prohibition and testify as to

any and all transactions with the deceased, such as giving evi- (300)
dence to prove her marriage to the deceased, her living with him as man and wife and the paternity of the children, the other defendants.

This renders it unnecessary to consider the other exceptions.

Error.

Cited: *S. c.,* 111 N. C., 179; *Davis v. Evans,* 139 N. C., 441.

EMILY C. SILER ET AL. v. JOHN DORSETT ET AL.

Devise—Will—Evidence—Burden of Proof.

1. A testator may make a paper-writing, whether attested or not, written before or contemporaneously with, and clearly identified in a will, a part of it.

2. The testator devised a certain tract of land to his nephews, "upon the terms and conditions more fully set forth and explained in a written agreement between myself and their father, of even date with these presents": *Held,* that the burden was upon those who claimed under this devise to show what were the "terms and conditions," and a compliance therewith.

ACTION tried at May Term, 1890, of CHATHAM, *Womack, J.*

The action is brought to recover possession of the land described in the complaint. On the trial it was admitted that Matthias Siler was the owner of the land in controversy, before and at the time of his death, and that the plaintiff Lucy M. was his only surviving child and heir at law. The identity of the land in controversy with that described in the second item of the last will and testament of said Matthias Siler was also admitted, as well as the identity of the defendants Frank and John Dorsett, as the devisees named and described in the second item of said will. It was also admitted that Matthias Dorsett was dead, and (301) that he was the father of the defendants, who are in possession of the land, and he was the same person of that name mentioned in the clause of the will above referred to.

The said will was duly proven, and the second item thereof is in the words following: "To my nephews, Frank and John Dorsett, sons of Matthias Dorsett, I give the hereinbefore mentioned 'Jack place' tract of land, upon the *terms and conditions* more fully set forth and explained in a written agreement between myself and Matthias Dorsett, father of

the said Frank and John Dorsett, of even date with these presents." The defendants put the said will in evidence and rested their case for the present.

The plaintiff examined a witness, George Smith, and put to him this question: "Did you ever hear Matthias Dorsett, the father of the defendants, say that he had not complied with the agreement referred to in the will of Matthias Siler?" This question was objected to by the defendants. The objection was overruled, and the defendants excepted. This witness then said that he heard Matthias Dorsett say he didn't intend to comply with the agreement; that he was going to leave Matthias Siler and would not stay with him for his "Jack place" and everything he had. He was fixing to move away from Siler's. It was on Sunday before he left, after the will was written. He left before Siler's death. The defendants excepted.

On the cross-examination of this witness he stated, in reply to a question put by the defendants, that Matthias Dorsett said to him that he was to live on Siler's place his (Siler's) lifetime, and wait on him and take care of him, and he (Siler) would deed his place to his (Dorsett's) two sons.

The defendants' counsel requested the court, in writing, to instruct the jury that they should not consider as bearing upon the question of title any other evidence than the will of Matthias Siler and the
(302) contemporaneous written agreement. This the court declined to do, and told the jury that if they believed from the evidence that at the time of the execution of the will by Matthias Siler an agreement was made between him and Matthias Dorsett, the father of defendants, by which Dorsett should live on Siler's place during the latter's lifetime, and wait on and take care of him, and that Siler would deed the "Jack place" to the defendants; that in compliance with this agreement the said will was so executed, and that Matthias Dorsett did not comply with the agreement, but left Siler before his death, then the plaintiff is entitled to recover.

Thereupon the defendant excepted, first, upon the ground that the court refused to give the special instruction asked for; and, secondly, because of the charge given.

There was a verdict and judgment thereupon for the plaintiff, and the defendants appealed to this Court.

John Manning for plaintiff.
J. H. Headen for defendants.

MERRIMON, C. J. There can be no doubt that a testator may make a paper-writing, referred to, but not set forth in his will, a part of it.

But, to do so, such paper must be described and identified with such particularity as to designate and clearly show, and so that the court can certainly see, what paper is meant to be made part of the will. The paper must be written before or contemporaneously with the will, and not one to be written subsequent to the time it was executed. This is so, because the will must certainly express the testator's intention. And such paper, whether attested or not, will be part of the will. *Chambers v. McDaniel,* 28 N. C., 226; *Bailey v. Bailey,* 52 N. C., 44; *Johnson v. Clarkson,* 3 Rich. (S. C.), 305; *Tonnelle v. Hall,* 4 Comstock, 140; 1 Red. on Wills, sec. 261; Theobald Law of Wills, 60.

It seems to us clear that the testator intended that the agree- (303) ment referred to in the clause of his will, above recited, and under which the defendants claim title to the land in controversy, should constitute part of that clause and, therefore, part of his will. It is distinctly referred to, and described with such particularity as to the parties to it and its purpose as that there could scarcely be a mistake in identifying it as the agreement executed at the time of, or before, the execution of the will itself. It is intended that it should be part of, give character and distinctive purpose to, the devise. It expressed and embodied "the terms and conditions" upon which the devise was made—it was made an essential and material part of the devising clause.

In the absence of the agreement referred to, it is impossible to determine what the devise in question was—what was its "terms and conditions"—it is left incomplete and inoperative. The clear implication is that the testator intended to make the devise of the land to the defendants, not absolute, but in some way dependent upon "terms and conditions" specified in the agreement of the father of the defendants with the testator to do or not to do something—what, we cannot see, further than that it was material to the completeness and efficiency of the devise.

The plaintiffs did not at all claim under the will (the defendants did); their title wholly depended upon the devise in it to them, and hence the burden was upon them to show, not simply a part, but every material part of that devise, including its "terms and conditions," and to show that these terms and conditions, materially affecting their right, had been observed and performed. They failed to put in evidence a part of the will under which they claim materially affecting their rights, and hence they failed to make good their defense.

The evidence of the witness, received on the trial and objected (304) to by the defendants, in the absence of the agreement, was irrelevant and immaterial. But, as we have seen, it did not prejudice them, and, therefore, that it was received is not good ground for a new trial. And for the like reason the instruction of the court given to the jury,

and that requested and not given, were immaterial. The defendants failed to show a complete and effective devise of the land to them.

No error.

Cited: Johnson v. Johnson, post, 626; *Midgett v. Vann,* 158 N. C., 127; *Watson v. Hinson,* 162 N. C., 80.

THE DURHAM & NORTHERN RAILROAD COMPANY v. NORTH CAROLINA RAILROAD COMPANY.

Restitution, Writ of—Process—Possession.

The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court; nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment, or process therein.

MOTION for a writ of restitution, made by the defendant, before *Womack, J.,* at June Term, 1890, of DURHAM.

This case was before this Court by a former appeal (*R. R. v. R. R.,* 106 N. C., 16), and in that appeal the judgment of the court below dismissing the proceeding was affirmed. Thereupon the judgment of this Court was certified to the Superior Court. Afterwards, in the latter court, the defendants insisted that they were entitled to be put in possession of the land which the plaintiffs had sought by the proceeding to condemn as right of way for its purposes, and to that end they moved that a writ of restitution be issued. The court denied the motion and gave judgment as follows: "The opinion and judgment of the (305) Supreme Court being certified down, affirming the former judgment of this court dismissing this proceeding, it is adjudged that the defendants recover of the plaintiff and its surety the costs of this action, to be taxed by the clerk. The motion for a writ of restitution is refused, and from the refusal to allow the motion for writ of restitution the defendants appeal to the Supreme Court." The following is so much of the case settled on appeal as need be reported: "It appearing that the defendants were not in possession of the land in controversy when this action was instituted, that the plaintiffs did not enter into possession of said land under any process of the court, but under a grant from the town of Durham, and that the defendants have been enjoined from

entering upon and taking possession of said land, the motion of the defendant was refused and judgment rendered as appears in the record."

J. W. Hinsdale, John Devereux, Jr., and W. W. Fuller for plaintiff.
D. Schenck, J. W. Graham, and F. H. Busbee for defendants.

MERRIMON, C. J. Generally the writ of restitution lies in favor of a party after a judgment or order of the court, under and in pursuance of which he has been put out of possession of property, has been reversed, set aside or adjudged void, to restore him to the possession of which he had been so deprived. The law will not allow its process granted and enforced erroneously, by improvidence, mistake or abuse, to work injury to a party. It will always and promptly, in appropriate cases, restore the party prejudiced by its process to the like possession, plight and condition as he had at the time the same was executed, as nearly and as completely as practicable. The court seeks, and is anxious to do justice, and as well to preserve its own integrity and honor. Hence, (306) it is said that "if a judgment be reversed, the party shall be restored to all that he has lost by occasion of the judgment, and a writ of restitution shall be awarded." *Perry v. Tupper,* 70 N. C., 538; *Lytle v. Lytle,* 94 N. C., 522; Tidd's Practice, 1186; Cro. Jac., 698; Roll Ab., 778. But here it does not appear that the defendants were put out of possession or prejudiced by the process of the court. On the contrary, the court finds that they were not in possession of the land in question when the proceeding began, and that the plaintiff did not obtain possession of the same by virtue of the court's process, but in an entirely different way, with which the court had no connection whatever.

Besides, it appears from the record of the proceedings that at the time the same began, the plaintiff was in possession of the land, and alleged its right to have such possession. The defendants denied such right, and alleged that such possession was wrongful, and that they owned the land and were entitled to possession thereof. Obviously, these allegations raised questions to be litigated, but as it turned out, not in this proceeding because it could not be sustained. But it thus appears that the defendants were not put out of, nor was the plaintiff put in possession of the land by the judgment, order or process of the court. The defendants were left free to enforce their rights to the land and the possession thereof in some lawful way. As they were not put out of possession by the process of the court, and the plaintiff was also in possession, alleging and claiming the same to be rightful, it would not only be irregular, but violative of common right to grant a writ of restitution upon simple motion, and without allowing the plaintiff to litigate its right in some appropriate way prescribed by law. A writ so granted would not be a writ of restitution!

Affirmed.

(307)

JOSEPH N. BURNAP v. VERLINGER SIDBERRY ET AL.

Contract—Specific Performance—Affirmative Relief.

A vendee in an executory contract to convey lands, having failed to pay the purchase-money when it became due, subsequently purchased his notes therefor at an administrator's sale for a nominal amount, and then brought an action to compel the vendor's representatives to convey to him: *Held*, (1) that a specific performance would not be decreed until the vendee had paid the price stipulated in the contract of sale; (2) that the defendants having prayed for affirmative relief, it was not error to decree that the lands should be sold and the proceeds applied to the satisfaction of the balance due, if the plaintiff did not pay within a time fixed.

CASE agreed, tried at Spring Term, 1890, of ONSLOW, by *Graves, J.*, to compel the specific performance of a contract to convey land.

The following is a statement of the facts agreed upon by the parties to the action:

"1. That on 10 March, 1881, the defendants' ancestor and intestate, Burgess Williams, gave the plaintiff his bond for title for the land in question, thereby obliging himself to make title upon the payment to him of $170, secured by two notes, each dated 10 March, 1881—one for $100, due 1 January, 1882, with interest from date, and the other for $70, due 12 March, 1883, with interest from date.

"2. That on the $100 note there were paid $20 on 10 March, 1881, and $32 on 12 April, 1883.

"3. That in 1886 the defendant Christian A. Williams, the administratrix of the vendor Burgess Williams, procured license from the clerk of the Superior Court of Onslow County to sell the evidences of debt of her intestate, and through an agent sold the said notes; that at the time of said sale she knew that the said notes had been secured by the
(308) bond for title, but she was advised, and she supposed, that the lapse of time would prevent the lien from being enforced.

"4. That the said notes were bid off at said sale of the administratrix for 55 cents each, and the bidder assigned his bid to the plaintiff, who paid the amount of $1.10 for the notes, and the said administratrix, through her agent, wrote on the back of each of said notes the following: 'Received 55 cents, the amount bid for this note at public sale. C. A. Williams, Administratrix, per H. E. King.'

"5. That the plaintiff is in possession of the land in controversy, and has been since the date of said bond for title, 10 March, 1881."

Upon this state of facts the court gave judgment that the plaintiff is not entitled to have specific performance of said contract as demanded in the complaint, that he will be entitled to have title for the land, to

be conveyed to him by the defendants, when he shall pay the balance of the said purchase-money, less $1.10, the sum he so paid for the notes mentioned; that if such balance shall not be paid to the defendant administratrix within ninety days, then a commissioner shall sell the said land, and out of the proceeds of the sale thereof pay such balance to the said administratrix, and any surplus to the plaintiff. The latter excepted, and appealed to this Court.

S. W. Isler for plaintiff.
Manly & Guion (by brief) and Nixon & Galloway (by brief) for defendants.

MERRIMON, C. J., after stating the case: The specific performance of an executory contract to convey land cannot be insisted upon in a Court of Equity as a matter of absolute right. It rests in the discretion, not the arbitrary, but the sound discretion of the court, controlled and governed by principles and rules of equitable justice, applica- (309) ble in each case as it arises, according to the facts and circumstances attending it, whether specific performance will or will not be required. The court will look through the contract without regard to merely legal forms and technical advantage, to see what are its spirit and purpose, and whether the party demanding relief has on his part fairly and justly complied with its requirements of him, or whether he, in some cases, is ready, willing and able to do so. If it appears that the party suing has taken undue, unjust and inequitable advantage of the opposing party, specific relief will not be granted; he will be left to his strict legal remedy, whatever that may be. The relief demanded is equitable in its nature, and he who asks the same, must himself observe and be governed by the principles of equity, putting aside mere forms and technical advantage not affecting the substance of the matter. *Herren v. Rich,* 95 N. C., 500; *Love v. Welch,* 97 N. C., 200; *Ramsey v. Gheen,* 99 N. C., 215, and the cases there cited; *Willard v. Taylor,* 8 Wall., 557.

Now in this case the vendor retained the title to the land which he contracted to sell to the plaintiff on purpose to secure the purchase-money the latter obliged himself to pay at the times specified. The latter paid a small part of it—he ought to have paid the whole when it was due, but did not. After a long lapse of time, and after the death of the vendor, he managed to buy indirectly from the administratrix his notes for a mere trifle, and by this action now demands that the heirs of the vendor shall convey title to the land to him, although it appears, and he does not deny, that he has paid but a small part of the purchase-money. If he thus got possession of his notes and has a technical legal advantage, it is certainly unjust and inequitable that he should have the title of the land

(310) from the heirs of the vendor while he has paid but a fragment of the purchase-money, which, by the terms, spirit and purpose of the contract under which he claims, was a lien upon the land until it should be fairly and fully paid. He bought his own notes for the purchase-money with the knowledge that he had not paid them, and that the debt, of which they were evidence, was justly a lien upon the land. He was not a simple buyer of these notes, he bought them with the knowledge that he was bound, in conscience, to pay them and thus discharge the lien on the land. A Court of Equity will not help him to avail himself of such inequitable advantage; it will not compel the heir to make title while the spirit of the contract remains unperformed on the part of the plaintiff.

The defendants, in their answer, aver their readiness to make title to the land to the plaintiff when he shall pay the balance of the purchase-money, and they demand judgment that he be required to pay such balance within a time specified, and that in default of such payment the land be sold, etc. There is no reason why this might not be done. The plaintiff has brought his action, and thus submitted himself to the jurisdiction of the court. The defendants have answered, alleging their rights and demanding counter-relief. The court has jurisdiction of the parties and the subject-matter, and may determine and administer their respective rights embraced by the litigation. The judgment of the court is clearly warranted by the pleadings and the facts agreed upon.

There is no error, and the judgment is

Affirmed.

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(311)

THOMAS C. McILHENNY, ADMR. OF JOHN E. LIPPITT, v. THE WILMINGTON SAVINGS AND TRUST COMPANY, GUARDIAN.

Statute of Limitations—Judgment—Docketing.

1. A judgment of a justice of the peace, duly docketed in the Superior Court, becomes a judgment of the Superior Court, and may be enforced by execution at any time within ten years from the date of such docketing.

2. Where the judgment debtor made a motion, within ten years from docketing judgment, for leave to issue execution thereon, which was denied, and thereupon, within one year after such denial, but more than ten years from the date of docketing, he brought an action on the judgment: *Held*, that the action was barred by the statute of limitations, the statute (The Code, sec. 166) not being applicable to the facts.

ACTION tried before *Graves, J.*, at April Term, 1890, of NEW HANOVER.

It appears that the intestate of the plaintiff in his lifetime obtained a judgment in the county of New Hanover in the court of a justice of the peace against Calhoun C. Walker, the insane ward of the defendant, on 30 March, 1878, for $140.66, and on the same day docketed it in the office of the Superior Court clerk in that county; that thereafter the said Walker was duly ascertained to be insane, and committed to the insane asylum, and has ever since, there remained; that thereafter and after the death of his intestate, on 11 February, 1888 (no execution having theretofore issued upon said judgment), the plaintiff made a motion demanding that an execution issue thereon, as allowed by The Code, sec. 440, which motion was opposed by the guardian *ad litem* of said Walker as to the motion, and denied by the court; that thereafter, and within twelve months next after such denial, this action was brought, wherein it is demanded that judgment be entered directing the clerk "to ascertain and set apart an adequate support for the said Walker, according to law, out of his property, and that out (312) of the surplus, if any, a sufficient amount be applied to the satisfaction of the plaintiff's said judgment, and that he have general relief." The defendant in its answer pleads the statute of limitations.

Upon the facts admitted, as above substantially stated, the court gave judgment for the defendant, and the plaintiff appealed.

Thomas W. Strange for plaintiff.
Junius Davis for defendant.

MERRIMON, C. J. The judgment which the plaintiff seeks by this action to have satisfied out of the property of the defendant therein (now insane) was rendered by a justice of the peace, and hence was barred by the statute (The Code, sec. 153, par. 1), after the lapse of seven years next after its date. As, however, this judgment was docketed in the office of the clerk of the Superior Court, the plaintiff had the right (but for the lunacy of the defendant therein) to enforce the same by execution and to obtain execution for that purpose from time to time as occasion might require, just as if it had been rendered by the Superior Court. Indeed, from the time such judgment was so docketed it became a "judgment of the Superior Court," as provided by the statute (The Code, sec. 839); *Broyles v. Young*, 81 N. C., 315; *Adams v. Guy*, 106 N. C., 275, and the cases there cited. So that generally in such case the plaintiff would be entitled to have execution to enforce his judgment at any time within ten years next after it was so docketed. *Lytle v. Lytle*, 94 N. C., 683; *Lilly v. West*, 97 N. C., 276.

In the present case the judgment debtor became and was duly ascertained to be insane after the date of the judgment. The plaintiff (313) could not, therefore, enforce the same by the ordinary execution against the insane debtor's property. His property was to be treated as *in custodia legis,* and a creditor could not reach it except through an order of the Superior Court in a proper case, and such order would not be made until first a sufficiency should be set apart for the maintenance of the lunatic and his family—his wife and infant children. *Blake v. Respass,* 77 N. C., 193; *Adams v. Thomas,* 81 N. C., 296 and 83 N. C., 521. The plaintiff made application by motion for the ordinary process of execution against the lunatic's property within ten years next after his judgment was docketed in the office of the clerk of the Superior Court, but his motion was denied upon the ground, it seems, that he could not have such execution against the property of a lunatic. After the lapse of ten years next after the judgment was docketed, the plaintiff brought this action, but he brought it within one year next after the motion for such execution was denied, and he here contends that his action is brought within the saving of, and as allowed by, the statute (The Code, sec. 166) and, therefore, it is not barred by the statute of limitations in any aspect of it.

We think the statute just cited, invoked by the plaintiff, does not bear the interpretation contended for by his counsel. It has reference only to actions regularly instituted in the regular course of civil procedure, and does not embrace mere motions in an action or a motion for an execution upon a dormant judgment. This appears from the legal meaning of the terms employed and the obvious implication arising upon them, taken together, to express the legislative intent. The leading important words are "an action," "an action commenced within the time prescribed therefor," "a judgment therein," "reversed on appeal," or "arrested," "the cause of action survived," "a new action." These words and such phraseology do not apply for the most part to motions and merely incidental proceedings.

The plaintiff's motion for an execution, which was denied, did (314) not, therefore, prevent the bar of the statute. At the time his action (this action) began, more than ten years had elapsed next after his judgment was docketed. His judgment was barred next after the lapse of seven years from its date, and his right to enforce it by execution or otherwise was barred after the lapse of ten years next after the time it was docketed. *Adams v. Gray, supra.*

The purpose of this action is to enforce a judgment against a lunatic, obtained against him before he became insane. We are not called upon now to decide whether or not it could be maintained if it were not barred by the statute of limitations, or whether the remedy in such case should

be by proceedings supplementary to the execution; and we make this remark to exclude the conclusion that we approve this method of enforcing a judgment against a lunatic.

Affirmed.

Cited: Oldham v. Rieger, 148 N. C., 550.

M. FAULK v. F. W. THORNTON.

Easement—Evidence—Pleading.

In the trial of an action to recover damages for an alleged obstruction of an easement over lands to which the plaintiff did not, in his complaint, claim title, it was error to admit testimony that the plaintiff had title to the servient land.

APPEAL at May Term, 1890, of CUMBERLAND, from *Gilmer, J.*

The complaint alleges that the plaintiff is the owner and in possession of the tract of land—a town lot—described by particular metes and bounds specified, that do not embrace the "alley-way" and the room or rooms situate immediately over the same, presently to be mentioned and described, and that his two-story brick house described (315) is situate upon this lot.

It further alleges—

"2. That until the times hereinafter complained of there was formerly an open alley-way running the whole length of the aforesaid brick building, by, through and over which the plaintiff, and those under whom he claims, formerly, and from the times whereof the memory of man runneth not to the contrary, and for more than twenty years next preceding the times hereinafter complained of, were wont and accustomed to have free ingress and egress, without hindrance or molestation, to and from the back part of the aforesaid brick building, and the back part of the premises embraced in the aforesaid boundary lines, the said alley-way being on the south side of and adjoining the land whereon said brick building stands.

"3. That immediately over the aforesaid alley-way, and at a distance from the ground equal to the height of the second story of the aforesaid brick building, and on the south side thereof, and connected with the second story of said brick building, there is enclosed by brick walls a

room, which has walls on the east, south and west sides thereof, and opens into the second story of said brick building, the same being really and actually a projection or extension of said second story of said brick building over the alley-way aforesaid, with an open window in the front thereof, and an open window in the rear thereof, and the south side of said room is the solid, unbroken brick wall of the building immediately adjoining, which said brick wall of the building immediately adjoining serves to support said room and enclose it on the south side thereof.

"4. That the plaintiff was, at the times hereinafter complained of, in the peaceable and quiet adverse possession of the aforesaid room
(316) over the alley-way aforesaid, using and occupying the same in connection with his occupany of the premises and brick building aforesaid.

"5. That the plaintiff, and those under whom he claims, have continuously, for more than forty years next preceding the times hereinafter complained of, held the quiet, peaceable and undisputed adverse possession of, and used and occupied the aforesaid room over the aforesaid alley-way as a part and parcel of and as belonging to and connected with the occupancy of the second story of said brick building, and enjoyed all the appurtenances and privileges thereto belonging without any hindrance or molestation.

"6. That within six months next preceding the commencement of this action, that is to say, on or about the 1 August, 1883, the defendant, utterly disregarding the plaintiff's rights in the premises, with a large number of laborers and workmen, such as brickmasons and carpenters and other builders in his employment, wrongfully entered upon the premises hereinbefore described, and wrongfully did, or caused to be done and committed, the acts of trespass hereinafter set forth, that is to say:

"1. Erected a brick wall so as to obstruct and close up the aforesaid alley-way so that the same cannot be any more used as theretofore it had been, and so as to render ingress and egress to and from the plaintiff's said premises impossible;

"2. Erected said brick wall so as to interfere with the use and enjoyment by the plaintiff and his tenants of the room over said alley-way hereinbefore described;

"3. Erected said wall so as to destroy one-half (or thereabouts) of the rear window of said room over the alley-way, and closed up about one-half thereof so as to exclude light and air from said room to the extent of said wall, acting as an obstruction to said window;

"4. Erected said wall, as the plaintiff is informed and believes, partly on the premises described in the aforesaid deed, and of which
(317) the plaintiff was then in the quiet and peaceable adverse posses-

sion; and other wrongs to the plaintiff then and there did, to the great damage and injury of the plaintiff."

Wherefore, the plaintiff demands judgment:

1. For $2,000 damages.
2. For the costs and disbursements of this action.
3. For such other and further relief as he may be entitled to.

The answer denies all the material allegations in the complaint. On the trial, the defendant insisted that in the complaint the alleged "alley-way" was described as situate "on the south side of and adjoining the land whereon said building (brick-building mentioned) stands," and, therefore, he could not claim the ownership of "alley-way" and claim to locate his lines so as to include it; he contended that the plaintiff had alleged a description of his land and he was estopped to depart from this in his proof. The court held otherwise, and the defendant excepted. "The defendant claimed that the dividing line was in the middle of the alley." There was conflicting evidence as to the possession of the alley-way, and also as to whether the alley-way was open for the public until a short time before the bringing of this action.

Defendant further asked the court to charge that the plaintiff, in paragraph three of the complaint, having set up a claim to an easement in the alley-way, not as a matter of right, but only as acquired by long usage, and having offered no paper-writing granting an easement to him therein, cannot in this action assert any claim to an easement in the alley; that the claim of plaintiff to an easement in the alley is inconsistent with his claim of title to the land over which the alley passes, and both cannot be asserted in this action.

That the acts of trespass complained of in paragraph six of the complaint as to obstructing the alley, and all evidence in regard thereto must be disregarded by the jury, because the plaintiff only claims an easement in said alley and has offered no evidence of any (318) right to an easement therein.

The court declined to give any of these instructions to the jury, and the defendant excepted.

The defendant also asked the court to charge that the plaintiff, having set out in subdivision four, paragraph six, of the complaint, that the defendant erected the wall partly on the premises claimed, is estopped now in this action to say that the said wall is wholly on plaintiff's land; and that the plaintiff, having failed to show paper title in himself, or those under whom he claims, prior to 10 December, 1860 (the date of the deed to Reuben Jones), cannot recover on the strength of his paper title. The court declined to give said instructions, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant, having excepted, appealed to this Court.

W. A. Guthrie and T. H. Sutton for plaintiff.
N. W. Ray and J. W. Hinsdale for defendant.

MERRIMON, C. J., after stating the case: It is not the purpose of this action to recover possession of the land described in the complaint or any part of it, but its object is to recover damages occasioned by the alleged trespass of the defendant thereon. The action is in the nature of the action of trespass *quare clausum fregit* under the former method of civil procedure in this State, and the gist of it is the injury to the possession of the plaintiff. The general rule is that unless at the time the injury complained of was committed, the plaintiff was in the possession of the land, trespass cannot be supported. Though the title to the land may come in question, yet it is not essential to the action in all cases that it shall. If the plaintiff shows a legal title to the land, such title draws to it the possession, if there be no adverse possession, and if he be (319) not in actual possession, he must show a legal title. *London v. Bear,* 84 N. C., 266, and the cases there cited; *Harris v. Sneeden,* 104 N. C., 369; *Roberts v. Preston,* 106 N. C., 411; Chitty Pleading, 174. The complaint first alleged that the plaintiff is the owner and in possession of the lot of land particularly described on which his brick house is situate, but it was not insisted on the trial, nor was there any evidence to prove, that the alleged trespass was committed on that land. Any question in that respect may, therefore, be put out of view. And so also the contention as to the title to and possession of the rooms situate above the "alley-way" alleged in the complaint, may be put out of view here, because there was no evidence to prove any trespass in the same, and the court should have so instructed the jury.

As to the alley-way mentioned, it must be observed that the plaintiff does not in the complaint allege his title to or possession of the same; he simply but distinctly alleges an easement in and through it that himself, and those under whom he claims, had ever been accustomed to have, use and enjoy for a long period of time. The case settled on appeal states that "there was conflicting evidence as to the possession of the alley-way, and also as to whether the alley-way was open for the public until a short time before the bringing of this action"; but nothing is said of evidence to prove the plaintiff's private right to use and have an easement in the same. On the trial, however, he contended that he had *title* to the whole alley-way and produced evidence going to prove the same. The defendant objected to the reception of such evidence, upon the ground that the plaintiff had not alleged title to or possession of the alley-way. The court overruled his objection, and he excepted.

We think the objection to the evidence of title should have been sustained by the court. The easement alleged in the complaint was, in its

nature, substance and purpose, distinct and very different from (320) title to the land. The allegation of it by strong implication admitted title to the land on and over which it was situate in the defendant; and very certainly it did not at all put him on notice to defend and prepare to defend his title to the same as a pleading alleging a cause of action should do. A chief purpose of pleading is to enable parties to litigate their rights intelligently and fairly and prevent shift and undue advantage. And to this end it is a well-settled rule that there must be *allegata et probata.* The court should not receive evidence that is not pertinent in some aspect of material allegations in the complaint, nor should it receive evidence to prove a cause of action not alleged. *McKee v. Lineberger,* 69 N. C., 217; *McLaurin v. Cronly,* 90 N. C., 50; *Brittain v. Daniels,* 94 N. C., 781; *Greer v. Herren,* 99 N. C., 492.

This is not the case of variance between the alleged cause of action and evidence to prove the same contemplated by the statute (The Code, secs. 269 and 270). The evidence in this case was received to prove a cause of action not alleged in the pleadings at all. The plaintiff was allowed to introduce evidence to prove that he was the owner of the land, and therefore in possession of the same, in the absence of adverse possession, when he had not alleged any cause of action. *Carpenter v. Huffstetler,* 87 N. C., 273, and the cases cited *supra.*

There are numerous other exceptions to the pleadings, issues, evidence, instructions given to the jury, and judgment, more or less in confusion, to which we do not deem it necessary to advert. They may be obviated by proper amendment of the pleadings. What we have said is sufficient to show that the defendant is entitled to a

New trial.

Cited: Dickens v. Perkins, 134 N. C., 223; *Millhiser v. Leatherwood,* 140 N. C., 238; *Talley v. Granite Quarries Co.,* 174 N. C., 447.

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(321)

R. F. MORRIS v. F. M. CONNOR.

Deed, Description in—Evidence—Contract.

1. The rule in reference to the certainty of the description of personal property in a deed, and admissibility of parol evidence to support it, is less rigid than that which prevails with respect to real property.

2. In conveyances of personal property, although the description may not be such as to distinguish it from other similar articles, or point to evidence

aliunde by which it might be identified, the instrument will not be void if supported by parol testimony sufficient to satisfy the jury that the property was separated in fact at the time of the contract, so that the parties understood what it was and were able to identify it.

CLAIM AND DELIVERY, tried at November Term, 1890, of HARNETT, before *Boykin, J.*

The plaintiff R. F. Morris was introduced as a witness, and testified that he was a printer, and sold to J. J. Stone a printing outfit, for the payment of the purchase-money of which a mortgage was given.

A chattel mortgage in the usual form and properly proven and registered was offered in evidence, and defendant objected to its admission.

The property conveyed was described in said mortgage as follows:

"1 Washington Hand Press, 2 Imposing Stones and stands, 4 cases of Long Primer type, 1 case of Brevier type, 1 case of Nonpareil type, 2 stands and cases, 1 pair chases, rules, slugs, leads, display type and other articles of printing outfit, this day purchased from said R. F. Morris."

Witness testified further, as follows:

"Washington Hand Presses are made by different firms, and are of different numbers and of different sizes. Imposing stones and
(322) stands are of different sizes and different colored stone. Primer type is of different nicks; stands are differently constructed by different manufacturers and are of different sizes. Chases are of different sizes, ordered according to number of columns of press. Rules, slugs, leads, etc., are sold by the pound, and of different parts and sizes."

The subsequent ruling of the court is stated in the case on appeal as follows: "Mortgage from Joseph J. Stone to R. F. Morris offered and objected to by defendant. Objection sustained, and plaintiff excepts. Plaintiff takes nonsuit, and appeals."

N. Y. Gulley for plaintiff.
No counsel for defendant.

AVERY, J. We can draw no other inference from the unsatisfactory statement of the case on appeal than that his Honor below excluded the chattel mortgage because the description of the property conveyed was upon its face too vague. While it seems that the court heard testimony, it was not directed to the identification of the articles mentioned in the mortgage, and the judge subsequently stated in explicit terms that the objection sustained was to the competency of the mortgage, and not to the sufficiency of the evidence offered to be submitted to the jury upon the question of its separation from other similar property and consequent complete identification.

Although articles of personal property may not be described in a conveyance or an executory contract for sale in such terms as to identify and distinguish them from other similar property, and the descriptive words used may not point to evidence *aliunde* by which they can be identified, the contract or conveyance will not be declared void upon its face, but will be enforced if parol testimony, sufficient to satisfy the jury, that the property was in fact separated at the time when the contract or conveyance was executed, so that the contracting parties (323) mutually understood what it was and clearly identified it. *Carpenter v. Medford,* 99 N. C., 495; *Dunkart v. Rhinehart,* 89 N. C., 354; *Harris v. Woodward,* 96 N. C., 232; *Goff v. Pope,* 83 N. C., 123.

The courts have drawn a distinction between deeds and contracts relating to realty and those that affect personalty. The rule in reference to the description of personal property in written contracts or bills of sale is less rigid than those applicable to any interest in land falling within the inhibition of the statute of frauds, because all agreements for the sale of personalty can be proven by oral testimony. *Carpenter v. Medford* and *Dunkart v. Rhinehart, supra.* In *Blow v. Vaughan,* 105 N. C., 204, one of the reasons for requiring nicety in the identification of land conveyed by deed, was stated as follows:

"The rule that the descriptive words in the deed, with the aid of evidence *aliunde* to which they point, must, in order to establish the validity, identify the boundaries of the land conveyed, has been sanctioned by this Court, not only upon the idea that there must be a certain subject-matter in the deed, but because its observance is essential to the proper enforcement of the statute of frauds. The evasion is as palpable and dangerous a violation of the statute, when it is accomplished by amending a void contract, as when the entire contract is proven by parol evidence."

The mortgage was competent upon its face, and after being admitted, if, in fact, the plaintiff failed to offer any testimony tending to show that, at the time when it was executed, the contracting parties identified and mutually agreed as to the particular property that passed by it, then it was the province of the court to so instruct the jury. But if such was the ruling of his Honor, it does not so appear from the statement of the case.

Reversed.

(324)

JAMES H. MURRAY v. JAMES PENNY.

Statute of Limitations—Partnership.

In an action against a copartner for an account, the statute of limitations begins to run from the date of the dissolution of the copartnership, unless there is some agreement, expressed or implied, to the contrary, or some circumstances that render a settlement impossible.

ACTION commenced on 4 April, 1890, and tried at October Term, 1890, of WAKE, before *Boykin, J.*

It was admitted that plaintiff and defendant entered into a copartnership in 1884, and that the copartnership was dissolved by mutual consent in the fall of 1885.

There was but one issue submitted to the jury, and that was upon the statutory bar; and after hearing the evidence, the court held that the plaintiff's action was barred by the statute of limitations, and instructed the jury to return a verdict in favor of the defendant, and from a judgment rendered in accordance therewith the plaintiff appealed.

The plaintiff testified that at the time of the dissolution of copartnership, the defendant was indebted to him upon a fair accounting in the sum of $400; that soon after the dissolution the plaintiff and defendant agreed that they would submit the whole matter to one Jesse Winborne and abide his decision; that the plaintiff carried the partnership books and accounts to the said Winborne and requested him to state the partnership account; the defendant was not present and did not assent to the manner of stating the account; that Winborne stated the account from the book and *ex parte* statement of plaintiff, and found a balance due plaintiff of over $430; that plaintiff the next day carried this
(325) statement to defendant, and the defendant at once refused to accede to the same; said he desired two men to state the account, and that he should be present when it was done; that he was not present when Winborne made the statement, nor was he notified to be present; plaintiff, after this, upon several occasions, demanded a settlement, and defendant as often put him off, and finally the plaintiff demanded of defendant a settlement a few days before this action was brought, and the defendant, for the first time, refused to account, and said, in substance, plaintiff would have to sue him.

T. P. Devereux for plaintiff.
J. H. Fleming for defendant.

CLARK, J. The court having held that, upon the evidence, the plaintiff's claim was barred and so instructed the jury, it is necessary to consider the evidence in the light most favorable to the appellant.

Unless there is some agreement, express or implied, fixing a period for accounting beyond the time of dissolution, or circumstances that render an accounting impossible, the statute begins to run from the time the partnership is in fact dissolved. Wood on Lim., sec. 210. During the existence of the partnership, the partners mutually sustain the relation of trustee and *cestui que trust.* Where there are debts still due the firm, and after dissolution one of the partners is to collect them, or other circumstances showing that a settlement is impossible, the relation of trust between the partners may continue till some act puts them in adversary position to each other. Nothing of that kind is in evidence. There is nothing to show that any debts were outstanding and uncollected, or that any trust remained to be executed. On the contrary, it appears that an immediate settlement was possible, and that both partners agreed that it should be made at once. The plaintiff relies upon the evidence offered by himself, that "soon after the dissolution the plaintiff (326) and defendant agreed that they would submit the whole matter in controversy to Jesse Winborne and abide his decision." The plaintiff contends that this is an equitable estoppel upon defendant to plead the statute. How far this is true under the statutory requirement that a waiver of the statute must be in writing, we need not now consider. *Bates v. Herren,* 95 N. C., 388. For conceding that such an agreement was valid to bar the running of the statute, it was not so for an unlimited period. It could only be a waiver for such time as was reasonable for the statement to be made out by Winborne, or until the agreement was repudiated by one of the parties, when their position would again become antagonistic and the statute would begin to run. *Joyner v. Massey,* 97 N. C., 148. According to the evidence of both parties the agreement to refer to Winborne was almost immediately repudiated (in November, 1885), and though there was evidence that the defendant then offered to leave the matter to two referees, it is not stated that such offer was accepted or acted on. This action was not brought till April, 1890, more than five years after the repudiation by the defendant of the attempted arbitration. It is true the judge held that the statute began to run upon the dissolution, but the error (if there was any) is immaterial error, for the statute certainly ran after the refusal to acknowledge the statement made by Winborne, which was a very short time after the dissolution, and, therefore, much more than three years before the institution of this action.

No error.

Cited: Moore v. Westbrook, 156 N. C., 492.

(327)

B. G. SAUNDERS ET AL. v. W. B. SAUNDERS.

Deed, Construction of—Devise—Residuary Clause—Administrators and Executors—Powers.

S. devised a tract of land to his wife for life or widowhood, and, upon her death or marriage, to his daughter. In the residuary clause he directed that "all the balance of my estate, both real and personal, be sold and the money divided between my wife and the rest of my heirs at law," and appointed his executor "to execute this my last will according to the true intent and meaning of the same." The wife and daughter, without issue, died before the testators: *Held*, (1) that the devises to the wife and daughter lapsed, and by virtue of the statute (The Code, sec. 2142) the land fell into the residuary clause *(Lea v. Brown*, 56 N. C., 141, commented upon); (2) the will conferred authority upon the executor to sell and convey the land, and upon his renunciation and appointment of the administrators *cum testamento annexo*, the latter might exercise such power; (3) a deed from such administrators, in which it was recited that they had bargained and sold to P. "all the right we held as administrators of S., one certain parcel of land (giving description), . . . do promise to warrant and forever defend the right and title of above-named tract of land to P. and her heirs, to be free and clear from encumbrance, so far as our appointment gives," while very informal, and not containing the usual words of inheritance, passed the fee, it being obvious that such was the intention.

SPECIAL PROCEEDING to compel partition of the land specified in the petition, heard before *Boykin, J.*, at Spring Term, 1890, of NASH.

The defendant denies most of the material allegations of the petition, and alleges that he is sole seized of the land. Both the plaintiffs and defendant claim to derive title under the will of Sion Saunders. The following is a copy of the material parts of the will:

"2. I lend unto my beloved wife, Elizabeth, during her natural life or widowhood, three hundred acres of land, including my dwell-
(328) ing and outhouses, known as the 'old tract'; also two negroes, slaves, Toney and Watey, and all her increase born after the date of this will—one horse, bridle and saddle, two cows and calves, two sows and pigs—her choice in the above-named stock; one buggy and harness. And I give, absolutely, unto my said wife, one feather bed (her choice) and all the bed-clothing that she brought here, and all she has raised since she came here, and one large chest, known as her own; one drawing table, two milly clocks, and all the fowls and poultry on hand at the time of my death. It is also my will that my wife have one year's provisions for herself and family out of the crop, stock and provisions on hand at the time of my death.

"3. I give and bequeath unto my youngest daughter, Loutory Susan Frances, all the above-named lent property, and all the increase thereof, both of negroes and stock, that shall be on hand at the death or marriage again of her mother.

. . . . . .

"It is also my will that all the balance of my estate, both real and personal, be sold and the money equally divided between my wife and all the rest of my heirs at law.

"And lastly, I do hereby constitute and appoint my trusty friend, A. H. Denton, my lawful executor, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made."

The executor named in the will renounced his right as such, and E. H. Morgan and Ruffin H. Saunders were duly appointed administrators *cum testamento annexo*. The devisees mentioned in the second and third clauses of the will died in the lifetime of the testator, the daughter dying unmarried and without issue.

Afterwards, on 18 March, 1864, after due advertisement, the (329) administrators sold the land embraced by the second clause of the will, and Primy Saunders purchased the same and took their deed therefor, and the material parts thereof necessary to be reported here are as follows: . . . "have bargained and sold and conveyed to the said Primy all the right we hold as administrators of said Sion Saunders' estate, one certain tract or parcel of land (that mentioned above) this being one-half of the house tract of land supposed to contain 150 acres, be the same more or less, all within the bounds; we, E. H. Morgan and Ruffin H. Saunders, administrators of the above named Sion Saunders, do promise to warrant and forever defend the right and title of the above named tract of land to Primy Saunders and *her heirs* to be free and clear from encumbrances as far as the virtue of our appointment gives. In testimony," etc.

The plaintiffs contend that such administrator had no power or authority under the said will or otherwise to sell the land, and that their alleged sale and deed in pursuance thereof are void. They further contend that the said deed, if it has validity at all, conveyed to the bargainee therein only a life estate. (They allege other objections to the deed that need not be mentioned here.) The defendant claims mediately under such sale and deed. It is admitted that the parties are those, or the representatives of those, entitled under the residuary clause of the will set forth above, and that Primy Saunders and Coly Saunders were sisters of the testator. The issue, "Are plaintiffs and defendant tenants in common of the land described in the petition?" was submitted to the jury, and they responded,

under instructions from the court, "Yes." Thereupon the court gave judgment directing a sale of the land for partition, and the defendant, having excepted, appealed to this Court.

No counsel for the plaintiffs.
J. B. Batchelor for defendant.

MERRIMON, C. J. The devisees mentioned in the second and
(330) third clauses of the will before us died in the lifetime of the testator, and hence the devises therein to them lapsed, and the real estate, the subject thereof, in the absence of any intent to the contrary (none whatever appears) was included in the residuary devise, which provided that all the balance of the testator's estate, both real and personal, should be sold, and the money arising from such sale should be equally divided among his heirs at law. The statute (The Code, 2142) in force at, before and ever since the time this will was executed, expressly provides that the real estate, the subject of such lapsed devises, shall be included in the residuary devise if there be any, unless the contrary intention appear by the will. The purpose of this statute is too clear to admit of question. *Knight v. Knight,* 59 N. C., 134.

We are advertent to the case of *Lea v. Brown,* 56 N. C., 141, in which the late *Chief Justice Pearson* said: "In regard to the land (that devised) there is no difficulty, for it is a well-settled rule that all real estate which is not effectually disposed of by the will, devolves upon the heir at law, and a residuary devisee can take nothing except what appears from the will it was intended for him to take. So that if a devise fails to take effect because it is void, or by reason of the death of the devisee, the subject devolves upon the heir, and the residuary devisee is not entitled to it—there being no reason for substituting a presumed general intention in place of the particular intention which has failed." He makes no reference in the opinion (an elaborate one) to the statute above cited, which was in force at and before the time he wrote; and we are unable to see or understand upon what ground his opinion rests, except that the exception in the residuary devise may have been treated as excluding the intent that these devisees should take the real estate, the subject of the said devise. But nothing is said in this respect.

Power to sell the real estate of the testator embraced by the
(331) residuary devise is not in terms conferred upon the executor named in the will, but such power is certainly implied with sufficient clearness. By the law, in the absence of provision to the contrary, it is the duty of the executor to sell the personal estate. Here he is charged to sell it, and the direction to sell the same is coupled directly with the direction to sell the real estate. The implication is that the

same person (the executor) is to sell the estate, both real and personal property to be sold. The meaning is that the same person shall divide the fund arising from the whole property, and that person must sell both the real and personal property. Besides, the testator expressly declares in appointing the executor that he is such "to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof." He could scarcely express his purpose to confer such power more clearly otherwise than by express words. *Vaughan v. Farmer,* 90 N. C., 607; *Council v. Averett,* 95 N. C., 131; *Gay v. Grant,* 101 N. C., 218; *Orrender v. Call, ib.,* 399.

The executor appointed by the will renounced his right to qualify as such, but if he had so qualified he might have sold the land in controversy and conveyed such title thereto to the purchaser as the testator had. In his stead, administrators with the will annexed were appointed to execute its provisions, and they had power to sell the same land just as the executor might have done if he had qualified. The statute (Bat. Rev., ch. 46, sec. 40) in force at the time the will took effect, and at the time the sale in question was made and the deed was executed, so expressly provides. This statute has since the time referred to been somewhat modified by the subsequent statute (The Code, sec. 1493; Laws 1889, ch. 461; *Council v. Averett, supra; Gray v. Grant, supra; Orrender v. Call, supra*). Hence the administrators with the will annexed had power and authority to sell and convey the land in question to the purchaser by proper deed of conveyance. So far as appears by the (332) record, the sale was a valid one.

But the appellees contend that the deed executed by the administrators named, simply conveyed to the purchaser a life estate in the land, because sufficient words of inheritance were omitted. It must be admitted that the deed is informal. Clearly the draftsman of it was not skilled in such matters. The intent to convey the fee simple estate in the land is very obvious. The nature of the transaction, as the same appears in and by the deed, the comprehensive nature of the terms used, the nature of the words of conveyance and the use of the word heirs in the clause of warranty, all go to make such intent clear. Indeed, the word heirs, as used, has no meaning pertinent, or application, if the purpose was to convey but a life estate. Why shall the warranty extend to the heirs of the bargainee if he is to have but a life estate? The important words of the informal warranty clause are, "do promise and warrant and forever defend the right and title of the above-named tract of land to Primy Saunders and her *heirs.*" The intent implied is that by the informal deed, as a whole, the land therein specified is conveyed in fee to the bargainee and her heirs. The clear intent appears, and there are words of

inheritance sufficient in the deed to effectuate such intent, though such words are informally applied. It is now well settled that in such cases the deed will be upheld as sufficient to effectuate the intent so appearing. *Allen v. Bowen,* 74 N. C., 155; *Staton v. Mullis,* 92 N. C., 623; *Bunn v. Wells,* 94 N. C., 67; *Ricks v. Pulliam, ib.,* 225; *Graybeal v. Davis,* 95 N. C., 508, are directly in point, and these and other like cases, have been recognized with approval in the late case of *Anderson v. Logan,* 105 N. C., 266. The strict technical rule of interpretation applicable in such cases that prevailed in the distant past, even in this State, has gradually given way to the steady purpose of the courts to effectuate the intention of the parties to the deed when it contains apt words of inheri-
(333) tance, though they may not, as expressed, be in the most appropriate connection. Greater regard is now paid to the intention of the parties than to the manner of expressing the same, if that manner embraces words, though informally, essential to express the purpose. But in all such cases the intention to convey the fee must clearly appear. It thus appears that the defendant had title to the land in question, and was sole seized as he alleges. There is, therefore, error. Judgment must be reversed, and a new trial had according to law.

Error.

Cited: Ray v. Comrs., 110 N. C., 172; *Rackley v. Chestnut, ib.,* 264; *Duckworth v. Jordan,* 138 N. C., 525; *Lumber Co. v. Swain,* 161 N. C., 568; *Barfield v. Carr,* 169 N. C., 576; *Faison v. Middleton,* 171 N. C., 175; *Broadhurst v. Mewborn, ib.,* 402.

MATTIE LONG ET AL. v. W. S. RANKIN, ADMR. OF SUSAN BELL.

Consideration—Contract—Married Women—Separate Estate.

1. The note of a married woman being void, a promise to pay the same after discoverture must be founded upon a new consideration, or the original transaction must have been of such a character as to have constituted an equitable charge upon her separate estate.

2. Where the husband voluntarily paid off ante-nuptial indebtedness of the wife and advanced money for the improvement of her separate estate, taking only her promissory note for such advances: *Held,* that the general separate real estate was not thereby charged. *Held,* also, that the general separate personal estate would have been charged by the necessary implication growing out of the beneficial consideration, but the existence of such separate personal estate not being shown, there was no charge upon the

general separate estate which the husband could have created, and, therefore, no consideration for the promise made after disability removed.

3. Where it was alleged that the wife conveyed her land to the husband, who was to make such advances, and he reconveyed to her upon her executing a note to pay for the same: *Held*, that in order to charge the land with such advances upon the repudiation of such note as a valid obligation, equity requires that the exceptional circumstances under which she alone could have conveyed to her husband should be shown.

ACTION tried before *Whitaker, J.*, upon complaint and demur- (334) rer, at February Term, 1891, of HALIFAX.

The plaintiffs alleged:

. . . . . .

3. That on 18 March, 1887, Susan J. Bell executed to the plaintiffs her promissory note, whereby she promised to pay the plaintiffs, on demand, $1,500, with interest at 6 per cent from date.

4. That no part thereof has been paid.

5. That prior to said time, the said Susan J. Bell had conveyed to her husband, David B. Bell, one-half interest in the Gibson Hill gold mine tract of land in Guilford County, upon the understanding that if the same was not sold it should be reconveyed to said Susan upon her repaying to said Bell all amounts paid out by him on account thereof, and moneys advanced by him for the improvement of her separate estate, and the payment of certain debts contracted by her before her marriage with him. During the last illness of said Bell, the said Susan demanded that he reconvey said land to her, and the said D. B. Bell then showed to her a statement of the amounts paid out and advanced by him as aforesaid, aggregating $1,500, and agreed to reconvey said land if she would execute the aforesaid note to the plaintiffs. This was agreed to, and thereupon the said note was executed and delivered, and the said Bell executed a deed of reconveyance to his said wife. After the death of the said D. B. Bell, Mrs. Bell took said note for safe-keeping, representing to the plaintiff Mattie Long that she was fearful it would fall into the hands of some one else, and then and there she promised to pay the same.

Thereafter she declined to surrender the note, but promised to pay it.

Wherefore, the plaintiffs pray judgment for $1,500, with interest thereon, and for other and further relief, etc.

The defendant demurred, and alleged as grounds of demurrer (335) that the complaint does not state a cause of action, in this:

1. That it does not appear on the face of the complaint that the contract, specified as being entered into by Susan J. Bell, his testatrix, with the plaintiffs, was made with the written consent of her husband, D. B. Bell; (2) or that said contract was made for the neces-

sary personal expenses of said testatrix, or for the support of her family, or in order to pay her debts existing before marriage with D. B. Bell, or that she was a free trader.

2. That it does not appear that the debt secured by the note of the testatrix was specially charged on the separate estate and property of the testator at or before the execution thereof.

3. That the complaint fails to allege the existence of a separate estate in the said *feme,* and instead of seeking to charge a particular fund, seeks to charge the said *feme* personally.

4. That the complaint fails to allege that the said contract with the plaintiffs was for the personal benefit of said *feme* or some advantage to her separate estate.

5. That the alleged promise by said *feme* to pay said note since the death of her husband is of no validity, as said note and contract was void in its incipiency, and forms no consideration to support said promise.

R. O. Burton, Jr., for plaintiff.
Thos. N. Hill for defendant.

SHEPHERD, J. As the complaint does not distinctly allege the existence of any separate estate (*Dougherty v. Sprinkle,* 88 N. C. 300) and the action is not brought for the purpose of subjecting the same to an equitable charge, but is grounded upon the alleged legal obligation in-
(336) curred after discoverture, the only question we can consider is the sufficiency of the consideration to support the promise sued upon. The note was unquestionably void when executed, and there was no new consideration subsequent to the removal of the marital disability, as in *Bank v. Bridgers,* 98 N. C., 67.

It is well settled that a mere moral consideration will not support a promise (*Puckett v. Alexander,* 102 N. C., 95) but "a qualification to this rule, however, obtains in cases where there was originally a sufficient valuable consideration upon which action could have been sustained, but where in consequence of some statute or positive rule, growing out of general principles of public policy, the right of action is suspended and the party exempted from legal liability. In such cases, the moral obligation is sufficient to support an express promise, though it will not raise an implied promise. . . . This exception includes all promises barred by the statute of limitations or discharged by the bankrupt or insolvent law, and promises by an adult to pay debts contracted during his infancy." Story on Contracts, 466.

Whether such a promise made by a married woman after discoverture to pay a debt contracted during coverture falls within the limit of the above qualification, has been the subject of much anxious consideration

and many conflicting decisions. The distinction taken is that the contracts of a married woman being originally *void* cannot support a subsequent promise, even though she has derived a benefit therefrom. *Puckett v. Alexander, supra;* citing *Wennall v. Adney,* 3 Bos. and Pul., 252.

This distinction as to void contracts is recognized in this State, and is undoubtedly sustained by the weight of authority. We hold, however, that although in the case of a *feme covert* her contract is void, yet if the transaction is of such a character as to have subjected her separate estate to an equitable charge during coverture, it will be recognized in a court of law as a sufficient consideration to sustain a promise (337) made after disability removed. *Felton v. Reid,* 52 N. C., 269.

Our case, then, turns upon the question whether from the facts alleged the husband during the coverture had any equitable rights which he could have asserted against the separate estate of the wife.

It is the duty of the party seeking to subject such estate to set forth his grounds with particularity, and the court should not be left to mere inference or conjecture as to the existence of any element which is essential to constitute such a charge. We will first consider whether the general separate estate was chargeable with the alleged advances of the husband. It is well settled that the separate real estate cannot be thus charged except by deed and privy examination (*Farthing v. Shields,* 106 N. C., 289; *McMillan v. Gambrill,* 106 N. C., 359, and the cases there cited) and that the separate personal estate cannot be charged unless it is expressly done by the instrument evidencing the obligation, or unless such a charge arises by necessary implication growing out of a beneficial consideration. *Flaum v. Wallace,* 103 N. C., 296. As there is nothing to show that the wife was possessed of a separate personal estate (the language of the complaint strongly implying that her property consisted of realty alone) and there being no deed or privy examination, we are unable to see how the husband could have asserted his claims against the general separate estate. If, however, a separate personal estate had been allged, we think from the facts stated that it would have been charged by the necessary implication arising from the nature of the consideration. It is further insisted that the husband could have charged the particular land mentioned with the amount included in the note on the principle laid down in *Hinton v. Ferrebee,* 107 N. C., 154; *Burns v. McGregor,* and other similar cases. There can be no doubt that where a conveyance has been made in consideration of the concurrent per- (338) formance of a particular act, equity will not permit the grantee to hold the fruits of the transaction and refuse to perform his part of the agreement. But it is contended that this principle does not apply here, because the wife, by executing the note, performed the only act agreed upon as a prerequisite to the reconveyance of the property. Con-

ceding, for the sake of the argument that this view is the result of too refined a construction of the real agreement of the parties, we are met with a very serious objection which goes to the root of the plaintiff's equity as to the land in question. The objection is that the plaintiff has not shown that he ever acquired any title from his wife. Ordinarily, where a conveyance of a *feme covert* is alleged, it will be presumed, upon demurrer, that it is valid and effective, but where a conveyance by the wife to the husband is made the basis upon which equitable relief is asked, the rule is different, on account of her general legal incapacity to make such a conveyance (*Simms v. Ray,* 96 N. C., 87) and it is, therefore, necessary that it should affirmatively appear, in a case like the present, that the provisions of The Code, secs. 1835, 1836, have been strictly complied with, or that the title has been acquired in some other exceptional manner.

As we are not at liberty to assume that the conveyance was executed so as to bring it within any exception to the general law, we cannot see from the complaint how the husband could have availed himself of the principle above mentioned.

Our conclusion then is, that upon the rather general statements in the complaint, the husband had no equitable rights which he could have asserted against the wife, and that there was, therefore, no consideration for the promise upon which this action is founded.

Affirmed.

Cited: Cotton Mills v. Cotton Mills, 116 N. C., 649; *Stout v. Perry,* 152 N. C., 313; *Butler v. Butler,* 169 N. C., 586; *Elliott v. McMillan,* 180 N. C., 233.

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(339)

D. C. FARABOW ET AL. v. ELIZABETH GREEN ET AL.

Devise—Waste—Injunction.

The testator devised to four of his children a tract of land "in common to their use, or the use and benefit of all of them or either of them during their natural life, and, should either E. or R., or both of them, marry, . . . they shall share equally with those of my other children heretofore married. . . . I desire it kept in common to their use and benefit during the natural life of either or all of them." After bequeathing personal property upon same limitations, he proceeded, "and at the death of the four children above named, all said property then remaining be sold and the proceeds divided between all my lawful heirs": *Held,* (1) the four children took a joint estate, with the right of survivorship, for life, with a contin-

gent interest in the fee, subject to the condition that if either E. or R. should marry, her interest in the life estate should end; (2) upon the death of the four children, or upon the death of two and the marriage of the other two, the fee became vested in the heirs at law of the testator; (3) the rule in *Shelly's case* was not applicable; (4) the estate of the four children was not impeachable for waste, but they might be enjoined in a proper case from depositing the inheritance.

ACTION, for an injunction against waste and for damages, tried at September Term, 1890, of GRANVILLE, before *Armfield, J.*

Elijah Green, the ancestor of the plaintiffs and defendants (who together constitute all of his heirs at law) died about 1855, having first made and published his last will and testament, which was duly proved and recorded, and is in form as follows:

. . . . . .

"First, I give and bequeath unto the four children which is now living with me, namely, Elizabeth, Rachel, Francis and Elijah E. Green, the tract of land whereon I now live, in common to their use or the use and benefit of all of them or either of them during their natural life, and should either Elizabeth or Rachel or both of them marry, I (340) desire, in that case, that they shall share equally with those of my other children heretofore married, and not with intending the property herein given to the four children hereinabove named, I desire it to be kept in common to their use and benefit during the natural life of all or either of them, and I also give to the same four children above named, five negroes (slaves) namely, Abram, Daniel, Solomon, Caroline and her child Henry, and all the future increase of said woman Caroline. My one-third part of the mill on the Knapp of Reed Creek and my part of the mill tract of land, three choice horses, ten head of cattle, their choice of all my stock of hogs and sheep, and their choice wagon, all the crop on hand, old and new, and provisions of every description, all my farming utensils, household and kitchen furniture which I may die seized and possessed of, to their own proper use and benefit, in the same way and with the same condition that the land is given, and it is my will and desire that all the residue of my property which is not herein named, be sold to the highest responsible bidder on a credit of one year, and the proceeds of such sale, together with all moneys on hand or otherwise due me, be collected by the proper authority and be placed in the hand or hands of my executor or executors, be properly used to the benefit of the same four children above named, which is now living with me, and at the death of the four children above named, that all said property then remaining be sold on a credit of one year, and the proceeds of such sale be equally divided between all my lawful heirs."

The defendants Elizabeth Green and Rachel Green are the only survivors of the four children mentioned in the devise. They are both now over 80 years old, and neither of them is married. Francis Green and Elijah Green both died without having married. The other plaintiffs and defendants are heirs at law of the testator, except H. T. Stem and —. —. Stem, who were lessees of the *feme* defendants, charged
(341) with committing waste in the destruction of timber. There was evidence tending to show that, of three hundred acres in the home place, only eleven acres remained uncleared, and that while it was not good husbandry to clear any of it for cultivation, the *feme* defendants Elizabeth and Rachel Green had permitted the defendant W. H. T. Stem to remove timber for house logs, and the defendant H. A. Stem to clear five acres of the woodland and haul off and sell valuable timber taken from it.

Upon the verdict returned upon issues submitted, there was judgment restraining all the defendants from committing further waste, and against the tenants for damages, from which defendants appealed.

A. W. Graham for plaintiffs.
T. C. Fuller and J. B. Batchelor for defendants.

AVERY, J., after stating the facts: It seems that the testator not only devised the home place and bequeathed certain specific articles of personal property to the four children, subject to the limitations expressed in the will, but declared it to be his desire that "all the residue of my property" which was not therein named, should be sold and the proceeds of such sale, together with all moneys on hand, should be properly used by his executors for the benefit of the four children named in the will. The home place is devised "unto the four children which is now living with me, namely, Elizabeth, Rachel, Francis and Elijah, during their natural life; and should either Elizabeth or Rachel, of both of them marry, I desire in that case that they share equally with those of my other children heretofore married."

In the latter part of the will, we find a further provision, which must be construed with the foregoing, if we would ascertain the leading pur-
pose of the testator and reconcile any apparently conflicting pro-
(342) visions in such a way as to give effect to the controlling intent in his mind in distributing his bounty. He evidently intended to provide a comfortable home and a support from a well stocked farm for his four children during their lives, or that of the survivor, if both daughters remained single; but when one of them should marry, such one should share equally with those children previously married, or should thereafter be entitled to receive nothing under the will until the time

should come for a sale for partition according to its terms. In order to give effect to the two clauses referred to, and bring them into perfect harmony, we must construe his purpose to have been that the sale and division should not necessarily occur at the death of the last survivor of the four, but whenever it should happen that both of the sons, Elijah and Francis, should be dead and both of the daughters should be either dead or married. Upon the happening of these contingencies "all of said property is to be sold on a credit of one year" and divided "between all my lawful heirs," including either of the daughters, Elizabeth or Rachel, if she should marry while either of the two sons survived or the other sister should be living and unmarried. Upon the happening of these contingencies, and not sooner, the fee would vest, not in the heirs of any of the children, *eo nomine,* but in the heirs of the testator, and, therefore, not being a conveyance in which an estate for life is given to an ancestor, and also an estate mediately or immediately to his or her heirs, the rule in *Shelly's case* does not apply. But as the land is not devised to the executors named in the will to be sold upon the termination of the life estate, and, as no power is given them in the will to sell, the land must vest, now that the two sons are dead, whenever it shall happen that neither of the daughters shall be living and unmarried, and can be sold for partition when it shall vest by and under the direction of the court for the persons then *in esse* and entitled to take under the will. *Gay v. Grant,* 101 N. C., 206; *Perkins v. Presnell,* 100 N. C., 220; (343) *Orrender v. Call,* 101 N. C., 399.

It follows, therefore, if we have correctly interpreted the purpose of the testator, that if either of the sisters, Rachel or Elizabeth, should hereafter marry and survive the other, a share of the home place, equal to that descending to the children previously married or their issue, would vest in her. Whatever may be the ages of the sisters, there is, certainly, in contemplation of law, a possibility that either may marry, if not have issue. As in the contingency mentioned either of them may take under the will an undivided interest in the fee, neither is within the meaning of our statutes (The Code, secs. 624 to 630) a life tenant, nor is either impeachable for waste, but the plaintiffs must be content with equitable relief by injunction. In the case of *Gordon v. Lowther,* 75 N. C., 193, the Court said, in effect, that while persons holding a vested estate for life, coupled with such contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. That case was cited with approval in the later case of *Jones v. Britton,* 102 N. C., 166. As the judge permitted the jury to find the facts in response to the issues submitted, and had a right to do so

in aid of his conscience, there is no reason for granting a new trial. It is only necessary that the final decree shall be modified so as to provide that all of the defendants, their agents, etc., shall be restrained from committing further waste upon the lands, and to strike out so much of it as adjudges that the plaintiffs shall recover damages of the defendants H. A. Stem and W. T. Stem.

We have carefully reviewed the exceptions to the rulings of the court in admitting testimony and find them correct, and that the in-
(344) struction given to the jury was a full, clear and able exposition of the law governing the liability of life tenants and tenants for years for damages for waste. The judgment so modified is affirmed, and the plaintiffs will be taxed with one-half the costs of this Court, and the defendants, Elizabeth Green, Rachel Green, W. T. Stem and H. A. Stem, with the residue.

Modified and affirmed.

Cited: *S. c.,* 110 N. C., 414.

McABSHER & HULCHER v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Contract—Merger—Common Carrier—Sunday Laws—Issues.

1. It is erroneous to submit an issue to the jury which is not raised by the pleadings.

2. Where the law of the place of the performance of a contract for the sale and delivery of goods prohibits such transactions on Sunday, the courts will not recognize any market price alleged to be prevalent on that day.

3. The plaintiffs made an oral contract with a common carrier, by which the latter agreed to furnish cars for the transportation of plaintiffs' property on a day certain, but failed to do so; a short time thereafter the carrier did ship the goods, for which it gave a bill of lading: *Held*, that the prior oral contract was not merged in the latter, and the plaintiffs could maintain an action for damages for a breach thereof.

APPEAL at Spring Term, 1890, of ASHE, from *Bynum, J.*

The facts upon which the opinion is based are stated therein.

G. N. Folk and G. W. Bowers for plaintiffs.

D. Schenck and F. H. Busbee for defendant.

SHEPHERD, J. 1. The plaintiffs allege that defendant con- (345) tracted to furnish them two cattle cars at Taylorsville on a certain Thursday, in order that they might ship their cattle on the east-bound train of that day. They also allege, for the purpose of showing special damages, that their object in contracting for the cars at the time stated was to reach the city of Norfolk, Virginia, with their cattle on the following Saturday morning, so as to avail themselves of the Sunday market, that being "the best market day" in the said city. They further allege that their said purpose was known to the defendant, and they seek to recover damages for the breach of the said contract.

The defendant, among other defenses, denied these allegations, and issues one and two, involving their truthfulness, were properly framed and submitted to the jury. The court also submitted the third issue, which was as follows: "Did it (the defendant) agree to carry the cattle there in time for said market?" To this issue the defendant excepted, and we think that the exception should be sustained. There is no allegation that the defendant contracted to transport the cattle to Norfolk at any particular time, and the mere knowledge on its part of the plaintiff's object and purpose to reach that place on Saturday does not dispense with the necessity of alleging that there was an agreement to that effect. There must be *allegata* as well as *probata*. The defendant may well have been prejudiced by the said issue, as it does not appear that his Honor, in his charge, distinguished the damages to be recovered for a violation of this interpolated contract from those which might be recovered upon the contract upon which the first issue was founded.

2. The defendant further contends that the plaintiffs cannot recover, because their purpose was illegal, in that the sale of cattle in public market on Sunday was prohibited by the law of Virginia. As the court could not take judicial notice of such a law, and as its (346) proof was accompanied by evidence tending to show that the alleged transactions on Sunday were not, according to the custom of the place, completed sales—the payment and delivery being made on Monday, and therefore not a violation of the Sunday law of the said State (1 Whart. Com., 383; 2 Pars. Com., 763; Benjamin on Sales, 732)—we do not feel warranted in passing upon the vitiating effect of the said law upon the contract of carriage had it been clearly shown that the purpose of the plaintiffs was to effect a completed sale on the Lord's day.

Granting, however, that there was a legal contract, that is, one free from any illegal purpose in its inception, to transport to Norfolk, as alleged, we are entirely satisfied that the defendant's third prayer of instruction should have been given.

The prayer follows:

"That the plaintiff cannot show any sale day, or any market price in Norfolk on Sunday, because all work and labor is forbidden by the laws of Virginia, nor can he recover any damages by reason of the difference between such Sunday market prices and the market price of another day."

The Code of Virginia, ch. 192, sec. 17, prohibits such sales on Sunday, and this being so, it plainly follows that there can be no "market price" on that day which can be recognized in a court of justice. It is true that the plaintiffs explained the nature of the agreements that were made on Sunday, but it was for the jury to determine whether this explanation was true, and in view of the uncertainty in which the matter was involved, we think the prayer should have been given with the modification that, if the transactions were of the character as stated by the plaintiffs, such damages might be considered.

There were other exceptions, but, as we think for the foregoing reasons that a new trial should be granted, it is unnecessary to pass upon them all in this appeal.

3. We think it best, however, to express our opinion upon the (347) point so earnestly and ably pressed upon us, to wit, that the shipping of the cattle by the plaintiffs at a later day and the taking of a bill of lading had the effect of merging into this latter contract the prior oral one which is sued upon. This point is distinctly decided in *Hamilton v. R. R.*, 96 N. C., 398, and we are asked to overrule that decision.

We have examined with great care the cases cited by the defendants, but they fail in our opinion to shake in the slightest degree the authority of the case mentioned, and they clearly have no application to the present suit. It is familiar learning that where parties have put their contracts in writing, in the absence of fraud or mistake, oral testimony shall not be heard to contradict, add to or vary their terms; and that this Court is fully impressed with the importance of maintaining this salutary rule of evidence, will be seen from the case of *Moffitt v. Maness*, 102 N. C., 457, and other decisions. But we are at loss to understand how that principle is violated by the ruling of his Honor in this case. It is not denied that a common carrier may enter into an oral contract concerning the carriage of freight, and the plaintiffs insist that such a contract was entered into between them and the defendant. What contract? Very plainly not the actual contract of shipment, which was evidenced by the bill of lading, for that contract was duly performed. But it is the contract sued upon which was a distinct, or, as *Chief Justice Smith* says in *Hamilton's case*, an "antecedent" one, to wit, not as to the terms of the proposed shipment, but that the defendant would have the cars ready to transport the cattle of the plaintiff on a certain

day. The cars were not ready on that day, and there was therefore a breach of the said agreement. In consequence of this breach of agreement, there was in fact no shipment or contract of shipment on said day, and it is because there was no such shipment or contract of shipment at the time mentioned (which was the result of the defendant's failure to perform its contract to be ready to transport) (348) that the plaintiffs claim to have been endamaged.

Here, then, we have a special contract to provide transportation on a certain day. It is broken, and damage ensues. Can it be that because the plaintiffs afterwards entered into an actual contract of shipment, which was duly performed, that their right to recover damages for the breach of a prior special contract is "merged" into the second, and thus entirely defeated?

Suppose that A contracts with B, a liveryman, by which B is to furnish him a conveyance on a certain day to a certain place, and A is ready at the time and place to perform the contract, but B refuses or fails to comply, and by reason of such refusal or failure A is endamaged, can it with reason be contended because A still wishes to go to the place, and makes a contract with B on another day, under which contract B actually conveys him there, that this amounts to a waiver of damages for the breach of the prior contract? The mere statement of the proposition, without argument, would seem to furnish a negative answer, and yet such is the very case presented by this record.

The numerous authorities cited by the defendant establish the proposition that the terms of a contract evidenced by a bill of lading, duly assented to, cannot be varied by oral testimony, and that all preliminary "chaffering" about it is merged in the writing. This is the correct principle, though we find several cases cited in the notes to some of the defendant's authorities which seem to impinge upon the rule as above stated.

It will be noted, upon a careful perusal of the cases referred to by the defendant, that they relate to the *terms* of the contract. Take, for instance, *Hopkins v. R. R.*, 16 A. & E. R. C., 126, where the plaintiff proposed to show that the defendant had agreed to allow him rebates, but he subsequently accepted a bill of lading which (349) contained no such stipulation. It was properly held that this testimony was adding to a complete contract and could not be admitted.

In *Snow v. R. R.*, 28 A. & E. R. C., 77, the same principle was applied, and so it will appear in "Lawson on Contracts of Carriers," and all of the other authorities cited, that the courts were but applying the ordinary rule of evidence as to the terms of a contract which had been reduced to writing. The only terms of the contract in the present case were that the defendant was to be ready to transport on Thursday, and

to enter into and perform a contract of shipment on that day. They violated this special oral contract, and we cannot see what it had to do with the *terms* of an actual contract of shipment made on a subsequent day, and which has been duly performed.

We think that the judge's ruling was correct in this particular, but for the reasons first mentioned we are of the opinion that there should be a new trial.

Error.

L. M. WATERS v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Evidence—Laws of other States—Consideration—Sunday Laws—Contract.

1. Courts will not take judicial notice of the laws of another State in the Union, or of foreign countries.
2. Where the complaint alleged that the defendant, a common carrier, contracted for a valuable consideration to transport cattle to a place in another State by Saturday, the plaintiff giving as a reason that he desired to get the benefit of the following Sunday prices, and it was proved that the laws of the State where the cattle were to be delivered forbade sales on Sunday: *Held*, that it was not error to refuse to instruct the jury that the contract was based upon an illegal consideration.
3. Evidence of the market price of a commodity on Sunday in a State where business transactions on that day are forbidden, will not be heard in support of an action to recover damages for a breach of contract to deliver the goods on that day.

(350) ACTION tried at Spring Term of ASHE, *Bynum, J.*

The plaintiff alleged that the defendant entered into a contract with him, by which it undertook, in consideration of the sum of $58.50 to furnish, on Thursday morning, at the town of Taylorsville, in this State, a stock-car capable of holding and transporting thirty-two head of cattle, and would transport and deliver the cattle in the city of Charleston, S. C., on the following Saturday, "so that he (plaintiff) could be ready for the Sunday market, because he had reliable information that beef cattle would be very high at that time, and because, further, it was the best day for sale"; that the defendant entered into the contract with this distinct understanding of the purposes and intention of the plaintiff; that the defendant failed to perform the contract according to its terms, and did not deliver the cattle in Charleston until Sunday after the close of the market, whereby he suffered great damage, etc.

The defendant put in a general denial, and, for a further defense, alleged that the contract was void, because it contemplated a sale of the cattle on Sunday.

The plaintiff, against the objection of defendant, offered evidence of the market price of beef cattle in Charleston on the Sunday next after the day for delivery provided in the contract, and defendant excepted.

The defendant introduced in evidence the general statute of South Carolina, as follows:

"Section 1632. No person or persons whatsoever shall publicly cry, show forth or expose to sale any wares, merchandise, fruit, herbs, goods or chattels whatever upon the Lord's day or any part thereof, upon pain that every person so offending shall forfeit the said (351) goods so cried or shown forth or exposed to sale."

And also see section 1631 of said statutes, as follows:

"No tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any useless labor, business or work of their calling on the Lord's day, commonly called the Sabbath, or any part thereof, works of necessity or charity only excepted; and every person being of the age of fifteen years or upwards offending in the premises shall for every such offense forfeit the sum of one dollar."

Defendant asked the court to instruct the jury that sales of property on Sunday being forbidden by the laws of South Carolina, the jury are not to consider any evidence offered by plaintiff tending to show a market in Charleston, S. C., on Sunday, or the market price on that day, in estimating his damage, if he has sustained any.

This instruction was refused, and the defendant excepted.

The defendant then moved the court to dismiss the action on the ground that it appeared from the complaint and the evidence that the contract, the breach of which was complained of, was based on an illegal consideration and was void. This was also refused, and defendant excepted.

There was judgment for plaintiff, from which defendant appealed.

G. N. Folk and G. W. Bowers for plaintiff.

D. Schenck and F. H. Busbee for defendant.

SHEPHERD, J. 1. The defendant moved in this Court to dismiss the action for that on the face of the complaint it appeared that the ultimate purpose of the plaintiff in making the contract sued upon, was illegal, in that he intended to violate the Sunday laws of South Carolina. As a motion of this character is based entirely upon the facts stated in the complaint, and as it does not appear from the (352) said pleading that the sale of cattle in market on Sunday is forbidden by the laws of the said State, and as we cannot take judicial notice of such laws *(Hooper v. Moore,* 50 N. C., 130), it is very plain that the motion must be denied.

2. On the trial below, however, the defendant proved that by the statute laws of South Carolina (General Statutes 1631, 1632) such a sale was unlawful, and it prayed the court to hold that, from the facts alleged and the evidence, the contract "was based upon an illegal *consideration* and was void." The court very properly declined to give the instruction, as there is not the slightest illegality either in the consideration or promise. The consideration was the sum of $58.50, and the promise was to transport the cattle so as to reach the city of Charleston on Saturday. We presume that the defendant intended to present the question as to the effect of the alleged *illegal* purpose of the plaintiff, but as this point is not raised by the prayer for instruction, we do not feel at liberty to pass upon it in this appeal. The distinction to which we have adverted is universally recognized, and is clearly expressed by Pollock Contracts, 317. He says that, "An agreement is the complex result of distinct elements and the illegality must attach to one or more of those elements in particular. It is material whether it be found in the promise, the consideration or the ultimate purpose."

3. The defendant asked the court to instruct the jury that sales of property on Sunday being forbidden by the laws of South Carolina, the jury are not to consider any evidence offered by plaintiff tending to show a market in Charleston, S. C., on Sunday, or the market price on that day in estimating his damage, if he has sustained any." This instruction was refused, and in this we think there was error. It will be noted that there was no evidence as in *McAbsher's case, ante,* tending to explain the nature of the customary Sunday transactions at (353) said market, to the effect that the sales were not to be completed on that day, and as such completed sales were prohibited by law, it must follow that there could have been no Sunday market price. The defendant was entitled to the instruction. There must be a new trial.

Error.

Cited: Tucker v. Tucker, 110 N. C., 338, 340; *Rodman v. Robinson,* 134 N. C., 508.

G. H. MITCHELL v. T. W. HOGGARD.

Devise—Tenants in Common—Action to Recover Land—Trial—Judge's Charge.

1. A devise to "my daughter E and my grandson G one tract of land adjoining lands of H and M, lying on the south side of the road leading from M to W, to be divided between the two as follows, . . . so that my

daughter E shall have adjoining the lands of B and G, the lands adjoining the lands of H and others, to them and their heirs forever," did not create an estate in common in the entire tract, but an estate in severalty in the devisees respectively to the parcels as established by the dividing line.

2. An erroneous instruction to the jury upon an immaterial aspect of the case, which does not appear to have misled the minds of the jury from the real issue, is not sufficient ground for a new trial.

APPEAL at February Term, 1891, of BERTIE, from *Graves, J.*

It appears that George Wynns died many years ago in the county of Bertie, leaving a will, which was duly proven, wherein he devised part of his real estate as follows:

"I give to my daughter, Elizabeth Burden, and my grandson, George H. Mitchell, one tract or parcel of land adjoining the lands of Elisha Hoggard and Giles Mitchell, lying on the south side of the road leading from Giles Mitchell's to Windsor, to be divided between the two as follows: The dividing line to begin near the place called the (354) Watering Hole on the road, thence running straight to the back line, so that my daughter Elizabeth shall have adjoining the lands of Abram Burden, her husband, and Giles Mitchell and George H. Mitchell, to the parcel adjoining Elisha Hoggard and others, to them and their heirs forever." And there is no other part of the will relating to the same or affecting it.

The plaintiff is the male devisee mentioned in this clause of the will, and the defendant claims the land in question, deriving title thereto from the *feme* devisee therein mentioned.

The action is brought to recover possession of part of the land so devised to the plaintiff, and as specified in the complaint. He alleges and contends that the "watering hole on the road," designated in the devise as the beginning of the boundary line, is at a point alleged and specified in the complaint, and that the defendant is in the possession of land described on the plaintiff's side of that line, etc.

The defendant, in his answer, admits the will and the devise therein; alleges that he is the owner of the land so devised to the *feme* devisee mentioned, and denies that he is in possession of any part of the plaintiff's land, etc.

The case settled on appeal states that on the trial "one of the main points in the controversy was the location of the beginning point on the road for dividing the land," that is, the "watering hole," each party claiming a different location.

The following issue was submitted to the jury: "Is the plaintiff entitled to the possession of the land described in the complaint?"

The plaintiff asked the court, upon the pleadings, proofs and admissions of the defendant, to answer that issue "Yes."

This the court refused, saying that he would reserve any question growing out of the pleadings and tenancy in common until after the verdict. To the refusal so to instruct the jury the plaintiff excepted.

The jury answered the issue thus: "No; we find the watering
(355) hole claimed by the defendant the starting place."

Upon the return of the verdict the plaintiff again asked for judgment for the possession of the land with the defendant, which was refused by the court, and the plaintiff again excepted.

There was no evidence of any ouster of plaintiff by defendant, or demand of plaintiff to be let into possession, and refusal by defendant.

No demand of plaintiff, as averred, that the court should instruct the jury to respond to the issue, "Yes."

His Honor instructed the jury that, as a matter of law, plaintiff and defendant were tenants in common, and the dispute was the beginning point on the road—plaintiff claiming one place and defendant another—and it was for them to say, from the evidence, which point was intended by the testator George Wynns, and they responded accordingly.

Upon the verdict the court gave judgment for the defendant, and the plaintiff appealed to this Court.

R. B. Peebles for plaintiff.
D. C. Winston for defendant.

MERRIMON, C. J., after stating the case: The case settled on appeal is not at all free from confusion. It seems that the plaintiff contended, on the trial, that he and defendant were tenants in common of the land in controversy, and the court so held; but it held further in this connection that there was no evidence of ouster of the plaintiff or demand on his part that he be let into possession. But such questions were certainly not raised by the pleadings in any view of them.

The complaint plainly alleges that the plaintiff is the owner of the land therein specified; that the defendant is wrongfully in possession thereof and unlawfully withholds the same, etc. This the defend-
(356) ant denies, and as to the possession, a proper issue raised was submitted to the jury. The parties both claim under the devise above recited. It seems that the court was of opinion that this devise made the parties tenants in common, and hence the opinion expressed—that they were. We think such opinion was not well founded, and therefore the plaintiff was not entitled to any benefit from it in any aspect of the case. The devise must be construed as a whole, and the intention of the testator must prevail. The first part of the devising clause simply

declares the testator's purpose to devise the tract to the devisees named, but in that immediate connection he qualifies, explains and makes his purpose specific by designating and specifying a "dividing line," cutting the tract into two distinct parts, and devising to his daughter named the part described, situate on one side of that line, and to the plaintiff the other part, sufficiently designated, situate immediately on the opposite side of that line. The clear purpose was to divide the tract into two parts, and devise one part to the plaintiff in severalty and the other part to the other devisee in severalty.

It seems that the real dispute on the trial was as to the true location of the "dividing line." It is stated in the case settled on appeal that "one of the main points in the controversy was the location of the beginning point on the road for dividing the land—that is, the 'watering hole'—each party claiming different location." So far as we can see, the parties were not tenants in common, and no question in that respect could arise. The plaintiff contended that the "watering hole" was at one point, the defendant that it was at a different point on the road mentioned, and the true location of the "dividing line" depended upon whether the contention of the plaintiff or that of the defendant was well founded. The cause of action and the pleadings might appropriately and pertinently raise such contentions. It sufficiently appears that such was the real ground of the controversy, and the court instructed the jury that "it was for them to say, from the evidence, what (357) point was intended by the testator," etc. There was no exception to this instruction. The evidence produced on the trial was sent up. It tended very strongly to prove that the "watering hole" was at the point contended for by the defendant, and the jury so found. Upon the verdict the court properly gave judgment for the defendant.

It is true, as we have seen, that the court erroneously said on the trial that the parties were tenants in common of the land, but the opinion thus expressed was immaterial and not at all pertinent. It did not in its nature mislead or distract the minds of the jury as to the issue submitted to them. It had no application. It is not suggested nor does it appear that it did. It was harmless, and therefore not ground for a new trial.

No error.

J. W. BURBAGE AND WIFE v. SAMUEL WINDLEY AND H. A. WINDLEY, EXECUTORS OF R. C. WINDLEY.

Insurance—Contract—Consideration—Wager—Pleading.

1. In actions upon parol contracts it is necessary that the complaint should disclose a sufficient consideration.

2. W took an insurance policy, payable to himself, upon the life of H for $10,000; he had no insurable interest in the life of H, and it was alleged in the complaint that the only consideration which induced H to have his life insured for W was the promise of the latter that he would pay H's widow $500 from any moneys he might collect on the policy. H died and W collected the sum specified in the policy, but refused to pay any part to the widow: *Held*, that the alleged contract was without consideration; that the promise was simply a wager, a mere gambling speculation—*contra bonos mores*—and would not be enforced.

(358) APPEAL from *Whitaker, J.*, at May Term, 1890, of BEAUFORT.

The complaint alleges in substance that in the year 1883, R. C. Windley, now deceased, the testator of the defendants, at different times specified, applied to three several insurance companies and obtained from each of them an insurance policy, granted and made payable to him and for his own benefit, whereby each, for the consideration specified therein, insured the life of John W. Hammond "on the ordinary life plan" for the sum of money in each specified, the three policies aggregating the sum of $10,000. It is not alleged nor does it at all appear that the said testator had any insurable, or any interest, in the life of the said Hammond. It is alleged:

"*Third.*—That the consideration, and the only consideration, which induced and moved the said John W. Hammond to permit Mr. Windley to have his life insured was that the said Windley contracted and agreed with the said John W. Hammond and his wife Sarah E. Hammond that out of the moneys which the said Windley would collect on these policies and certificates of insurance upon the life of the said Hammond after his, the said Hammond's death, he, Windley, would pay to Sarah E. Hammond, now Burbage, the sum of five hundred ($500) dollars."

Hammond died on 15 January, 1884, leaving surviving him his said wife, who afterwards, on 6 February, 1884, intermarried with her coplaintiff. The said insurance companies afterwards, in April, 1884, "took up the policies and certificates of insurance" from the said testator. The plaintiffs made demand of the said testator, in his lifetime, that he pay to the *feme* plaintiff, who was his wife and widow of the said Hammond, the said sum of five hundred dollars, which he refused

to do. The said R. C. Windley afterwards, on 15 December, 1886, died, leaving a last will and testament, which was proven, and the defendants qualified as executors thereof.

The plaintiffs bring this action to recover the said sum of (359) $500. The defendants in their answer deny the material allegations of the complaint; allege that said contracts of insurance were without consideration, and void as wagering contracts, and against the policy of the law, and pleaded the statute of limitations.

On the trial there were several exceptions of the defendants to evidence received, others to instructions given to the jury, and others upon the ground that the court refused to give certain instructions specially asked for by them. It is not necessary to report these, as this Court disposed of the case on another and a different, distinct ground.

In this Court the defendants moved to dismiss the action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action.

Simmons & Whitaker (by brief) for plaintiffs.
J. H. Small (by brief) and W. B. Rodman, Jr., for defendants.

MERRIMON, C. J., after stating the case: In this and like actions where the contract or promise sued upon is by parol, a sufficient consideration should be alleged in the complaint to support the contract or promise. This is essential, because otherwise no cause of action is alleged or appears in the pleadings. In some cases, such as where the cause of action is a bill of exchange or a promissory note, and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient. In these cases the nature of the liability itself sued upon implies the consideration; but in all other cases of simple contract it is necessary that the complaint should disclose a sufficient valuable consideration, whatever that may be. Moreover, the consideration alleged must be lawful and not in its nature, because of some tainting or vitiating quality in it, void. *Moore v. Hobbs,* 79 N. C., 535; *Burnett v. Besso,* 4 John., 235; 1 Chitty Pl., 294.

There are cases where a cause of action is imperfectly alleged (360) in the complaint; this pleading may be helped by admissions in the answer, but this is not one of them. Indeed, there is no admission in the answer that, in any view of the allegations of the complaint, would help them at all. Hence, it appears from the complaint itself—the allegations of the supposed cause of action—that the only consideration alleged or relied upon is, as we shall presently see, unlawful and void as such. In other words, it appears from the complaint that there is no consideration to support the promise to pay the sum of money for which the plaintiffs demand judgment.

The complaint itself discloses the material facts that R. C. Windley, the testator of the defendants, in his lifetime, procured three policies of insurance, each purporting to insure the life of John W. Hammond, the former husband of the *feme* plaintiff, for a sum of money specified therein, the three sums aggregating ten thousand dollars—Windley, in consideration of permission given him by Hammond to so insure the latter's life, agreeing to pay of the money he might realize from such insurance five hundred dollars to the *feme* plaintiff. It is not alleged that Windley had any insurable interest in the life of Hammond. On the contrary, it appears by implication, if this is not expressly alleged, that he had none. It is alleged "that the consideration, and the only consideration, which induced and moved the said John W. Hammond to permit Mr. Windley to have his life insured, was that the said Windley contracted and agreed with said John W. Hammond and his wife Sarah E. Hammond that out of the moneys which the said Windley would collect on these policies and certificates of insurance upon the life of the said Hammond after his, the said Hammond's death, he, (361) Windley, would pay to Sarah E. Hammond, now Burbage, the sum of five hundred ($500) dollars."

It thus clearly appears that the purpose of Windley, with the knowledge, consent and coöperation of Hammond, was to insure the latter's life, in which he had no insurable interest, for his own benefit. He simply promised to pay the *feme* plaintiff of the money he might realize after the death of her husband five hundred dollars, expecting to realize nine thousand, five hundred dollars for himself, less such premiums on the insurance as he might pay.

As the assured had no insurable interest in the life of the *cestui que vie* the contract was simply a wager; it was not founded upon any just and lawful consideration; it was a mere gambling speculation. The assured was not to be indemnified against loss, injury or disadvantage in any respect growing out of the life he insured; the insurance was not intended to serve any legitimate business purpose or end—it was purely a matter of speculation founded upon nothing but hazard.

Such contracts and speculations are wholly unnecessary; they cannot serve or promote any useful and wholesome purposes of individuals, society, or government. They do not stimulate, promote or encourage industry, enterprise, legitimate business, sound morality, or increase the wealth of the people or the strength and power of the State. On the contrary, their nature and uniform experience go to show that they represent nothing substantial or valuable, or of practical advantage to persons or communities. They strongly tend to demoralize society and embarrass industries and general business. In their very nature they stimulate, afford incentives to, and encourage those who become parties

to them to resort to sinister, oftentimes criminal, means to turn or end the hazard in their favor, and thus gain unjust and dishonest advantage. They encourage men to engage in the business of speculation in hazards not necessary or useful in the general purposes and business of life, but which is positively and seriously injurious to them. (362) Such contracts and speculations contravene the justice and policy of the law—they are *contra bonos mores,* and are therefore void.

While there is no decision of this Court directly in point here, it is well settled by a multitude of uniform decisions that all contracts against the policy of the law, and such as contravene sound morality, are on such account void. We cite a few of the many cases: *Sharp v. Farmer,* 20 N. C., 255; *Blythe v. Lovinggood,* 24 N. C., 20; *Ingram v. Ingram,* 49 N. C., 188; *King v. Winants,* 71 N. C., 469; *Williams v. Carr,* 80 N. C., 295; *Griffin v. Hasty,* 94 N. C., 438.

In *Shepherd v. Sawyer,* 6 N. C., 26, the Court held that when "A agrees with B for 2½ per cent premium paid down to insure a negro slave reported to be lost in Pasquotank River, B has no interest in the negro, yet, his loss being proved, B is entitled to recover his value." This decision is placed upon the ground that it was an "innocent wager," and that such wagers were sanctioned by the common law. The opinion of the Court is very brief, and no authority is cited to show that it was "innocent," nor is any reason stated why it was such wager. If the Court intended that the case should have general application to wagers in insurance embracing cases like the present one, we cannot hesitate to say, in the absence of reasons stated in support of it, that, in our judgment, it is not sustained by the greater weight of reason or the greater weight of authority, certainly at the present day. *Ruse v. Ins. Co.,* 23 N. Y., 516; *Lord v. Dall,* 12 Mass., 115; *Ins. Co. v. Hazzard,* 41 Ind., 116; *Cormack v. Lewis,* 15 Wall., 643; *Ins. Co. v. France,* 14 U. S., 561; *Womack v. Davis,* 104 U. S., 775; Bliss on Ins., sec. 9.

The consideration of the contract of promise sued upon here, as expressly alleged, was the permission granted to the testator of the defendant by the former husband of the *feme* plaintiff Hammond to insure the latter's life. If such permission, in any case or connection, be a valuable privilege or advantage, in this case it was (363) granted with the view and for the purpose of enabling and helping Windley to make an unlawful contract—a wager—on the life of Hammond. Thus the latter became connected with and intended to share in the wagering transaction. The promise to pay five hundred dollars to the *feme* plaintiff was expressly based upon and grew out of it; it was, as to Hammond and his wife, part of it. It partook of the wager—the vicious nature of the contract of insurance. Such consideration was, therefore, void. Hence, the promise founded upon it

was without legal sanction and of no binding effect in contemplation of law. *Ex turpi causa non oritur actio. Duke v. Asbee,* 33 N. C., 112; *Bettis v. Reynolds,* 34 N. C., 344; *Covington v. Threadgill,* 88 N. C., 186; *Griffin v. Hasty,* 94 N. C., 438.

If, in good faith, the purpose had been to insure the life of Hammond for the benefit of his wife, the case, as to her, might have been very different. But, as we have seen, this was not the purpose or any part of it. The insurance was for the benefit of Windley; the policies were granted to and made payable to him; he promised to pay the small sum mentioned to the *feme* plaintiff for permission to insure the life.

As, therefore, it appears from the complaint that no cause of action is alleged, the motion to dismiss the action must be allowed.

Action dismissed.

Cited: Albert v. Ins. Co., 122 N. C., 94; *Powell v. Dewey,* 123 N. C., 106; *Maynard v. Ins. Co.,* 132 N. C., 713; *Hinton v. Ins. Co.,* 135 N. C., 321; *McNeill v. R. R., ib.,* 733; *King v. R. R.,* 147 N. C., 266; *Lloyd v. R. R.,* 151 N. C., 540; *Hardy v. Ins. Co.,* 152 N. C., 291.

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(364)

LENNIE WATSON v. JAMES S. MITCHELL.

Process—Return—Officer—Venue—Jurisdiction.

1. An action against a sheriff of a county other than that from which the process issued, for making a false return, is properly brought in the courts of the county to which that process was returnable.

2. The term "return" means that the process must be brought back and produced in the court whence it issued with such endorsements as the law requires.

APPEAL from *Womack, J.,* at September Term, 1890, of NORTHAMPTON, refusing a motion to remove the action for trial to Hertford County.

R. B. Peebles for plaintiff.
B. B. Winborne for defendant.

SHEPHERD, J. The defendant, the sheriff of Hertford County, is sued in Northampton County for a false return of a summons issued by the Superior Court of the latter county and returnable to the same. He

contends that the cause of action arose in Hertford County, and that there was error on the part of the court in declining his motion to remove.

The argument is, that as the official acts of a county officer are confined to his county, the "return" must necessarily have been made in the same, and therefore, the cause of action could only arise therein. It is true, as a general proposition, that the acts of county officers are confined to their counties (*Steele v. Comrs.*, 70 N. C., 137), but this has no application to a case like the present. The Code, sec. 200, expressly requires a sheriff to whom a summons is directed to execute the same and return it to the Superior Court of the county from which it is issued. "The term 'return' implies that the process is taken back to the place from which it was issued." *Re Crittenden,* 2 Flip., (365) 215. "It is the bringing of a process into court with such endorsements as the law requires, whether they in fact be true or false." *Herman v. Childress,* 3 Yerg., 329.

As the statute requires the officer to make his return to the Superior Court of Northampton County, and as the return could not be made elsewhere, it must follow that the cause of action arose in the said county, and that the refusal of his Honor to remove must be

Affirmed.

LARKIN SMITH, BY HIS NEXT FRIEND, v. CHARLES H. SMITH.

Appeal—Assignment of Error—Presumption—Insanity—Evidence—"Next Friend"—Costs—Parties.

1. Error in the charge to the jury may be assigned for the first time in appellant's statement of case on appeal.

2. The presumption that every person is sane is not so far rebutted by the fact that the clerk of the court had, in a preliminary proceeding, appointed a next friend to represent the alleged insane person in the pending action as to change the burden of proof.

3. The law attaches peculiar importance to the testimony of subscribing witnesses and family physicians.

4. While the "next friend" is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs.

MERRIMON, C. J., dissenting.

(366) APPEAL from *Boykin, J.*, at October Term, 1890, of WAKE.

The action was brought in the name of Larkin Smith, by his next friends, A. L. Ferrell and others, appointed by the court. The purpose of the action was to set aside a prior power of attorney executed by Larkin Smith to the defendant, Charles H. Smith, by reason of mental incapacity, and to have a receiver appointed for his estate. After the service of the summons on Charles H. Smith, to wit, on 26 February, 1889, Larkin Smith executed a power of attorney to Messrs. Fuller & Snow and Batchelor & Devereux, attorneys, empowering and directing them to dismiss the said action.

When the case was called for trial, the attorneys for Larkin Smith read their power of attorney to the court, and moved to dismiss the action.

The next friend of Larkin Smith resisted the motion, on the ground that when the power of attorney was executed, to wit, on 26 February, 1889, he was incompetent mentally to execute the said power of attorney.

The court adjudged that the rights of the parties would be better subserved, and the cause more intelligently and fairly tried, by submitting to the jury at this time the sole issue, which is set out in the record, and, in its discretion, submitted this issue alone:

"Was Larkin Smith incompetent, by reason of mental incapacity, to execute a good and valid power of attorney on 26 February, 1889?"

To this there was no exception, nor was there any exception to evidence by the appellants.

Among other things, his Honor charged the jury that the question for them to determine was the mental condition of Larkin Smith on 26 February, 1889, and the evidence as to his mental condition, both before and after that time, was only admitted and to be considered by them for the purpose of determining what his mental condition was on that day.

This was not excepted to until appellants' case on appeal was
(367) served.

His Honor further charged that the law attaches peculiar importance to the testimony of a subscribing witness. "In this case, L. L. Doub, the only subscribing witness to the power of attorney in question, has testified, but you are to determine from his character, and his appearance on the stand, and his demeanor on the stand, what weight, if any, you will give to his evidence." (The defendant had introduced evidence tending to show that Doub was a man of good character.)

His Honor further charged that the law attaches peculiar importance to the testimony of the attending family physician. "He (Dr. Knight) has testified, as have also other medical experts on both sides, but you are to determine from their manner and appearance, what weight, if any, you will give to their testimony."

The appellants excepted to this part of the charge.

His Honor further charged the jury that the law presumes every man to be of sound mind, and the burden of proof was upon the plaintiffs to show the contrary, and this must be shown by a preponderance of the evidence.

To this the appellants excepted.

The residue of his Honor's charge was not excepted to and is, therefore, not set out. The jury found in response to the issue "No," and the court rendered judgment dismissing the action and taxing the next friends with the costs, and they appealed.

A. Jones and J. H. Fleming for plaintiff.

J. B. Batchelor, John Devereux, Jr., T. C. Fuller and George H. Snow for defendants.

CLARK, J. The exceptions to the charge were taken in time (368) when set out in appellants' statement of case on appeal (*Lowe v. Elliott,* 107 N. C., 718), though it is better practice and fairer, both to appellee and appellant, to make such exceptions on a motion for a new trial, since if a slip has been made the judge may perhaps correct it and save parties the costs and delay of an appeal. *McKinnon v. Morrison,* 104 N. C., 354.

We find no error in the charge in the particulars excepted to. There are many precedents to support it. It is true that, ordinarily, if insanity is found to exist, it is presumed to continue till the opposite is shown. *S. v. Vann,* 82 N. C., 631. But here the main contention in the action being as to the mental capacity of Larkin Smith, the preliminary action of the clerk in appointing next friends to conduct the proceeding is not such a finding as to change the burden of proof and prejudge the very question at issue.

While there is no specific exception to the judgment, any error therein which is apparent upon the face of the record the Court will take notice of and correct. *Thornton v. Brady,* 100 N. C., 38. The next friends are not parties to the action. *Mason v. McCormick,* 75 N. C., 263; *George v. High,* 85 N. C., 113; *Tate v. Mott,* 96 N. C., 19. They are appointed by the court to act for and represent the real party in interest. The verdict and judgment having settled that Larkin Smith was *compos mentis,* the order appointing next friends was properly set aside. He then could have continued the action as to so much of it as asked to set aside the prior power of attorney to defendant, or have discontinued it. He elected to do the latter. The costs of the proceedings instituted in his behalf, and by order of the court, should, *prima facie,* be taxed against him. It is to be presumed that the order of the court appointing next

friends was made regularly, after due inquiry, and in the interest of Larkin Smith. He is the party plaintiff, in fact and in law, and appeared by next friends, who merely represented him, under the authority and appointment of the court. The Code, sec. 180. It is
(369) contended, however, that though not strictly parties to the action, the next friends in the case at bar, in resisting the motion to discharge them, were in fact (virtually found by the verdict of the jury) resisting the will of Larkin Smith, a person of full age and competent to appear for himself; that such next friends officiously and unnecessarily caused themselves to be appointed, and that they, and not Larkin Smith should pay the costs incurred by their false clamor. There is some force in this suggestion. While "next friends" may not be embraced in the strict letter of The Code, sec. 535, they come within the purview of that section. It was held error to tax trustees of an express trust who are parties to an action with the costs unless the court had adjudged that they were guilty of "mismanagement or bad faith in such action," *Smith v. King,* 107 N. C., 273. *A fortiori* it is error to tax "next friends" who are not parties without at least a similar finding. This is not alleged here in the answer or found by the court. Indeed, the presumption, by virtue of their appointment by the court, is that they acted in good faith, and they cannot be liable to costs unless there is an express finding against them of the facts requisite to tax them with costs. An analogous rule obtains in criminal actions, as to which it is held that an order taxing a prosecutor with the costs is erroneous unless the court finds the facts which would authorize such order, and that the absence of such finding from the judgment would be an error apparent on the face of the record which the court would correct without assignment of error. *State v. Roberts,* 106 N. C., 662. It is further held in the same case, that it is, notwithstanding, still open to the solicitor, when the case goes back for correction of the judgment, to move the court below that it pass upon the facts, the court not having found the facts either way so as to make its judgment a finality, but having simply omitted to find them.

We find no error, except in the judgment as to costs, which
(370) should not have been awarded against the next friends without a distinct finding by the court "of mismanagement or bad faith" by them in the institution or conduct of the action. To the end that such fact may be passed upon by the court below, and the costs awarded in accordance therewith, the cause is remanded. The judgment in all other respects is affirmed.

MERRIMON, C. J., dissenting: This action was brought by the plaintiff Larkin Smith, *non compos mentis,* as alleged, appearing by his next

friends named in the summons and the record, who were appointed by the court as such, and directed, by the order appointing them, to bring the action to recover possession of certain property of the plaintiff in the possession of the defendant, to have a power of attorney executed to the latter by the plaintiff in respect to such property "delivered up and canceled," and for relief specified and demanded pending the action, etc.

In the course of the action, counsel other than those who appeared for the plaintiff brought his action and conducted the same at the instance of the plaintiff, through his said next friends, appeared in court and exhibited a power of attorney purporting to be executed by the plaintiff to them, empowering and authorizing them to dismiss the action, and they accordingly moved to dismiss the same. The said next friends resisted this motion upon "the ground that when the said power of attorney was executed, to wit, on the 26 February, 1889, the said Larkin Smith (the plaintiff) was incompetent, mentally, to execute the said power of attorney."

The court, before disposing of the motion to dismiss the action, at October Term, of 1890, submitted this issue to a jury: "Was Larkin Smith incompetent by reason of mental incapacity to execute a good and valid power of attorney on 26 February, A. D. 1889?" The jury responded "No." To this course of procedure there was no (371) objection.

It was admitted on the trial of this issue that the plaintiff had been paralyzed before the execution of the power of attorney in question, on the right side, which partly deprived him of speech and rendered him unable to walk. Numerous witnesses were examined on the trial. Among other instructions, the court gave the jury the following. "His Honor further charged the jury that the law presumes every man to be of sound mind, and the burden of proof was upon the plaintiffs to show the contrary, and this must be shown by a preponderance of the evidence." To this the appellants excepted.

The court granted the motion to dismiss the action, and gave judgment against the said next friends of the plaintiffs in favor of the latter and the defendants for the costs of the action. Whereupon such next friends appealed to this Court. Granting that the court properly instructed the jury "that the law presumes every man to be of sound mind," I am of opinion that it erroneously instructed them further in that connection that "the burden of proof was upon the plaintiffs (meaning the next friends of the plaintiff in this action, the present appellants) to show the contrary"; because, in this very action, the court itself in the proper exercise of its authority for the *purposes of*

the action had adjudged that the plaintiff was *non compos mentis,* had appointed such next friends to be such, and authorized them to bring the action, as it might do.

A lunatic, or person *non compos mentis,* may bring his action in a case like this, and the statute (The Code, sec. 180) provides that, in the absence of a guardian, he may appear by his next friend. The statutory provision is serious, and, in proper cases, must be observed in some orderly effective way. Summary application by petition or motion in writing, stating the material facts upon which such
(372) application is founded, should be made to the court to appoint such next friend substantially as suggested in *Morris v. Gentry,* 89 N. C., 248; and if, upon due inquiry, it shall appear that the person in whose behalf such application is made is *non compos mentis* and the suggested action ought to be brought, the court will appoint a suitable next friend, with leave or direction to bring the action, which must be brought in such case in the name of and for the lunatic, and the same will be his action—not that of the next friend. He will appear by the next friend. The latter will employ counsel, manage and prosecute the action under the supervision and direction of the court. The court may, for cause, remove him and appoint another in his stead, and in case, in the course of the action, the lunatic shall become sane, he may be discharged altogether and the action left to the former's management and control. The next friend is not a party to the action. He is the mere agent of the plaintiff, appointed by the court for the special purpose and duties assigned him. His name as next friend appears on the record, but not as that of a party. He is under the control of and amenable to the court in the discharge of his duties. In possible cases he may be chargeable with costs, but not when he acts in good faith and with reasonable prudence and care, especially where the plaintiff can pay the costs. The Code, sec. 180; *Latham v. Wiswall,* 37 N. C., 294; *Brooks v. Brooks,* 25 N. C., 389; *Green v. Kornegay,* 49 N. C., 66; *Tate v. Mott,* 96 N. C., 19; *Smith v. Smith,* 106 N. C., 498. Such application should be made in good faith, and the next friend should be appointed not as of course, but only upon due inquiry by the court, and for substantial cause shown. And a next friend will not be appointed if the lunatic shall have a general or testamentary guardian in this State. The statute expressly provides that he shall appear by such guardian if he shall have one, but if the latter should faithlessly refuse to sue when he ought to do so, possibly in that case a next friend might be
(373) appointed.

In this case, application by petition was made to the court to appoint a next friend. It was alleged in the petition that the plaintiff was *non compos mentis* and unable to take care of his property; that his

large property was in possession of defendant, who was wasting and destroying the same, etc. The court thereupon declared that it appeared that the plaintiff was "incompetent to defend his possessions from injury"; that "it was necessary to bring suit," etc.; and appointed appellants to be the next friends of the plaintiff, and authorized them to bring the action. The order thus made was not a mere matter of form; it was important and significant, and was based upon a finding of the court, for the purposes of the action at least, that the plaintiff was then *non compos mentis*. It was certainly, in effect, so adjudged.

At any time in the course of the action it was competent for the plaintiff, or some person in his behalf, upon affidavit, to suggest that he had become sane since the action began, and acting upon such suggestion the court might at once institute an inquiry into the state of plaintiff's mind and capacity to do business and manage his own affairs, as the same might come within the compass of the action. This inquiry should be made summarily, but seriously and carefully, in the action by the court, and if it should be satisfied of the restoration of the plaintiff to sufficient mental capacity to have charge of the action, then it should discharge the next friend and leave him to prosecute the same, or dismiss it, as he might deem proper. Such inquiry should not be confined to the ascertainment of the plaintiff's mental state at a particular time, or to the time when he executed a power of attorney empowering and authorizing counsel to dismiss his action, but it should extend to his general mental capacity to do and manage his business affairs, and particularly at the time of the hearing of the motion to discharge the next friend. He may have had a lucid interval at a particu- (374) lar time, and yet generally be *non compos mentis*. The order appointing the next friend should not be made if it appeared that the plaintiff was only on a particular occasion or for a brief while insane; still, on the other hand, the next friend should not be discharged because the plaintiff had occasional brief lucid intervals. The court should be satisfied of the plaintiff's restored mental capacity to enable him to transact his business, or give reasonable directions concerning and about the same, at the time of the disposition of the motion to discharge the next friend.

The motion of counsel to dismiss the action was, in effect, a motion to discharge the next friend of the plaintiff and allow him to dismiss his action. It was competent to make such motion in a proper way, and the court might entertain it, and itself inquire into the mental condition of the plaintiff as above pointed out. The inquiry should have been made by the court. It was its province and duty to find the facts. The issue submitted to the jury was not raised by the pleadings or the motion. It had reference to the ascertainment of facts, not necessarily by

the jury, but by the court. The latter, *ex mero motu,* submitted the issue for the purpose of aiding it in ascertaining material facts necessary to enable it to dispose of the motion to dismiss the action pending before it. It was sole judge of the extent it would require the aid of the jury or the compass of the inquiry embraced by the issue. It may be, it seems, that the inquiry should have extended to the mental condition of the plaintiff from the time specified in the issue up to the time the latter was submitted, but no question in that respect was raised. As I have said, it was the province of the court itself to ascertain the material facts, but it might require the aid of the jury. It was not, however, in such case at all bound by the jury's findings of fact. It was the
(375) duty of the court to find them, but it might adopt, as its own, the findings of fact by a jury upon an issue or issues submitted to it, the court hearing and considering the evidence. It should be simply aided by the findings of the jury. Although the issue submitted did not embrace the whole scope of the inquiry before the court, and the court was not bound by the finding, still the issue and the finding were important. The court may have regarded the finding as leading and controlling; indeed, it seems it did so accept and treat it. The instructions given the jury were, therefore, material and important, especially that in which the court told them that "the burden of proof was upon the plaintiffs (the appellants) to show that the plaintiff was not of sound mind." This may have been, probably was, potent in inducing the jury to respond to the issue in the negative, as it did do.

Clearly, in my judgment, such burden was not on the appellants. The court, in the inception of the action and in connection with it, had decided that the plaintiff was *non compos mentis.* When, afterwards, in its course, it was suggested to the court that the plaintiff was *compos mentis,* was always so, or had become so, as might be done, surely the court would not stultify itself by simply ignoring its own solemn decision in which it had before adjudged that the plaintiff was *non compos mentis.* That adjudication was presumed to be correct, well founded and effectual, until he or they who suggested the contrary should prove the sanity of the plaintiff; the burden was upon them and not upon the appellants to make such proof. The adjudication was pertinent and remained of full force until some person, in a proper way, should take upon himself the burden of showing that it had been improvidently made, or was incautious, or that the plaintiff had become sane. When it was ascertained that the plaintiff was *non compos mentis,* he was presumed to continue to be so until the contrary should be shown.

The motion in question raised an inquiry to be made by the
(376) court, and a question to be decided by it in and about the action.

It was not part of the purpose of the motion to declare the plaintiff a lunatic, to institute an inquisition of lunacy; it referred only to this action.

Strictly, there were no parties to the motion, and the court could deal with persons only as they put themselves in relation with it, and insisted that it should be allowed or disallowed. When, in such case, persons so come before the court in the action, they thereby submit themselves to its jurisdiction for proper and pertinent purposes, and if the court should erroneously adjudge that one or some of them pay costs, or the like, an appeal would lie in favor of the complaining party, and hence this appeal may be entertained by this Court. I may add that while, in such a case, the court might tax parties interfering with, and as to the *motion,* with the costs of the same, I cannot see upon what ground the court gave judgment against the appellants for the costs of the *action.* They were not parties to the action; they were the next friends of the plaintiff, and the latter was entirely solvent and able to pay the costs chargeable against him; nor was it suggested, nor did it appear, that they were chargeable with neglect or bad faith in any respect. It may be that, in some possible view of such a case, the next friend might be taxed with and required to pay costs, but it seems to me that ordinarily, in cases like this, they are not so chargeable.

Per Curiam. Affirmed and remanded.

Cited: S. v. McKinney, 111 N. C., 685; *Bank v. Sumner,* 119 N. C., 592; *Hockoday v. Lawrence,* 156 N. C., 322; *Lance v. Russell,* 165 N. C., 632.

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(377)

W. TAYLOR v. THOMAS P. SHARP AND GERTRUDE SHARP.

Domicile—Husband and Wife—Contract—Lex Fori Lex Loci—Jurisdiction.

1. In the absence of evidence to the contrary, it will be presumed that the residence of a party to a contract is at the place where the contract was made.

2. It is a general principle that the validity of a contract and its construction are determined by the law of the place where it is made, and if valid there, it is valid everywhere.

3. Where the defendant and his wife executed and delivered in the state of New York their joint promissory note to the plaintiff, payable in the city

of Baltimore, Maryland, two months after date: *Held*, that personal service of the summons having been made, the courts of North Carolina had jurisdiction of an action to recover the sum alleged to be due thereon, and that the fact of the relation of husband and wife between defendants did not prevent a judgment against the wife.

ACTION tried at January Term, 1889, of ROCKINGHAM, *Bynum, J.*

The summons had been personally served on both defendants.

The plaintiff alleged:

"1. That the defendant Thomas R. Sharp on 9 January, 1886, at No. 1 Bivay, in the state of New York, executed his promissory note to the defendant Gertrude E. Sharp, whereby he promised to pay her the sum of $5,657.13 two months after date, at the National Union Bank, Baltimore, Maryland, which said note was endorsed by the said Gertrude E. Sharp and Thomas R. Sharp.

"2. That on 9 January, 1886, the defendant Thomas R. Sharp, at No.1 Bivay, in the state of New York, executed his promissory note to the defendant Gertrude E. Sharp, whereby he promised to pay
(378) her the sum of $1,000 two months after date, at the National Union Bank, Baltimore, Maryland, which said note was endorsed by the defendant aforesaid.

"3. That said notes at the date of their maturity were duly presented at the said National Union Bank, Baltimore, Maryland, for payment, and the same were duly protested for nonpayment.

"4. That the plaintiff is the owner and holder of the aforesaid notes, and no part thereof has ever been paid.

"Wherefore, plaintiff demands judgment against the defendants," etc.

The defendant Thomas R. Sharp admitted the execution and endorsement of the notes, but set up an equitable defense thereto.

The defendant Gertrude E. Sharp alleged:

"1. That at the time of the execution of the notes mentioned in articles 1 and 2 of the complaint, and the delivery thereof to the plaintiff, she was, and still is, the wife of Thomas R. Sharp, her codefendant, and was so known to be by the plaintiff, and that at the time of the commencement of this action this defendant was and still is a resident and citizen of the State of North Carolina.

"2. That she admits the execution of said notes to her by her husband, and also admits that she endorsed the same, but doth aver that said notes were without consideration, originally, as between herself and husband, and that she never received any consideration, legal or equitable, for her endorsement thereof, and that she was a party to the execution, endorsement and delivery of said notes to the plaintiff at the time of their date, under the solicitation and persuasion of her said husband, and so was

party to the transaction aforesaid with the full knowledge of the plaintiff, who hath continually held said notes up to this time.

"3. And for a further defense against each of the alleged causes of action set out in the complaint, she avers that neither note expresses that it or the endorsement was for her separate use, and, in fact, was not; and no charge or judgment can be had thereupon (379) against her or her separate estate, her connection therewith having been had under a kind of matrimonial coercion, and without any consideration whatsoever to her thereunto moving, and without any benefit to her separate estate thereby arising, and this to the full knowledge of the plaintiff. . . . Wherefore, this defendant prays judgment that she go without day, and recover her costs, and for such other and further relief as she may be entitled unto."

Upon the call of the cause, and before the jury was empaneled, the *feme* defendant moved to dismiss the suit as to the *feme* defendant, upon the grounds that on the pleadings the plaintiff could not recover against her as he had stated no sufficient cause of action against her. The court had the pleadings read and refused the motion, and the *feme* defendant excepted.

The jury was then empaneled and the cause proceeded with. Plaintiff introduced the statute of New York, Laws 1884, ch. 381, to show that the wife had a right to make the contract in New York. No evidence was offered on either side.

The defendant asked the court to instruct the jury that, under the allegations and admissions of the pleadings, the plaintiff was not entitled to recover against *feme* defendant.

The court declined this instruction, and the *feme* defendant excepted.

The court instructed the jury that, under the allegations and admissions of the pleadings, the plaintiff was entitled to recover against both defendants, and that the answer to both issues would be "Yes; in the sum of $6,657.13, the amount of the notes declared on, with interest from 12 March, 1886, at 6 per cent interest, and $4.28, amount of costs of protests." *Feme* defendant excepted.

The jury rendered their verdict in accordance with the instruc- (380) tion given. Thereupon, the *feme* defendant moved for a new trial, assigning as error:

1. In that the court refused to dismiss on her preliminary motion to vacate for want of a sufficient cause of action stated against her in the pleadings.

2. In that the court refused to instruct the jury that the plaintiff could not recover against her, and instructed them that the plaintiff was entitled to recover against her.

Motion for a new trial overruled, and the court rendered the following judgment:

"This action having been brought to trial before a jury at this term, upon the issues submitted to them by the court, and the jury for their verdict having found all the issues in favor of the plaintiff, it is now ordered and adjudged that the plaintiff Wm. W. Taylor recover of the defendants Thomas R. Sharp and Gertrude E. Sharp the sum of $6,657.13, amount of the notes declared on, with interest thereon from 12 March, 1886, until paid, at 6 per cent, and for the further sum of $4.28, protest charges, and costs of this action by the plaintiff expended."

From this judgment the defendant Gertrude E. Sharp appealed.

A. W. Haywood for plaintiff.
W. N. Mebane for defendant.

SHEPHERD, J. The single question presented in this appeal is whether the judgment rendered by his Honor was authorized by the facts appearing in the record.

It is a general principle that all matters bearing upon the execution, the interpretation and the validity of a contract are to be determined by the law of the place where the contract is made, and if valid there, it is valid everywhere. *Watson v. Orr,* 14 N. C., 163; *Davis v. Coleman,* 29 N. C., 424; *Anderson v. Doak,* 32 N. C., 295; *Scudder v. Bank,* 91 U. S., 406. An exception, however, is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the incapacity of the domicile attaches to and follows the person wherever he may go. This is not, says *Mr. Justice Story* (Conflict Laws, 103, 104) the doctrine of the common law; and *Gray, C. J.* (in *Milliken v. Pratt,* 105 Mass., 374) after an elaborate examination of the question, concludes that the general current of English and American authorities is in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of the domicile, be deemed capable of making it. This principle has been doubted in the case of a married woman where her contract, made in another State, is sought to be enforced in the State of her domicile, where by the laws of such State she is under a complete common law disability to make any contract whatever. The question, however, does not arise in the present case, as there is nothing to show that the *feme* defendant was domiciled in this State at the time of the execution of the contract sued upon. In the absence of anything to the contrary, the law presumes that she was, at the date of the contract, a resident of the State where it was made.

(381)

The contract was executed in New York, and under the laws of that State (Laws 1884) a married woman may contract as if she were *feme*

sole, except where the contract is made with her husband. This contract was not made with her husband within the meaning of the act above mentioned (*Bank v. Sniffin,* 7 N. Y. S., 520) and was, therefore, valid where made.

It is well settled that our courts will entertain personal actions (382) between citizens of other States where jurisdiction has been obtained by service of process within our limits (The Code, sec. 192), and we are unable to see how the defendant by a mere change of residence can rid herself of liability upon the contract in question. 2 Parsons Cont., 576.

We have very carefully examined the authorities cited by the defendant's counsel, but they fail to convince us that in sustaining the judgment we are contravening any well-settled public policy in this State in reference to the laws of married women. Many phases of the general subject (not free from difficulty) were presented by the counsel, but we have purposely abstained from their discussion, as they are not directly presented by the record. We simply decide that we are of the opinion that this particular judgment should be

Affirmed.

Cited: Wood v. Wheeler, 111 N. C., 234; *Armstrong v. Best,* 112 N. C., 61; *Smith v. Ingram,* 130 N. C., 109; *S. c.,* 132 N. C., 967; *Bank v. Granite Co.,* 155 N. C., 45.

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*W. D. SPRAGUE v. L. N. BOND ET AL.

Contract—Statute of Frauds—Trust—Consideration.

1. S. being the owner of certain lands, conveyed them by deed absolute to B. upon the parol promise of the latter that from the proceeds of any sale the vendee might make, after paying expenses, etc., the vendor should be paid a part: *Held,* not to be within the statute of frauds.

2. While such agreement constitutes no trust, nor passes any interest in the land itself, and while equity would not compel a sale by the vendee, yet where the latter makes a voluntary sale the vendor has the right to call for an account, and to recover his share of proceeds under the agreement.

ACTION tried at Spring Term, 1891, of CALDWELL, before *Hoke, J.*

The plaintiff was introduced as a witness in his own behalf, and testified, after defendant's objection, that in the years 1871 and 1872,

*CLARK, J., did not sit.

(383) and thereafter, he was engaged in entering lands in Caldwell and Burke counties, N. C., when Henry F. Bond, father of the defendant Louisa N. Bond, said his daughter had some $10,000 in bonds, the money on which would soon be available, and, as her agent, said Henry F. Bond agreed to advance the money necessary to take out certain grants. Plaintiff was also to contribute part of the expenses of surveys and certain services in selling said lands, which were to be repaid him; that plaintiff did make outlays and expenditures to the amount of $500 and more, and Henry Bond, as agent of his daughter, the defendant, advanced enough money to perfect and take out grants in fifty-two entries, being 18,000 acres of land, which grants were taken out in plaintiff's name, and are the lands referred to in the complaint; that after the grants were so taken out, said Henry F. Bond said his daughter would feel safer if the plaintiff would convey the lands to her, and by such conveyance the sale and transfer of the lands would be facilitated, and requested plaintiff to convey said lands to his daughter, Louisa N. Bond; that on such request the plaintiff did, in the latter part of 1875, or January, 1876, convey all of said lands to said Louisa N. Bond, under a contract and agreement in parol that said Louisa N. Bond should hold said land in trust to sell the same, and out of the proceeds, when sold, pay plaintiff for his services and expenses, and pay defendant Louisa N. Bond the moneys advanced by her agent in procuring the grants, and divide the residue equally between plaintiff and Louisa N. Bond; that said agreement was one of the inducements to the making of such deed; that Henry F. Bond died in 1881, and some time after his death plaintiff, hearing a sale of some of the lands was about to be effected by Col. S. McD. Tate, one of the defendants, having a power of attorney from Louisa N. Bond, went to Morganton and demanded of Colonel Tate, agent of defendant Louisa, that he account for proceeds of sale under the contract and agreement. Colonel Tate showed plaintiff his deed,
(384) and said he understood his principal, Louisa Bond, was absolute owner of the property; that he would write to her about it. This was the first time plaintiff was ever informed that his claim in the lands was disputed. And that defendant has failed to pay him anything on his claim. This demand was about a year before the sale.

Witness was shown the deed from himself to defendant Louisa Bond and the grants, the deed bearing date 15 January, 1876, and said the deed was made at said time and included all the lands granted. Plaintiff testified further, on cross-examination, that the deed was signed as he intended, and everything was in it that the parties intended should be put in it, and that the contract and agreement as to the trust was in parol and at the time of the execution of the deed.

The court, upon the evidence and the deed and record of grants, here intimated that plaintiff could not maintain his contention in the first issue, or set up the trust claimed, or engraft the same upon the deed by parol, in the absence of any allegation of fraud or mistake. In deference to this intimation the plaintiff suffered a judgment of nonsuit, and appealed.

M. Silver and F. H. Busbee for plaintiff.
S. J. Ervin for defendants.

SHEPHERD, J. We entirely concur with the rulings of his Honor that the plaintiff could not have established any trust in the lands conveyed by him to the defendant. This is conceded by the plaintiff's counsel, and it is, therefore, needless to enter into the consideration of that question.

We are of the opinion, however, that upon the pleadings and evidence, the plaintiff is entitled to an account of the proceeds of the sale of the land in order to ascertain the amount due him as the consideration of the conveyance, and that he may recover the same.

The enforcement of the alleged agreement, *after the sale of the* (385) *land,* does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the land as there was no enforceable trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced. The principle is illustrated by the following cases:

In *Hess v. Fox,* 10 Wend., 436, the plaintiff conveyed his equity of redemption to his mortgagee in consideration of the actual cancellation and discharge of the mortgage indebtedness and a promise to sell the land and pay the surplus, if any, to the plaintiff. The land was sold, and there being a surplus, the plaintiff recovered it in an action of *assumpsit. Savage, C. J.,* after stating that the agreement to sell could not have been enforced, said that "no question can arise as to the validity of the agreement to sell, that was performed, and the remaining part was to pay over the money supported by the consideration of land conveyed to the promisor."

In *Massey v. Holland,* 25 N. C., 197, the plaintiff, being indebted to the defendant, conveyed certain lands to him upon the understanding that he should sell the same, satisfy his claim and pay the surplus to the plaintiff. The land was sold and the plaintiff recovered the surplus in an action of *assumpsit.* The defendant objected to the introduction of parol testimony to prove the agreement, but it was held that it was not

within the statute, the Court remarking that "the plaintiff has not brought his action upon the agreement. He treats the agreement as having been executed, and claims the money which in consequence of that agreement became due to him." See, also, Browne on Statute of Frauds, 117.

Still more directly in point is the case of *Michael v. Foil,* 100 (386) N. C., 178. There "the contract for the sale of the land was in writing; the land itself was sold, but the agreement that if the mineral interest in the land should be sold during the lifetime of the plaintiff he should have one-half of it, was not put in the writing."

The Court said: "If the contract of sale was made subject to this agreement, as an inducement to the contract, the agreement, though in parol, may be enforced. The agreement did not pass or purport to pass any interest in the land, and does not fall within the statute of frauds."

In addition to the authorities cited in the opinion in the foregoing case, we will add the case of *Miller v. Kendig,* 55 Iowa, 174, in which it was held that "a parol agreement by the grantee of land, that in case he sells the land for more than the price paid, one-half of the excess shall be paid to the grantor, does not create an interest in real estate within the statute of frauds." The Court, after stating that the agreement to sell could not be enforced, proceeds as follows: "The agreement entered into between the parties pertained merely to the purchase price. It was to be at least $1,650, and in a certain contingency more than that. The plaintiff shows that the contingency has happened." It was held that he was entitled to recover.

In *Trobridge v. Weatherbee,* 11 Allen (Mass.), 361, it is said that "a parol promise to pay to another a portion of the profits made by a promisor on the purchase and sale of real estate is not within the statute of frauds and may be proved by parol." See also *Mehagan v. Mead,* 63 N. H., 130; *Sherrill v. Hagan,* 92 N. C., 345.

We have examined with great care the cases cited by the defendant's counsel, but in our opinion they do not shake the authority of *Michael v. Foil, supra,* sustained as it is by the general current of judicial decision. The principle there laid down is applicable to the present case. The plaintiff here had the legal title to the land and conveyed it upon (387) an apparently nominal consideration to the defendant. He testifies that the inducement to the making of such conveyance was the agreement that the defendant should sell the land, and when sold he was to be paid for his services and expenditures, and after deducting the amount advanced by the defendant, he was to have one-half of the proceeds of the sale. We think that if the plaintiff can establish such an agreement he will be entitled to recover.

As the land was not sold until 1890, the plaintiff's cause of action did not accrue until then, and is, therefore, not barred by the statute of limitations. This defense was not seriously urged before us.

For the reasons given we think there should be a new trial.

Error.

Cited: Maxwell v. Barringer, 110 N. C., 81; *Sprague v. Bond,* 111 N. C., 426; *S. c.,* 113 N. C., 552; *S. c.,* 115 N. C., 530; *Bond v. Wilson,* 129 N. C., 329; *Bourne v. Sherrill,* 143 N. C., 383; *Faust v. Faust,* 144 N. C., 387; *Brown v. Hobbs,* 147 N. C., 75; *Buie v. Kennedy,* 164 N. C., 300; *Brogden v. Gibson,* 165 N. C., 19; *Walters v. Walters,* 172 N. C., 330.

ANN E. BROWN ET AL. v. T. B. MCKEE, ADMR. OF WILLIAM WALKER ET AL.

Administration—Assets—Parties—Pleading—New Trial.

1. In an action against one surety on an administration bond, it is not error in the court to refuse to make an order to join the other sureties.

2. The admission of incompetent testimony will not be sufficient to warrant a new trial where it is apparent it could work no injury to the party objecting.

3. A judgment by default against an administrator appointed prior to July, 1869, rendered in an action begun in 1882, conclusively fixes him with assets, notwithstanding the complaint upon which the judgment was based failed to allege that he was possessed of assets.

4. The objection that an action upon an administrator's bond was not brought in the name of the State must be made in apt time.

APPEAL at Spring Term, 1890, of MECKLENBURG, from (388) *Philips, J.*

The facts shown and admitted by the pleadings were as follows:

On 30 April, 1858, T. B. McKee administered on the estate of William Walker, deceased, giving as sureties on his administration bond R. R. Rea, J. B. Walker and J. L. Walker. In 1862 J. B. Walker and the defendant W. H. Walker administered on his estate.

On 14 August, 1882, the plaintiff Ann E. Brown and others, the distributees of William Walker, brought an action against T. B. McKee and the sureties on his administration bond, including the defendant W. H. Walker, as administrator of J. B. Walker, in the Superior Court of Mecklenburg County.

The summons in said action was served on the defendant W. H. Walker, administrator, but he failed to appear or file any answer to the complaint.

The cause was referred to the clerk to take and state an account of the estate of William Walker in the hands of said McKee, as his administrator, for the purpose of ascertaining and reporting the amount due to the plaintiffs as distributees of William Walker.

The referee filed his report at the February Term, 1888, of said court, showing a balance of more than $1,200 in the hands of the administrator, with interest thereon from 15 October, 1872, and no exception having been filed the report was at that term of the court confirmed.

The present action was brought against W. H. Walker as administrator of J. B. Walker, and heirs at law and distributees of J. B. Walker on 26 November, 1888, to enforce said recovery.

When the cause was called for trial the defendant W. H. Walker moved the court to make T. B. McKee, and the other sureties on the bond of said McKee, administrator of William Walker, parties to this action, insisting that they were necessary parties to a complete determina-
(389) tion of the matters involved therein. The court refused the motion, and the defendant W. H. Walker excepted.

The plaintiff offered in evidence the record of the suit begun in August, 1882, and rested her case.

The defendant W. H. Walker asked the court to submit issues to the jury raised by his answer to the complaint, and also offered evidence to establish the different defenses therein set up, all of which was objected to by plaintiff upon the ground that the judgment in the case of *Ann E. Brown et al. v. T. B. McKee et al.* was conclusive as to W. H. Walker, administrator, as to all defenses set up by him in said answer; and by the defendants H. K. DeArmond and wife upon the ground that, while the judgment was not conclusive as to the statute of limitations upon said defendants DeArmond and wife, nor as to the defense and denials contained in their answer, the defendant W. H. Walker, administrator, having failed to appear or plead, the judgment was, as to him, an absolute and final judgment, in the sense that it fixed him with assets to pay the debt sued for, and that he could not now be allowed, in this way, to change its nature or effect as an absolute judgment to the prejudice of said defendants DeArmond and wife.

This objection was sustained, and the court refused to submit the proposed issues, or to allow the evidence to be introduced, and the defendant W. H. Walker excepted.

After the argument addressed to the court was begun, the counsel for the defendant Walker, administrator, contended that there was nothing in the record of the action of *Ann E. Brown et al. v. T. B. McKee et al.*

to show that J. B. Walker, the intestate of W. H. Walker, died before 1 July, 1869, or that the defendant W. H. Walker administered on his estate prior to that date, and contended that the judgment on which this action is based was not a final judgment, and not a judgment absolute as to this defendant, but only ascertained the indebtedness of T. B. McKee as administrator of William Walker. Thereupon, (390) an issue was submitted as follows:

"When did W. H. Walker take out letters of administration upon the estate of J. B. Walker?"

The plaintiff and defendant H. K. DeArmond and wife then introduced evidence tending to show that J. B. Walker died in 1862, and W. H. Walker qualified as his administrator in (1862) the same year; also the answer of the defendant W. H. Walker, which admitted that said W. H. Walker made a settlement of the estate of his intestate in the year 1864.

The defendant W. H. Walker duly objected to the evidence. The court overruled the objection, and the defendant W. H. Walker, administrator, excepted. Upon the evidence and the judge's charge in reference thereto, the jury answered the issue as follows:

"At July Term, 1862, of the Court of Pleas and Quarter Sessions of Mecklenburg County."

The defendant Walker asked the court to instruct the jury that the effect of the record of the action offered in evidence by the plaintiff was not a suit upon the administration bond of T. B. McKee, administrator of William Walker, for the reason that it was not instituted by the State on the relation of the parties in interest, but that the same was a suit instituted by Ann E. Brown against the defendants therein named, and that the judgment therein rendered did not fix the defendant Walker with assets. The court declined to give the instructions, but held that said judgment was an absolute judgment against said W. H. Walker, and fixed him with assets. To the refusal of the court to give the instruction prayed, the defendant W. H. Walker excepted. Judgment for the plaintiff against W. H. Walker, administrator and in favor of DeArmond and wife.

The defendant W. H. Walker appealed to the Supreme Court, (391) and assigns as causes of error:

1. The refusal of his Honor to make others parties to the action.

2. The refusal of his Honor to submit the issues and receive the testimony offered by the defendant Walker to establish the defenses set up in his answer.

3. The introduction of parol testimony to show when the defendant Walker administered on the estate of J. B. Walker.

4. The ruling of the court as to the effect of the judgment rendered in the action of *Ann E. Brown et al. v. T. B. McKee, administrator, et al.*

C. Dowd for plaintiff.
G. F. Bason, P. D. Walker, and C. W. Tillett for defendant.

SHEPHERD, J. The first exception is addressed to the refusal of the court to make T. B. McKee, administrator of William Walker, and the other sureties to his administration bond, parties to this action. This exception cannot be sustained. *Flack v. Dawson,* 69 N. C., 42; *Syme v. Bunting,* 86 N. C., 175; The Code, sec. 186.

The second exception is also without merit. The defendant W. H. Walker was sued as the administrator of J. B. Walker, who was a surety on the administration bond of T. B. McKee. He was duly served with process, but failed to appear, and as the matters of defense which he now offers to establish could have been asserted by him in that action, he is concluded by the judgment, and cannot now litigate them.

The third exception is to the admission of parol testimony to show the date of the administration of the said W. H. Walker.

It does not appear that such testimony was introduced, the only (392) case simply stating that "evidence" was admitted upon that point.

Conceding, however, that such testimony was inadmissible, and that the question could only have been determined by the record of the appointment, and that it should have been tried upon inspection by the court, we are unable to see how the appellant was in any way prejudiced.

The only purpose and effect of the evidence was to prove that the said defendant administered prior to 1 July, 1869, and this is clearly admitted by his answer, in which he states that his intestate died in 1862, and that he, as administrator, settled the estate in August, 1864. The exception must therefore be overruled.

The remaining exception involves an inquiry into the nature of the judgment rendered against the said Walker in the former action as administrator. His intestate was one of the sureties on the administration bond of T. B. McKee, and these plaintiffs brought an action on said bond against the principal and sureties. The said Walker, as administrator of J. B. Walker, was made a party defendant, but failed to appear or make any defense whatever. Upon a reference it was found that McKee was considerably indebted as administrator to the plaintiffs, and the report was confirmed and judgment rendered against all of the defendants. It is insisted by the defendant Walker that this judgment did not have the effect of fixing him with assets, and that he is now at liberty to show that he has properly administered the estate, and that the lands of his intestate should be subjected to the payment of the claims of the plaintiffs. While the judgment is somewhat informal, it expressly includes all of the defendants, and the most favorable view in

which it can be considered as to Walker is that it is a judgment against him as administrator. As the administration was prior to 1 July, 1869, this case is governed by the laws existing at that time (The Code, secs. 1476, 1477), and we think it well settled that under the former practice "a judgment against an executor or administrator, (393) whether by default or demurrer, or upon any plea pleaded by an executor or administrator except *plene administravit,* or admitting assets to such a sum, and *rieus ultra,* is conclusive upon him that he has assets to satisfy such judgment." Iredell Executors, 673; Eaton's Forms, Note, 225. In *Ruggles v. Shearman,* 14 Johns., 446, it was held that "if an executor or administrator confesses a judgment or suffers judgment by default, he is estopped from denying assets to the extent of the judgment as far as regards the plaintiff therein." To the same effect are *Triel v. Edwards,* 6 Modern, 368; *Rock v. Leighton,* 1 Salk., 310; *Skelton v. Hawling,* 1 Wilson, 258; *Wheatley v. Lane,* 1 Saunders, 216, and numerous other cases. This doctrine is considered as firmly established by modern writers (2 American Law of Administrators, 792) and is recognized to have been the former law in this State in *McDowell v. Asbury,* 66 N. C., 444. In that case it is said that "where a personal representative is sued, he must protect himself by proper pleading," and the administrator having withdrawn his plea of "fully administered," it was held that a judgment against him for "the debt of his intestate" fixed him with assets. So in *Hooks v. Moses,* 30 N. C., 88, where a judgment was confessed by an administrator before a justice of the peace for the amount of the debt, and nothing was said about assets, it was held in an action upon this judgment that the plea of *plene administravit* was immaterial, as the former judgment was conclusive against the defendant upon that question. The case of *Armistead v. Harramond,* 11 N. C., 339, is not in conflict with the above authorities, as it was there simply held that a judgment against an administrator for the debt of his intestate, while evidence of the debt and of assets, did not, as to the latter, bind his sureties, who were not parties to the action.

It is also contended that the complaint in the former action (394) should have alleged that the defendant Walker was possessed of assets, and our attention was called to the declaration in *Platt v. Robbins,* 1 Johns., 276, which contains such an averment. The case is not in point, as it was an action of debt upon a former judgment suggesting a *devastavit,* which was one of the methods of enforcing a judgment after a return *nulla bona* upon an execution *de bonis testatoris.* Under the former system an action against an administrator for the recovery of a debt due by his intestate, in itself implied a charge that the administrator had such assets; and, as we have seen, it was necessary for him to protect himself against liability by proper pleas. Indeed, it

was common practice to declare simply upon the debt of the intestate, and if there was a judgment by default or on plea as to the assets, the judgment was regarded as fixing them in the hands of the administrator. The manner of enforcing such judgments is elaborately considered in *McDowell v. Asbury, supra,* and need not be repeated here. Suffice it to say that if the sheriff returned *nulla bona* to the *fieri facias de bonis testatoris,* the plaintiff must generally have proceeded by *scire facias* in order to have obtained an execution *de bonis propriis,* and in such proceeding, while the defendant could make any defense arising subsequent to the judgment fixing him with assets (as for instance, their loss or destruction under excusable circumstances), he would be precluded from setting up any matter which could have been pleaded before the rendition of such judgment. The same principle applies in this proceeding, but the only matter which the said defendant relied upon could have been pleaded before the judgment and is therefore inadmissible.

The objection that the former action should have been commenced in the name of the State, would have been good if taken in apt time *(Carmichael v. Moore,* 88 N. C., 29), but cannot avail the defendant under the circumstances of this case.

(395) Our conclusion is that as Walker, administrator, is fixed with assets, and as it is not shown that he and his sureties are insolvent *(Latham v. Bell,* 69 N. C., 135, and *Lilly v. Wooley,* 94 N. C., 412), the land should not be sold and the judgment against the said Walker should be

Affirmed.

Cited: S. v. Pearson, 119 N. C., 874; *Mann v. Baker,* 142 N. C., 236.

JOHN D. BROWN v. T. D. MILLER ET AL.

Chattel Mortgage—Lien—Description of Property.

1. A chattel mortgage upon the mortgagor's "entire crop of cotton to be raised by me or my tenants on all my lands during the year 1889," sufficiently designates the property conveyed to make the instrument operative, and the fact that the land upon which the crop was planted was, while it was growing, recovered from the mortgagor by one claiming under superior title, did not affect the validity of the lien.

2. A subsequent mortgage on same property given to secure advancements of "supplies," there being nothing to show for what purpose the supplies were furnished, did not create a prior lien.

BROWN *v.* MILLER

APPEAL at Fall Term, 1890, of MECKLENBURG, from *Brown, J.*

Action to recover the value of a bale of cotton which, it is alleged, belonged to the plaintiff and was converted by the defendants to their own use. On the trial the plaintiff put in evidence a chattel mortgage proved and registered 23 January, 1889, executed to him by John P. Patterson, whereby the latter purported and undertook to convey to the plaintiff his "entire crop of cotton to be raised by me or my tenants on all my lands during the year 1889," etc. The mort- (396) gagor was examined as a witness for the plaintiff, and testified that "the defendants got the bale of cotton, which is the subject of this controversy, from me in October, 1889." The plaintiff then asked the witness: "On whose land was that cotton raised?" Under objection, the court allowed the witness to say: "On the lands I live on at home, and have been on for fifteen years. The lands were known as my lands. I paid for them as my lands. On 2 February, 1889, I was declared by the court (in an action) not to be the owner." One Fisher obtained judgment in his favor for the land in the action referred to, and afterwards Patterson leased the land from him in June, 1889, and agreed to pay him one bale of cotton as rent, which Fisher directed him to leave at Nesbit's gin. The bale of cotton in question was produced on the lands mentioned, and which Fisher so recovered.

In March, 1889, Patterson executed to the defendants his other mortgage, which was duly registered on the 4th of the same month, to secure a debt due to them for "supplies," which they furnished to him, and the cotton in controversy was embraced by this mortgage. Patterson further testified that he delivered the bale of cotton in question to defendants as the rent he owed Fisher, and directed them to deliver it to him as such rent. Nesbit (who is one of the defendants) took the bale and refused to so deliver it, saying that the defendants wanted it on account of their mortgage debt above mentioned. Patterson said he was willing to this if Fisher was willing. The defendants took the bale, and Patterson the next week delivered to Fisher another bale for the rent due him.

The court submitted to the jury two issues, the first of which was: "Did the defendants wrongfully convert the bale of cotton belonging to the plaintiff as alleged?" The defendants insisted that the court should instruct the jury to respond "No" to this issue, but on the contrary it told them that if they believed the evidence, to respond "Yes," and the defendants excepted. (397)

There was a verdict and judgment for the plaintiff, and the defendants appealed, assigning error as follows:

"1. For admission of evidence objected to as above set forth.

"2. For refusal to charge that, upon all the evidence, the jury should answer the first issue 'No.'

"3. For error in charging that, if the jury believed the evidence, they should answer the first issue 'Yes.'"

G. F. Bason for plaintiff.
Jones & Tillett (by brief) for defendants.

MERRIMON, C. J., after stating the case: The deed of mortgage under which the plaintiff claims title to the bale of cotton in controversy sufficiently designates and identifies the land upon which it was to be produced, and the cotton itself, to render this deed operative and effectual for the purpose contemplated by it. The purpose of this description was not to designate land to which the mortgagor certainly had absolute or perfect title, but the land claimed by him as his at the time he executed the deed, and upon which he intended that himself or his tenants should thereafter produce the cotton crop that the mortgage was intended to embrace. The simple purpose was to identify the land claimed by him as his on which the crop of cotton was to be produced. The mere fact that a third party, after the deed was executed, recovered the land sufficiently described by it, could not affect the sufficiency of the description or the deed. The land described as "my (mortgagor's) land" remained the same. The description, the designation of it, was not destroyed or rendered less certain.

The cotton crop conveyed by the deed was sufficiently designated. It was not an indefinite part of it, but all—"the entire crop of cotton
(398) to be raised by me (the mortgagor) or my tenants on all my lands during the year 1889"—that is, the "entire crop" so raised on the land described as "my (the mortgagor's) lands." The deed identified the land and the cotton crop embraced by it with such definiteness as that the same could be certainly ascertained and known. *Woodlief v. Harris,* 95 N. C., 211; *Gwathney v. Ethridge,* 99 N. C., 571; *S. v. Logan,* 100 N. C., 454.

Nor could the supervenient rights of Fisher, after he recovered the lands from the mortgagor, as the latter's landlord, to rent—the one bale of cotton—render the mortgage inoperative, except to the extent of the rent. As to this, the statute (The Code, sec. 1754) gave the landlord a prior lien for the rent; but the whole cotton crop belonged to the plaintiff, subject only to that lien. As between the plaintiff and the mortgagor the mortgage remained effectual, except as to the rent.

The defendants contend, however, that the mortgagor, Patterson, executed to them in March next after Fisher recovered the land from him a mortgage to secure a debt created for "supplies," which embraced the bale of cotton in controversy, and, therefore, they had good title to the same. This contention is without force. The last mentioned mortgage

was, in effect, a mortgage second to that of the plaintiff as to the cotton crop, including the bale in question. In no aspect of this second mortgage, so far as appears, can it be treated as creating a prior lien in favor of the defendants, as allowed in certain cases by the statute (The Code, sec. 1799). It does not appear how, or for what purpose, or on what account the "supplies" were made by the defendants to the mortgagor. *Rawlings v. Hunt,* 90 N. C., 270, and cases there cited. The defendants further contend that the bale of cotton in question belonged to Fisher, the landlord, and was for the rent due to him from Patterson. We do not think the evidence went to prove that this bale of cotton was delivered to the landlord to pay the rent so due to him. Accept- (399) ing the evidence pertinent as true, it only showed that Patterson, the tenant, at first intended that it should go to pay the rent, but the defendants did not so receive it for the landlord; they insisted that they should have it on account of their mortgage debt; the tenant, their mortgage debtor, consented, and afterwards he delivered to his landlord another and different bale in discharge of the rent due to him. This certainly is the fair and just interpretation of the facts as they appear.

No error.

Cited: Weil v. Flowers, 109 N. C., 217.

THE TOWN OF DURHAM v. THE RICHMOND AND DANVILLE RAILROAD COMPANY AND THE NORTH CAROLINA RAILROAD COMPANY.

Corporation—Statute, Public and Private—Evidence—Case on Appeal—Printing Record.

1. The statute (ch. 82, Laws of 1848-49) incorporating the North Carolina Railroad Company is a private act, and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence.

2. The rules require that the appellant shall print the case on appeal, and where that has been settled by the trial judge, and will exceed twenty printed pages, the Court will order that the appellant, if successful in his appeal, be allowed to tax the costs of the extra necessary printing against the appellee.

3. The attention of trial judges is directed to evils resulting from the insertion of unnecessary matter in cases on appeal, especially when stenographic reports are made of the trial.

APPEAL at Fall Term, 1890, of CHATHAM, from *MacRae, J.*

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

In the argument to the court and jury, the counsel for the
(400) defendants began to read the charter of the North Carolina Railroad Company, being Laws 1848-49, ch. 82. Objection was at once made by plaintiffs, because the charter had not been offered in evidence. The objection was overruled on the ground that it was a public act of which the court would take judicial notice, and his Honor allowed said charter to be read and commented on, both to the court and jury, without the same having been introduced in evidence. The plaintiff excepted and assigned this ruling as error.

John Devereux, Jr., and W. W. Fuller for plaintiff.

D. Schenck, F. H. Busbee, J. W. Graham, and W. A. Guthrie for defendant.

MERRIMON, C. J., after stating the facts: We are constrained to grant a new trial in this case upon the ground that the charter (Acts 1848-49) of the defendant, the North Carolina Railroad Company, is a private statute, and, the plaintiff objecting, the court erroneously allowed the defendants to read and comment upon the same to the jury without having first put it in evidence in a proper way on the trial.

The defendants contend earnestly that this charter is a public statute. It must be conceded that it embraces two or three public statutory provisions, but as to its chief purpose, and in the respects material for which it was read to the jury, it is clearly private and evidential in its nature and application. Its purpose is to authorize and create—not a public or political corporation, but a private one, to extend to individuals, such as purchase and own its shares of capital stock, personal and private advantages. The charter confers corporate powers to enable individuals the more successfully to do and prosecute the important business of
(401) transportation of persons and freights on a large scale and receive compensation therefor, and thus incidentally to extend important public convenience and advantage, which latter is largely the consideration to be paid for the franchises granted to the corporators. The statute, in so far as it confers corporate powers and rights, concerns and pertains to individuals and their business, and thus it has that quality which renders it a private statute. The rights of the public are incident to and grow out of the business of such corporations, and these may be regulated by public statutory provisions to be found in some respects in the charter itself, and in others in separate public statutes. *S. v. Chambers,* 93 N. C., 600, and the authorities there cited; *S. v. R. R.,* 73

N. C., 527. See also *Hughes v. Comrs.,* 107 N. C., 598; *R. R. v. R. R.,* 106 N. C., 27; *United States v. Trinidad,* 137 U. S., 160; *R. R. v. Fifth Baptist Church,* 108 U. S., 317.

A private statute may embrace one or more public statutory provisions, and so, also, a public statute may embrace private statutory enactments, but such intermixture of statutes does not change or modify their respective natures. Whether the statute, or some enactment in it, is public or private, is a question of law, which the Court must determine, in the absence of statutory enactment declaring and settling its nature. *Humphries v. Baxter,* 28 N. C., 437; *S. v. Wallace,* 94 N. C., 827; Pot. Dwar. on Stats., 53, and notes.

It was insisted on the argument that, inasmuch as the charter contained public statutory provisions, it thereby became and therefore is a public statute. As we have just said, such intermixture could not change the nature of a statute or a provision contained in it. This Court has repeatedly decided that statutes containing public statutory provisions were private statutes. The charter of the Bank of North Carolina (Haywood Manual, 61) clearly contained such pro- (402) visions, and in *Bank v. Clark,* 8 N. C., 36, it was held expressly that it was a private statute. A statute (Laws 1866-67, ch. 80) in respect to "The Washington Toll Bridge," expressly referred to and made applicable to it in certain respects the public statutes (Rev. Code, ch. 101), but this Court held that the statute was private. *Comrs. v. Bridge Co.,* 61 N. C., 118. To the same effect is *Humphries v. Baxter,* 28 N. C., 437.

The charter in question provides that the State shall be a stockholder of the corporation created by it, and it is such stockholder for a large amount. It was insisted that this made the statute public in its nature. We do not think so. The State, laying aside its sovereign character for the purposes of the corporation, put itself upon a footing with other corporations, except that it has advantages conceded to it on account of the large amount of stock it owns. That the State is a stockholder does not necessarily render the corporation a public one. *Marshall v. R. R.,* 92 N. C., 322; *Bank v. Clark,* 8 N. C., 36. The State was a large stockholder in the bank whose charter was held in the last case cited to be a private statute. *Connor v. Arkansas,* 15 How., 304.

It was further insisted that the statute was published among the public statutes, and therefore it is public. There is no provision in it or elsewhere directing that it be so published. That it was, could not alter or affect its nature in legal contemplation.

It is clear, in our judgment, that the statute in question is private in its nature and purpose in the respects as to which the appellants read and commented upon to the jury. It should have been put in evidence

on the trial. It is not questioned that private statutes must be pleaded (The Code, sec. 264), and that they must be proven when they become necessary as evidence.

It is strange, indeed, that the appellees failed to put the statute
(403) in question in evidence, especially as it was so convenient to do so. They simply needed to read it from the statute book (The Code, sec. 1339). The evidence afforded by it was material. The plaintiff insists upon its rights to have the material evidence produced on the trial according to law. This was not done, and therefore it is entitled to a new trial and we so adjudge.

We do not deem it proper to decide several other interesting questions presented by the record, because to do so might unduly prejudice one party or the other on the next trial.

Error.

After the opinion in this case had been filed, the appellant made a motion for an allowance for costs of extra printing.

John Devereux, Jr., for the motion.
F. H. Busbee contra.

CLARK, J. This is a motion by the appellant to retax the bill of costs in this Court by allowing "the actual cost of printing the record and brief." Rule 29 requires the "case on appeal" to be printed, and such other parts of the record as may be necessary to present the exceptions made, the designation of such parts to be made by counsel of the appellant. If, however, more than twenty pages are printed, the costs for the excess can only be allowed by order of the Court (Rule 31), for which purpose this motion is now made. An inspection of the transcript shows seventy-four pages printed. Of these sixty-eight pages are in the "case on appeal" settled by the judge. As to this the appellant was required by the rules to have printed, and could not omit any part thereof. It is but just that he should be allowed for said sixty-eight pages, deducting the twenty pages already taxed, to wit, forty-eight pages additional at sixty cents per page. The other six pages were
(404) not embraced in the "case on appeal," presented no exception to be reviewed, and were unnecessarily printed. This case differs from *Roberts v. Lewald, post,* 405, in which the case on appeal was only two pages, and the winning party having been allowed the cost of printing twenty pages, further allowance was denied.

In this connection it is proper to note that the "case" seems to have been made up from the stenographer's notes, and instead of making a brief of the evidence, or of such parts of the evidence as are material, the

entire evidence seems to have been put into the case. This may save labor to the judge, but is an unnecessary expense to parties, and is not a "case settled" within the meaning of the statute. As the use of stenographers will become more common in our courts, the attention of the trial judges should be especially called to this, which if not adverted to, is likely to become an evil and an oppression. It is not intended that the transcript of the "case on appeal" should become a dumping ground for the entire evidence and minutiæ of the trial below. The parties, if they agree on the case, or the judge, if he settles it. should eliminate the points excepted to, and only send up in connection with them so much of the evidence or other matter occurring on the trial as may be necessary to present and illustrate the matter excepted to. The judge does not do his duty in "settling the case" unless he keeps this in view. Parties ought not to be taxed and oppressed either with the copying by the clerk below or by the printing in this Court of a vast mass of testimony utterly irrelevant so far as concerns the exceptions to be reviewed. This is said, not in criticism of the careful and accurate judge who tried this particular cause, but because this is a "case" somewhat more lengthy than was necessary, which was evidently due to reliance on stenographer's notes, and to prevent, by a timely caution, what is already a growing evil from becoming a serious and fruitful source of unneces- (405) sary and oppressive costs.

As to the brief of appellant, he has already had taxed for his benefit ten pages, as allowed by Rule 37. We do not think that more was necessary, and that, with a proper regard to condensation and expense, the forcible and successful argument of the appellant could have been put within that compass. If he chose to elaborate it beyond that limit, it must be at his own "cost and charges."

Motion allowed.

Cited: Wool v. Saunders, post, 743; *S. v. Barringer,* 110 N. C., 529; *S. v. Womble,* 112 N. C., 864, 5; *Bank v. Bridgers,* 114 N. C., 107; *Logan v. R. R.,* 116 N. C., 944; *S. v. Locklear,* 118 N. C., 1160; *Simmons v. Allison,* 119 N. C., 564; *Mining Co. v. Smelting Co., ib.,* 416; *Hancock v. R. R.,* 124 N. C., 228; *Dargan v. R. R.,* 131 N. C., 630; *Parker v. Exp. Co.,* 132 N. C., 129; *S. v. Patterson,* 134 N. C., 615; *Sigman v. R. R.,* 135 N. C., 182; *Cressler v. Asheville,* 138 N. C., 486; *Hill v. R. R.,* 143 N. C., 597; *Lumber Co. v. Privette,* 179 N. C., 3.

R. R. ROBERTS ET AL. v. K. LEWALD ET AL.

Printing Record—Costs—Appeal.

1. The costs of preparing and transmitting the transcript of a record on appeal to this Court are not costs in this Court, but in the court below, where the necessary orders and judgments for their payment and recovery should be entered.

2. The successful party on appeal will not be allowed to recover costs for printing record in excess of the amount prescribed by Rule 31, except in extraordinary cases where the necessity for such printing is made to appear.

MOTION of plaintiff in this Court to retax costs.

J. W. Hinsdale for petitioners.
T. H. Sutton for defendants.

CLARK, J. The plaintiffs, in whose favor this cause was decided at last term (107 N. C., 305), move to retax the bill of costs so as to allow—

1. The sum of $29.05, paid the clerk of the court below for (406) preparing the transcript of the record on appeal.

2. The sum of $24.20, paid by appellant for printing the transcript, in excess of the amount already allowed and taxed for printing the maximum of twenty pages, under Rule 31.

The Code, sec. 551, requires the clerk below to make out and transmit the transcript of the record to this Court, but not unless his fees therefor are paid by the appellant. *Andrews v. Whisnant,* 83 N. C., 446; *Bailey v. Brown,* 105 N. C., 127. Such costs, like that of the filing and justification of the appeal bond and of transmitting the record here, and the like, are no part of the costs in this Court. They accrued anterior to docketing the case in this Court. While no part of the costs of the trial, they are none the less a part of the costs below, and their recovery must be adjudged by appropriate orders of the judge of that court.

The Rule (29) requires the printing of the "statement of case" and of "the exceptions appearing in the record to be reviewed by the Court." Rule 30 excepts criminal cases and appeals *in forma pauperis.* Rule 31 restricts the amount of printing allowed to be recovered in the costs to a maximum of twenty pages of the transcript of the record, unless otherwise specially allowed by the Court; and the Court by Rule 32 may order additional parts of the record to be printed. From this it will be seen that the rules only require the statement of the case on appeal, and such other parts of the record as present exceptions for review, to be

printed; and that the Court deemed, as a general rule, that twenty pages would be amply sufficient for that purpose, reserving, however, the right to allow, in extraordinary cases, the appellant, if successful, to recover for the printing of a greater number of pages. In proper cases this the Court will allow; but such cases are, in fact, unusual. We learn from our clerk that the average cost of printing transcripts on appeal is between four and five dollars, the cost in a majority of cases being less than that, and in a few above it. In looking into (407) the printed record in the present case, we find that the "statement of case on appeal" occupies only two pages. A most liberal allowance for "other matters required to be reviewed by the Court" will not entitle the plaintiff to recover in all for more than the twenty pages for which he has already been allowed. The plaintiff, in causing fifty-six pages to be printed acted improvidently, and cannot expect the appellee to bear the expense of the unnecessary printing. While the Court, in all proper cases, will certainly allow for printed matter in excess of twenty pages, it will not tax the losing party with needless expense. The rule requiring (except in criminal and pauper appeals) the printing of the "case on appeal," and the other parts of the record necessary to be reviewed, is a necessity, and on an average costs in each case less than one-third of the tax fee formerly allowed. It is a rule that benefits litigants and their counsel, as well as the Court, by permitting the more careful as well as the more prompt consideration of appeals. But the Court will not allow a beneficial and necessary requirement to be abused by saddling parties with unnecessary expense.

Motion denied.

Cited: Durham v. R. R., ante, 404; *Edwards v. Henderson,* 109 N. C., 84; *Mining Co. v. Smelting Co.,* 119 N. C., 416; *Hancock v. R. R.,* 124 N. C., 228; *Dobson v. R. R.,* 133 N. C., 625; *Waldo v. Wilson,* 177 N. C., 462.

CHARLES H. SIMPSON ET AL. v. T. H. PEGRAM ET AL.

Contract—Evidence—"Letter Heads" and Advertisements.

Upon an issue whether goods had been delivered to defendant as upon consignment, or upon an absolute sale—the letter containing the order being indefinite on this point—the "letter-head" of the defendant, printed upon the paper upon which the order was written, in which he described his

business as "General Merchandise Broker" and solicited consignments, was some evidence to be submitted to and considered by the jury in determining the nature of the transaction.

(408) APPEAL at February Term, 1891, of FORSYTH, from *Bynum, J.*

The plaintiffs brought this action to recover the value of a considerable quantity of flour from the defendant Pegram and his codefendants, who are his assignees. Pegram ordered from the plaintiffs the flour in question by letter, of which the following is a copy:

OFFICE OF
T. H. PEGRAM, JR.
General Merchandise Broker.
CONSIGNMENTS SOLICITED.
And Dealer in Wagons, Grain, Hay, Mill Feed, Etc.
WINSTON, N. C., Nov. 14, 1887.

Messrs. Simpson, Bass & Co., Richmond, Va.

GENTS:—Please send me the following:

100	bags	98lb.	Bob White	50	Bbls.
100	"	49	" "	25	"
200	"	24	" "	25	"
400	"	12	" "	25	"

Ship as soon as possible, as I need the goods right now. Want fresh goods.

Yours truly, T. H. PEGRAM, JR.

The plaintiffs contend the flour was consigned to defendant Pegram and not sold to him.

The defendants admit the flour in controversy was received by the defendant Pegram, and the most of it was in his possession at the time of his assignment to Buxton and Grogan; passed into the hands of the assignees, and the proceeds of said flour is now in their hands, but the defendants contend the flour was bought by defendant Pegram and not consigned.

The following issue was submitted to the jury: "Was the flour in controversy in this action consigned to the defendant Pegram by plaintiffs?"

The plaintiffs offered in evidence and read to the jury the letter (409) above set forth, and rested their case.

His Honor instructed the jury that, upon the evidence offered by the plaintiffs they should render a verdict for the defendants and answer the issue "No." Plaintiffs excepted.

There was a verdict for the defendants, and thereupon the court gave judgment in favor of the plaintiffs against the defendant Pegram for the value of the flour, and that defendant assignees go without day. The plaintiffs having excepted, appealed.

R. B. Glenn for plaintiffs.
J. S. Grogan for defendants.

MERRIMON, C. J., after stating the case: In the course of the business of trade, "letter-heads," "bill-heads," and like advertising mediums, when identified and connected with the party using and giving them out for his own purpose and advantage, have point and significance, and the more when they appear directly in connection with and give or reasonably may give cast and meaning to business correspondence and transactions in their nature uncertain and indeterminate and requiring explanation as to their meaning and purpose. They may and oftentimes ought to be taken as indicative and explanatory of the correspondence or transactions left uncertain and imperfect without them, and have more or less weight according to their nature, connections, applications, bearing and the circumstances. Oftentimes, the very purpose of the use of them is to give the public, as well as individuals, notice of the advertiser's business, its nature, where it is carried on, and to invite correspondence, business and trade transactions.

When a person thus holds himself out—declares the nature of his business and purpose to another person with whom he deals, in the absence of explanation in some way appearing to the contrary—
the reasonable inference is that his contract, the transaction per- (410)
tinent to his business, was of the nature contemplated by that
business thus made known. And that he thus made known his business may, in a proper case, be shown by any competent evidence. Thus, if such person should, under a "letter-head" declaring the nature and place of his business, write and send a letter to a person engaged in a business at a distance from him, with whom he wished and proposed to have a business transaction pertinent to his business, without particularly specifying its nature and terms, and a transaction accordingly took place, the inference would be that it was such as his business contemplated, and the letter, including the "letter-head," would be competent evidence of the fact in a proper case. The true office of such evidence would be "to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implication and presumptions and acts of a doubtful and equivocal character; and to fix and explain the meaning of the words and expressions of doubtful or various senses. On this principle the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." 2 Gf. Ev., sec. 251. In the notes to *Wigglesworth v. Dollison,* 1 Smith's Leading Cases, 300, it is said, "The usage of an individual in his own business as to the manner of performing it and the like, if known to the party dealing with him, is competent to show that the contract was on those terms." *Norris v. Fowler,* 87 N. C., 9.

In the case before us the defendant Pegram wrote to the plaintiffs immediately, under a printed "letter-head," stating the character of his business—that of a "General Merchandise Broker"—and soliciting "consignments" for the purpose of his business. The letter was in no
(411) wise inconsistent with such business purpose. It was in material respects indefinite in its terms. It did not contain a proposition to purchase goods or to pay for the same presently or in the future—it simply asked that the goods specified be sent to him promptly. By his letter, he represented to the plaintiffs that he was such broker—that he desired consignments of goods for the purpose of his business—he asked that certain goods pertinent for his business be sent to him at once. Taking his representations as to his business—his requests—the whole together constituted evidence to go to the jury tending to prove that he wished and intended that the goods be consigned to him to be sold, not as his own, but as the plaintiffs', in the course of his business, and that the plaintiffs so understood, intended and agreed, and sent him the goods accordingly. Pegram's business as "General Merchandise Broker" did not by its nature imply that he purchased or took title to the goods he sold; on the contrary, it might be that he sold such merchandise for one person to another for compensation, and to that end, and to facilitate his business, he "solicited" consignments of goods. He sent his letter-head in connection with and as part of his letter to the plaintiffs, and the whole constituted evidence of his contract with them and tended to prove that the flour in controversy belonged to them. The court should have so instructed the jury, leaving them to determine its weight.

Error.

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(412)

JOHN L. HINTON v. GRIFFIN PRITCHARD.

Appeal—Rules 5, 17 and 28.

Where the appellant fails to docket his appeal during the terms at which, under the statute and Rules of Court, it should be docketed, it will be dismissed on motion, notwithstanding the appellee did not docket the certificate and dismiss the appeal, as he might have done under Rule 17.

MOTION to dismiss appeal.

E. F. Aydlette and W. J. Griffin for appellant.

W. D. Pruden for appellee.

CLARK, J. The appellee moves to dismiss the appeal on the grounds:

1. That the record has not been printed, as required by Rule 28.

2. That the appeal was not docketed at the Fall Term, 1890, of this Court, as required by Rule 5, the judgment therein having been rendered prior to the beginning of said term.

3. That the appellant has filed no appeal bond.

The appellant makes no defense as to the first ground assigned. As to the second, he files an affidavit of his counsel that, though the judgment was rendered and the case on appeal was settled by the judge prior to the beginning of the Fall Term of this Court, he omitted, in the press of business, to notify his client (the appellant) till after the docket of the district had been called, and when it was too late to have the cause argued at that term. The appeal was docketed here 23 January, 1891. If this excuse were entitled to any consideration it is sufficient to say that, although the hearing of that district had passed, as the appellee had not docketed and dismissed the appeal as entitled (413) to do (Rule 17), it was still the privilege and the duty of the appellant to docket his appeal during the Fall Term of this Court. *Porter v. R. R.*, 106 N. C., 478.

As to the third ground of the motion, the appellant has not offered to file a bond, or make a deposit in lieu thereof, which the court is authorized in its discretion, to permit to be done. Acts 1889, ch. 135.

On either one of the grounds assigned in his motion, the appellee is entitled to have the

Appeal dismissed.

NOTE.—*Joyner v. Hines* and *Whitehead v. Blandiford*, from Pitt, and *Rodman v. Archbell*, from Beaufort, were dismissed at this term upon same ground.

Cited: Pippin v. Green, 110 N. C., 462; *Causey v. Snow*, 116 N. C., 498; *S. v. Deyton*, 119 N. C., 882; *S. v. Telfair*, 139 N. C., 556; *Mirror Co. v. Casualty Co.*, 157 N. C., 30; *Howard v. Speight*, 180 N. C., 654.

R. H. PARDUE AND WIFE v. ROBERT GIVENS ET AL.

MOTION by plaintiff in Supreme Court, where the cause was pending, for a writ of *venditioni exponas* to issue for the purpose of selling the more valuable shares in a partition proceeding, which were charged with the payment of certain sums for owelty of partition.

D. A. Covington for petitioner.
R. H. Battle and S. F. Mordecai, contra.

Per Curiam: This case is governed by the decision in *Herman v. Watts,* 107 N. C., 646, and, therefore, let it be entered.
Motion denied.

(414)

ALBERT PURCELL v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Common Carrier—Railroad—Contract—Tort—Damages—Negligence—Pleading—Jurisdiction.

1. It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for.

2. A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by the statute (The Code, sec. 1963) may bring an action on contract, or in tort, independent of the statute.

3. If the tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given.

4. Where the plaintiff alleged in his complaint and offered testimony tending to show that he purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and departure of its trains at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff: *Held,* (1) the complaint does set forth a cause of action in tort, of which the Superior Court had jurisdiction; and (2) the plaintiff was entitled to an instruction that, if the jury found the facts alleged to be true, he would be entitled to punitive damages, in the absence of sufficient excuse shown by the defendant.

APPEAL at Fall Term, 1890, of ALAMANCE, from *MacRae, J.*

PLAINTIFF'S APPEAL.

The material portions of the complaint are—
"That on 21 September, 1889, the plaintiff purchased from defendant's agent at Haw River a ticket to Burlington, and thereby the

defendant contracted with the plaintiff to receive him on its pas- (415)
senger train as a passenger from Haw River station to Burlington station, and for the fare as paid as aforesaid; that said ticket specified that it was good for that day and train only, and was purchased for the regular passenger train due on its western trip at Haw River at an early hour in the morning of said 21 September, 1889; that the plaintiff received said ticket and went upon the platform at the depot at Haw River to the place where the defendant is accustomed to receive and discharge its passengers, just before the time published by the defendant for the arrival and departure of its regular passenger train, which is due and passes said depot about five o'clock every morning, and remained upon or near said platform until the said train did arrive, which occurred about six o'clock a. m.; that when the said train did arrive it made no stop at Haw River station at all, but ran by said station with great speed, not allowing any passengers to get upon it, and leaving the plaintiff standing and remaining at said depot, to his great disappointment, annoyance and damage, in the sum of $500, and hence he brings this suit. Wherefore, the plaintiff demands judgment for the sum of $500 damages and for the costs of this action."

The material parts of the answer are—

"That the train is composed of freight cars, a combination car, at one end of which is used as a second-class car, one first-class car and a Pullman sleeper; that this train seldom carries more than seven or eight passengers outside of the Pullman sleeper, that on the morning of 21 September, 1889, when this train reached Haw River it was crowded with passengers to its full capacity, and that it would have been unsafe to the passengers aboard and those desiring to get on at Haw River to have stopped and taken on those proposing to go to Burlington, which crowd, as defendant is informed and believes, amounted to near one hundred persons; that the defendant was not apprised of this unexpected increase of passengers in time to provide necessary or (416) adequate carriage for them."

Defendant denies that the plaintiff was damaged $500, and says that it is informed and believes that the plaintiff was intending to go to Burlington to attend Robinson's circus, which gave an exhibition there that day, and that the only loss to plaintiff was the failure to see the circus; that the circus did not open until about two o'clock p. m., and was only four miles off, and the public highway, at that season of the year was in the best condition, led from Haw River to Burlington, and the latter place could easily have been reached by said highway between the hours of five o'clock a. m. and two o'clock p. m. by any ordinary pedestrian without inconvenience or loss.

Defendant further says, that the amount of damage recoverable under the circumstances set out in this answer, but which do not appear on the face of the complaint (if recoverable at all) are within the jurisdiction of a justice of the peace, and that this court has no jurisdiction of this action.

There was evidence offered by each party tending to support their respective contentions.

The plaintiff asked the court to charge the jury that if they believed that the defendant stopped its train at Mebane and received and discharged passengers, and also at Graham and there received twelve or fifteen passengers and discharged two or three, and that there was room, standing or sitting, for fifty or sixty persons at the time the train passed Haw River, and that a part of the tickets were sold to persons at Haw River the evening before, and in due time to communicate with the officers of the company, then to run by, as is shown in this action, is such willful disregard of the rights of the plaintiff as would entitle him to recover punitive damages. This prayer was refused, and plaintiff excepted.

(417) The court instructed the jury that, upon the testimony they would not be warranted in finding the defendant guilty of such a degree of negligence as indicated a reckless indifference to consequences, oppression, needless caprice, willfulness or other cause of aggravation as would entitle plaintiff to punitive damages. The measure of damages upon the admitted facts, or those proven, if the jury believed the testimony, would be the price paid for the ticket, fifteen cents, and the amount paid for another conveyance to Burlington, twenty-five cents.

There was a verdict for plaintiff, assessing his damages at forty cents, and from the judgment thereon he appealed.

J. A. Long for plaintiff.
D. Schenck and F. H. Busbee for defendant.

CLARK, J. The Code, sec. 1963, provides: "Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and the junction of other railroads, and *at usual stopping places established for receiving and discharging way passengers* and freight for that train, and *shall take, transport* and discharge such passengers and property at, from and to such places on the due payment of the freight or fare legally authorized

therefor, and *shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.*" For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges v. R. R.*, 105 N. C., 170) but he could elect to sue in tort for the injury and the breach of public duty (existing independent of the statute) by the willfulness or negligence of defendant. Bishop Noncon- (418) tract Law, secs. 73 and 74; Redfield Carriers, sec. 422; *Tallon v. R. R.*, 2 El. & El., 844. If the tort was committed by mere negligence of the defendant as simple carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, and as no special damages were alleged and shown other than obtaining another conveyance the measure of damages, as laid down by the court, to wit, the price of the ticket and of procuring such other conveyance—forty cents in all—would have been correct. But if the conduct of the defendant was willful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition.

Railroads are granted valuable franchises and privileges by virtue of the State's right of eminent domain. On their part they assume correlative obligations and duties to the public and become *quasi*-public servants. They are not granted such great and unusual privileges to the sole end that they may be operated for the mere pecuniary benefit of the corporation, and at the arbitrary pleasure and will of their managers and employees. It is well recognized that they are subject to proper regulation, supervision and control by public authority, and that they owe duties to the individuals who may wish to ship goods or travel over their lines. When the defendant advertised its schedule and the plaintiff bought a ticket and presented himself at the advertised time at a regular passenger station of the road, he had the right to be taken aboard the cars on their arrival at that point. In running its cars by the station without stopping the defendant committed a breach of public duty—a tort. If such breach were mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves which rendered it unsafe to take a greater number aboard, and the company could not by reasonable diligence have increased the number of cars, then the plaintiff would be held to recover only the bare compensatory damages laid down. If, however, the defendant, (419) having advertised for passengers for that train, by reasonable diligence could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but regardless of its duties and of the rights of those whom it had invited to leave their ordinary avocations and present themselves at its regular station for passage, ran its train by the station without stopping, or if there was room in the cars

for fifty or sixty persons additional, and the train passed by the station without taking on at least as many as it had accommodations for, then the defendant did display a gross and willful disregard of the rights of the plaintiff, which entitled him to recover punitive damages. There was evidence to justify, if believed, the state of facts recited in plaintiff's prayer for instruction, and it was error to refuse to grant it. Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and willful neglect of the duties it has assumed and such disregard of the rights of others. Yet such is the effect if, without adequate excuse, it should be allowed so to act, with no other penalty than refunding the price of the ticket and the price paid for another conveyance, since the latter would be demanded in very few cases and only when the destination is at a short distance. The effect of such ruling would be to license the common carrier to furnish cars or not, and to stop at its regular stations or not, at its arbitrary pleasure and not as a duty required by law. The refunding of the price of the ticket would amount in most cases to nothing, as the passengers would usually buy a ticket by the next train. Yet the inconvenience, annoyance and injustice to the traveling public by such detentions would be great, and difficult to estimate.

A case exactly in point is *Heirn v. McCaughan,* 32 Miss., 1, (420) where it is held that exemplary damages were recoverable against a common carrier (there, a steamboat company) in an action of tort for violation of duty in willfully refusing to land its vessel and receive the plaintiff as a passenger according to its advertisement. In *R. R. v. Hurst,* 36 Miss., 660, which was a case somewhat similar, where the train ran by the regular station without stopping to put off (instead of to receive), a passenger, the Court affirmed the case last cited, and said it is "the right of the jury in such cases to protect the public by punitive damages against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It is the duty of a common carrier, especially where it has a monopoly, to provide sufficient cars for the transportation of all passengers, as well as for the carriage of all freight which its invitation naturally brings to it, as was held in *Branch v. R. R.,* 77 N. C., 347. Indeed, the identical facts of the present case are cited by *Judge Rodman* as a hypothetical illustration in that opinion (p. 351).

No regard for its own profit or convenience will justify the corporation in having only sufficient cars for the ordinary amount of freight and travel, leaving the public to bear the inconvenience and loss, when on unusual occasions the volume of business may swell beyond the aver-

age. Common carriers could not be held liable for an unforeseen and extraordinary rush of business not within reasonable calculation, but when the additional volume of travel or freight is such as with reasonable foresight could be expected, it is the duty of the company to have extra cars furnished. With the modern facilities of telegraph and telephone, the occasion of an unusual number of passengers or quantity of freight can be promptly notified and provided for. If this is not done, it is gross and willful negligence, and the company should not be allowed to find its profit in a willful and reckless disregard of (421) the rights of the public and of its own duties.

It may be that, on the whole testimony, the defendant could show sufficient matter of excuse, but the plaintiff was entitled to have the phase of the evidence set out in his prayer for instruction presented to the jury. Taking that evidence to be true, nothing else appearing, he was entitled to recover punitive damages.

Per Curiam. Error.

DEFENDANT'S APPEAL.

When the complaint and answer were read, the defendant demurred *ore tenus,* and moved for judgment because the complaint did not state facts sufficient for a cause of action, in that no amount was alleged to have been paid for a ticket, no amount claimed for transportation to destination, and no special damages claimed, and that no exemplary damages could be recovered for breach of contract.

Motion overruled. Defendant excepted.

The defendant gave notice of a motion to dismiss for want of jurisdiction, which was reserved till after the evidence was in.

Upon the close of the evidence the defendant renewed its motion to dismiss for want of jurisdiction:

1. Because the complaint does not mention any amount of money demanded, or other damages which plaintiff is entitled to recover in this form of action, in that it does not specify any amount paid for a ticket; that it does not claim any amount for a substituted conveyance; that it does not allege any special damages.

2. That the complaint, as explained by plaintiff's evidence, shows on its face that the Superior Court has no jurisdiction of this action.

Motion denied. Defendant excepted, and appealed from the judgment. (422)

CLARK, J. The ruling of the court below was correct in both particulars. The defendant's demurrer and motion to dismiss were based upon the mistaken idea that the action was necessarily for breach of contract. It is true that the plaintiff might have elected to have sued in contract,

and if so, he should set out the price paid for his ticket, and the measure of his recovery would have been the price paid for the same, the cost of procuring another mode of conveyance to his destination, and such other special damages, if alleged, as were the direct and necessary consequences of the breach of contract.

But it is also equally true that the plaintiff could have sued in tort (Bishop Noncontract Law, secs. 73, 74; Thompson on Carriers, 544; Redfield on Carriers, sec. 414), and it is clear that such was his intention here. The gravamen of his complaint is that he "went to the passenger depot just before the time published by the defendant for the arrival and departure of its regular passenger train, which is due and passes said depot about 5 o'clock every morning, and remained upon or near said platform until said train did arrive, which occurred about 6 o'clock a. m.; that when said train did arrive it made no stop at Haw River station at all, but ran by said station with great speed, not allowing any passengers to get upon it, and leaving the plaintiff standing and remaining at said depot, to his great disappointment, annoyance, and damage in the sum of $500, and hence he brings this suit."

When a passenger, while traveling on the cars, is injured by negligence of the carrier, he can sue either for the breach of contract of safe carriage or in tort for the negligence. *Craker v. R. R.*, 36 Wis., 637, and the cases cited. And in a case where the passenger was carried past (423) his destination, it was held that the action would be deemed founded in tort, unless it plainly appeared that the breach of contract was the gravamen of the complaint; that "the action will be regarded in tort or contract, having regard to the character of the remedy the facts indicate, and the most complete and ample redress which, upon the facts stated, the law can afford," and that the allegation of "the contract of carriage is a mere inducement to the action to show that the defendant was lawfully there," but that the point of grievance is the wrong done the plaintiff and the violation of public duty by the common carrier. *R. R. v. Hurst*, 34 Miss., 661. A case exactly in point, however, is *Heirn v. McCaughan*, 32 Miss., 1, in which it is held: "An action against a common carrier for a failure to stop at a regular station and take on board a passenger, according to advertised schedule, is founded in *tort*, and not on a special contract, it being for a violation of a general duty to the public."

Even had the plaintiff alleged the price paid for the ticket (which was not necessary in the action for tort), it would not have been conclusive that the action was in contract; for the facts alleged in the complaint, taken as a whole, show that the plaintiff was not seeking to recover in contract for the pittance paid for his ticket, but for the wrong done him by the breach of public duty and the willful disregard of his

rights by the defendant in not allowing him to get on the train at its regular depot, but "running its train by without stopping, and leaving him standing and remaining at said depot, to his great disappointment, annoyance, and damage in the sum of $500."

It is clear that whatever merits the evidence might indicate, as a matter of pleading, the plaintiff's action was in tort; that the Superior Court had jurisdiction, and that the complaint did not fail to state a cause of action, in that (as defendant demurred) the price of the ticket, special damages and other matter which would have been proper in an action *ex contractu* were not alleged. Indeed, the whole (424) subject has been so recently considered in *Bowers v. R. R.,* 107 N. C., 721, that we might have contented ourselves with a bare reference to that case in which *Merrimon, C. J.,* says: "Obviously, these words were intended to allege more than a simple breach of the contract—a tort—a 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 pleading should be upheld and the jurisdiction sustained."

Under the former system of practice, the pleadings were construed most strongly against the pleader, but now the statute (The Code, sec. 269) requires them to be "liberally construed, with a view to substantial justice between the parties."

The case of *Hannah v. R. R.,* 87 N. C., 351, relied upon by the defendant's counsel, is really, it seems to us, an authority against him. There the plaintiff alleged that he had been wrongfully put off the cars after having bought and paid for his ticket. The Court held that it was an action for tort, but that, the plaintiff having died before judgment, the action abated as to the punitory damages for the technical assault (The Code, sec. 1491 [2]), and that, treating it as an action *ex contractu* to recover the price of the ticket, the amount stated was within the jurisdiction of a magistrate. The demurrer to the jurisdiction, and for failure to state a cause of action in the present case, is based entirely upon the alleged insufficiency of the complaint, treating this as an action on contract. The measure of damages, treating it as an action in tort, is considered in the plaintiff's appeal.

Per Curiam. No error.

Cited: Hood v. Sudderth, 111 N. C., 222; *Brooks v. R. R.,* 115 N. C., 625; *Hansley v. R. R., ib.,* 614, 618; *S. c.,* 117 N. C., 568, 572; *Solomon v. Bates,* 118 N. C., 315; *Cable v. R. R.,* 122 N. C., 900; *Thomas v. R. R., ib.,* 1006; *Richardson v. R. R.,* 126 N. C., 102; *Carter v. R. R., ib.,* 442; *Smith v. R. R.,* 130 N. C., 312; *Story v. R. R.,* 133 N. C., 62; *Wilson v. Brown,* 134 N. C., 407; *Coleman v. R. R.,* 138 N. C., 354; *Hutch-*

inson v. R. R., 140 N. C., 127; *Wilson v. R. R.*, 142 N. C., 340; *Blackmore v. Winders*, 144 N. C., 216; *Williams v. R. R., ib.*, 503; *White v. Eley*, 145 N. C., 37; *Stewart v. Lumber Co.*, 146 N. C., 69; *Peanut Co. v. R. R.*, 155 N. C., 153, 157; *Bank v. Duffy*, 156 N. C., 87; *Brown v. R. R.*, 174 N. C., 696.

(425)

J. T. BEATTIE v. THE CAROLINA CENTRAL RAILROAD COMPANY.

Condemnation of Land—Eminent Domain—Contract—Deed—Easement—Abandonment—Statute—Evidence.

In 1885 C and others executed to the Wilmington, Weldon and Charlotte Railroad Company an instrument, not under seal, stipulating that the makers "do hereby relinquish to the said company the right of way for said road through all and every piece of land owned by us severally in the county of Cleveland, and we do this in consideration of the prospective advantage which may accrue to us, arising from the road's location through our county." Prior to 1860 the company surveyed the line of its road through C's lands and began the construction, but in that year suspended all work, which was not resumed until 1885 by the Carolina Central Railroad Company, the successor of the original corporation. While the work was thus suspended, C sold and conveyed to the plaintiff, who entered, and for seventeen years used and cultivated the portion of the lands claimed by the railroad in the usual course of agriculture: *Held*—

1. The instrument, because of the absence of a seal and lack of apt legal terms, was not a deed effectual to convey an interest in land.

2. It did not convey an easement, but, at most, only constituted an executory contract to convey an easement whenever the road should be located on and completed through the lands, provided that result was produced within a reasonable time.

3. While the mere nonuser of an easement may not defeat or impair the claim of a railroad company to a right of way for an unfinished line, yet, when such nonuser is accompanied by such acts of dominion for a long period by the owner of the servient lands as are inconsistent with the nature of the easement, and as indicate an intention to abandon it, the easement will be lost and the owner of the fee will regain the title.

4. A title to a right of way can only be acquired (1) by condemnation and compensation in the manner provided by law; (2) by formal deed of conveyance from the owner; (3) by the performance of some act or payment of some consideration by virtue of an executory agreement enforceable in a Court of Equity between the owner and the corporation; (4) by completing a road over lands, and thereby exposing the corporation to liability for compensation, when such right and liability are provided by statute.

5. The conduct of the company in relation to the right of way had been such as to justify the belief on the part of the plaintiff, when he bought in 1869, that the purpose of completing the road had been abandoned.

6. As the plaintiff had no notice of the contract signed by C, his bargainor, the fact that grading had been done on the land did not preclude the plaintiff from claiming damage when the grading should be completed.

7. If C had not aliened the land, and had brought the action himself, the courts would not, in the exercise of their discretionary power, enforce the agreement by requiring C to perform his contract made upon the implied stipulation that the road would be completed within a reasonable time by the company or its assignees.

8. As the defendant is deemed to have abandoned its claim under the contract, it is not necessary to determine how long an adverse occupancy by the plaintiff was necessary to divest the equitable right to the easement.

PROCEEDING for condemnation of right of way, tried at Septem- (426) ber Term, 1890, of CLEVELAND, *Connor, J.*

The facts agreed were as follows:

1. That on 27 October, 1855, and for some time previous thereto, the land described in the complaint was owned and possessed by William H. Cabiniss, under whom plaintiff claims title, having purchased in 1869, and that plaintiff is now the real owner of said land.

2. That on said 27 October, 1855, the said William H. Cabiniss, being then the owner of said land, executed and delivered to the Wilmington, Charlotte & Rutherford Railroad Company, under whom defendant claims title, as hereinafter stated, a paper-writing, of which the following is a copy, to wit:

STATE OF NORTH CAROLINA—Cleveland County.

This indenture witnesseth, That we, whose names are hereunto subscribed, do hereby relinquish to the Wilmington, Charlotte & Rutherford Railroad Company the right of way for said road through all and every piece or parcel of land respectively owned by us, (427) severally, in the county of Cleveland, and we do this in consideration of the prospective advantage which may accrue to us, arising from the road's location through our county.

Witness our names, 27 October, 1855. WM. H. CABINISS.

3. That this paper-writing had reference to the land described in the complaint, and that it was duly proven, probated and registered, as required by the statute, 28 June, 1886.

4. That said Wilmington, Charlotte & Rutherford Railroad Company thereupon proceeded to locate, and did locate, their road over said land as hereinafter described; and upon said land a deep cut was excavated

and a long embankment erected, about the year 1856 to 1860, and that in 1885, when defendant completed its road, as hereinafter stated, the said cut and embankment were still distinct, though on the latter had grown up some pine trees in part, and other part of it was cultivated and had been since 1869.

5. That the other facts in this case are exactly as stated in the facts agreed upon in writing by the undersigned attorneys in the case (*C. Hendrick v. C. C. Railroad Co.*) now pending in this Court, and we hereby adopt said facts as filed in said case as the facts in this, in addition to those above stated, with the following exceptions, to wit:

(1) That paragraph No. 1 thereof be stricken out.

(2) That the portion in reference to the Forbis heirs being minors and nonresidents be stricken out.

(3) That the plaintiff's name be substituted in place of "C. Hendrick" wherever the latter occurs.

Upon these facts the following order was made by *Judge Clark:*

"Upon the foregoing facts agreed, the same being presented to
(428) the presiding judge, and a jury trial being waived, it is adjudged that the petitioner is entitled to the relief demanded in his petition.

"And it is further ordered that E. D. Dickson, D. S. Lovelace, and S. G. Brice be, and they are hereby, appointed commissioners to value the right of way over the land described in the complaint of petitioner and as therein described. They shall proceed according to the directions of respondent's charter, first giving to the parties twenty days notice of the time and place of making said valuation, and shall report their proceedings hereunder, under their hands and seals of this court. Exception by defendant."

On the coming in of the report, the following judgment was entered:

"This cause coming on for final hearing upon report of the commissioners to assess damages to the plaintiff for the causes stated in the complaint, and said commissioners having made due report thereof, in which they assess plaintiff's damages at $285, and there being no exceptions filed to said report: It is now, on motion of McBrayer & Ryburn, attorneys for plaintiff, ordered, considered and adjudged that said report be and the same is hereby in all things confirmed, and that the plaintiff have and recover of the defendant said sum of $285, with interest thereon from 5 August, 1889 (the term to which said report was returned), till paid, and the costs of this action, to be taxed by the clerk."

The defendant appealed, relying in part upon the exception previously entered to the ruling of *Judge Clark.*

R. McBrayer for plaintiff.
J. B. Batchelor, John Devereux, Jr., and T. H. Cobb for defendant.

AVERY, J., after stating the facts: In *Hendrick v. R. R.*, 101 (429) N. C., 617, it was clearly settled that the bargainee of an original landowner upon whose land the Wilmington, Charlotte & Rutherford Railroad Company had located its line and done a portion of the grading, without laying the superstructure, before the year 1860, was not barred of recovery in a proceeding instituted within two years after the completion of the line over his land by the defendant company, which purchased the franchise of the original company making the location and succeeded to its liability under its charter to pay such damage as might be assessed in a proper proceeding commenced by the owner within two years after the road should be finished over his land.

While it is admitted that the action was begun within two years after the portion of the road located on plaintiff's land was completed, the defendant insists that the plaintiff is estopped from claiming damages for said right, because his title was acquired, in 1869, through and under one William H. Cabiniss, who, being then the owner, was one of the persons who executed, on 27 October, 1855, the following paper:

STATE OF NORTH CAROLINA—Cleveland County.

This indenture witnesseth, That we, whose names are hereunto subscribed, do hereby relinquish to the Wilmington, Charlotte & Rutherford Railroad Company the right of way for said road through all and every piece or parcel of land respectively owned by us, severally, in the county of Cleveland, and we do this in consideration of the prospective advantage which may accrue to us, arising from the road's location through our county. WM. H. CABINISS.

Witness our names, 27 October, 1855.

The Carolina Central Railroad Company succeeded to the (430) rights of the Wilmington, Charlotte & Rutherford Railroad Company in the year 1873, and was organized after a foreclosure sale in 1880, the facts being fully recited in *Hendrick v. R. R., supra.* Between 1856 and 1860 the original company surveyed its line of road through the land of the plaintiff, then owned by said Cabiniss, and, after excavating a deep cut and making a fill on the premises, suspended work. Neither the Wilmington, Charlotte & Rutherford Railroad Company nor the defendant company assumed any control of the right of way on plaintiff's land, nor caused any grading or other work of construction to be done on said land or on any part of their line between Shelby and Rutherfordton from 1860 till 1885, when the work was resumed and the

grading finished, so that the trains ran from Shelby to Rutherfordton over plaintiff's land the next year. During this suspension of operations for twenty-five years Cabiniss sold to the plaintiff, who had been plowing over and cultivating a portion of the land on which the location was made, for about seventeen years, when the defendant entered upon his premises and began the work of construction afresh.

Passing over the question whether the description in the contract offered as evidence of title by the defendant was too vague to be enforced after it was executed, or admitting, for the sake of argument, that it was sufficiently definite because its location could be made certain by a survey, which was contemplated by the parties in entering into the agreement, we must still bear in mind the fact that the paper-writing is not a deed, because it is not sealed and wants apt legal words to make it an effectual conveyance of an interest in land. At the time of its execution it could have been construed in the most favorable view for the company only as an executory contract to convey the right of way whenever the road should be located and finished over the land of Cabiniss. 5 A. (431) & E., 441 (17, 3), and note 3; *Avent v. Arrington,* 105 N. C., 377.

The only consideration moving Cabiniss was the benefit to be derived from finishing and operating the line of railroad over his land. Under this agreement, entered into 27 October, 1855, the contracting corporation marked out a proposed line across his land in the year 1856, and during the four years immediately following made the excavation heretofore mentioned. The work of construction then ceased for twenty-five years, during which period there was no obligation on the part of the Wilmington, Charlotte & Rutherford Railroad Company to finish its line from Shelby to Rutherfordton. Neither Cabiniss nor his grantee, Beattie, could compel that company or its successor, the defendant, to complete the road over the land and impart to it thereby the enhanced value which was supposed would be consequent upon its completion. The owners of the land would have been helpless if, during that long period of time, the line had been diverted north or south of that surveyed and partially graded, or if Shelby had become the settled western terminus. If Cabiniss and his alienee held 100 feet, extending through the land, subject to the right of the corporation to treat them as tenants at sufferance at the option of its managers for seventeen years, when would that relation cease by nonuser on the part of the company and adverse occupation by the servient owner? It was contended for the defendant on the argument that the facts in this case brought it within the principle decided in *R. R. v. McCaskill,* 94 N. C., 746, and, therefore, that upon the execution of the paper-writing by Cabiniss, or certainly after fixing the location by survey and partial completion of the grading on his land,

the contracting company, and subsequently its successor, acquired an easement of infinite duration, and a right in the land that could not be barred by adverse possession. We cannot concede the correctness of this view as an interpretation of The Code, or an inference or deduction from the authority relied upon (*R. R. v. McCaskill,* (432) *supra*).

It is provided in section 150 of The Code that "No railroad, plank-road, turnpike, or canal company shall be barred of or presumed to have conveyed any real estate, right of way, easement, leasehold, or other interest in the soil *which may have been condemned or otherwise obtained for its use* as a right of way, depot, station-house, or place of landing, by any statute of limitation or by occupation of the same by any person whatsoever." The plaintiff's land has never been condemned, and, therefore, unless the defendant company had obtained the easement otherwise before he began to cultivate the right of way, he will not, by reason of this section, be deprived of whatever benefit might, in other cases, have accrued to him from his adverse possession. The word "obtained" must have been used in the sense of "secured" or "acquired." The consideration of the contract was, by its express terms, the prospective advantage which might accrue to the signers, arising from the location through their county. No benefit could be deprived by the owner from the mere act of surveying the line across his premises and indicating it by stakes, nor even from making excavations or fills, so long as the corporations failed, as they did, for thirty-one years, to complete and equip the road so as to furnish him the means of shipping the products of the soil and of ready communication with, and access to, the commercial centers of the country. The location, in the restricted sense of surveying and adopting the line in which engineers use it in this country, would not of itself have been attended with the slightest advantage to the owner. The defendant and its predecessor failed for over thirty years to finish, and for twenty-five years to work upon or assert any dominion over the right of way; and yet, when it at last reached the conclusion that the work should be completed, insisted that the courts should so construe section 150 of The Code as to (433) treat the plaintiff as its tenant at sufferance of the tract and a strip of 100 feet on either side of it which he had been cultivating continuously for sixteen years. Neither the defendant, nor those under whom it claims, had any title to the easement. Upon the completion of the road over plaintiff's land within a reasonable time, the corporation might have relied upon the equitable right arising out of the agreement, either in a suit to compel the plaintiff or Cabiniss to convey the easement or as a defense in a proceeding instituted by either of them to have the right of way formally condemned and the damages assessed. But

the corporation had not obtained the easement and had not given the promised *quid pro quo* for it; and, while its managers were considering the question whether they could or would ever give the plaintiff the contemplated advantages of a completed railroad, the plaintiff was plowing over and raising crops upon the very land marked out for the location of the track—an assertion of dominion over it that was utterly inconsistent with the active exercise of the defendant's right to the easement, by which alone it could perfect its title to it. If the easement had not been acquired by condemnation, or otherwise obtained, then the statute (The Code, sec. 150) has no application, and we may leave its provisions out of view in determining the question whether the conduct of the parties was such that the defendant would be deemed to have abandoned or allowed to become extinguished any right growing out of the execution of the agreement by Cabiniss. In other States, where corporations are not protected by such a statute, and in England, it seems to be settled that while mere nonuser may not defeat or impair the rights of a railroad corporation in a located and unfinished or unoccupied line, the owner of the fee may regain the title (unencumbered by the claim to an easement therein) to the whole or any part of a location (434) by adverse occupancy for the requisite statutory period, where the conduct of the company has been such as to indicate its intention to abandon the use of the line; and this rule has prevailed even where the right of way has been condemned and in some instances paid for. 2 Woods R. L., sec. 240; *Norton v. R. R.,* L. R., 13 ch., Div. 268. The failure to complete a road, and permitting the owners to use the land upon which its line is located for the prescribed statutory period, and for purposes inconsistent with its occupation and use as a railroad, is evidence of an intention to surrender the easement, and has been held to be an abandonment of it, because such conduct is calculated to induce the belief that the corporation does not purpose to again assert its rights. Mills on Em. Dom., sec. 57; *Hooker v. Turnpike Co.,* 12 Wend., 371; *Proprietors v. R. R.,* 104 Mass., 1; *Benedict v. Heineberg,* 43 Vt., 231; Angell Watercourses, 252, 252*a*; *Jennison v. Walker,* 11 Gray, 423; *Taylor v. Hampton,* 2 McCord (S. C.), 96.

The use of the land by plowing up and cultivating the very portion of the 200 feet of right of way marked out for the track was utterly inconsistent with its actual occupation as the roadbed of the defendant company. *Crain v. Fox,* 16 Barb., 187; *Pope v. Devereux,* 5 Gray, 409. He was planting yearly crops that the defendant must of necessity destroy if it should determine to complete its line to Rutherfordton. His claim that the right to the servitude has been abandoned and lost, is founded not simply upon nonuser on the part of the defendant, but upon the claim that this adverse occupation and use of the land on his own part

is irreconcilable with the acknowledgment of the right to the easement in the corporations, and that therefore he is entitled to the benefit of the bar of any statute that may apply. Angell, *supra,* secs. 244, 246, 252; *Bonnon v. Angier,* 2 Allen, 129. The fact that the plaintiff bought in the year 1869, when there had been a cessation of the work of construction for nine years, according to many authorities, made (435) it incumbent on the corporation claiming the easement to show an intention to resume control of the right of way within a reasonable time. *Corning v. Gould,* 16 Wend., 531; *Taylor v. Hampton, supra; Bank v. Nichols,* 64 N. Y., 65. Where rights of way are actually condemned, Lewis (in his work on Em. Dom., sec. 656) says: "The weight of authority undoubtedly is that in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment, the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." The author states that the doctrine laid down by him is sustained in all of the appellate courts of the States where the question has arisen, except those of New York and Nebraska. *Ib.,* p. 844; *Chicago v. Burton,* 80 Ill., 482. An executory agreement to convey, founded upon the consideration of completing a road over the land, places the parties in relations in some respects similar to those which ordinarily exist after condemnation proceedings, and before a corporation has elected to use the easement and has paid for it or incurred a liability to make compensation for it. Where there is neither a conveyance of the easement nor an executory contract in reference to conveying it, the corporation does not acquire a perfect title until it either satisfies the judgment for damages for a condemned right of way across a tract of land, or finishes its road over it, or in some way incurs such liability to pay the resulting damages when assessed. Lewis, *supra,* sec. 306. Cabiniss agreed, in effect, that the Wilmington, Charlotte & Rutherford Railroad Company should have the right to the easement whenever it should give him the advantages and benefit arising from finishing its line over his land. Our case falls within the rule, which seems to be settled by authority, that perfect title to a right of way can be acquired only— (436)

1. By a formal deed of conveyance from the owner;

2. By condemnation and the actual payment of just compensation ascertained in the mode appointed by law;

3. By the performance of an act, or payment of a sum, or by furnishing any consideration agreed upon in some executory contract, which a Court of Equity will enforce, between the owner and the corporation; or,

4. Where the general law or charter sanctions such a course, by completing the road over his land, and thereby incurring the liability to pay damages whenever assessed on petition and adjudged to be due. *Beasley v. M. L. W. Co.,* 13 Cal., 306; Lewis, *supra,* pp. 404, 405, secs. 306 and 656; *O'Neal v. Freeholders,* 41 N. J., 172; *R. R. v. Titers,* 68 Ill., 144.

The charter (Laws 1854-55, ch. 225, sec. 28) provides "That in the absence of any contract or contracts in relation to the land through which said road or any of its branches may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of said road, had been granted to said company by the owner or owners thereof, and the said company shall have good right and title and shall have, hold and enjoy the same so long as the same shall be used for the purposes of said road, and no longer, unless the person or persons owning the land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment of the value of said lands as hereinbefore directed within two years next after that part of said road which may be on the said land was finished," etc.

It appears, therefore, that where there is a contract, the (437) charter leaves it to be interpreted as any other agreement between the parties would be, according to its terms. How, then, would an agreement on the part of one person that he relinquished the right to a private way over his land to an adjacent landowner for the consideration of getting a good outlet for himself to a neighboring town be construed if the party proposing to construct the road should grade a portion of it within five years and then desist for twenty-five years, and until a grantee of his neighbor had plowed over the proposed line of road and cultivated the land for sixteen years? If, in such case, the person seeking to get the outlet would be deemed to have abandoned his right under the original contract and driven to the necessity of pursuing the plan pointed out by statute for the condemnation of cartways, then we think that in this case, as between the plaintiff and the defendant company, their relations and rights would be the same as if no paper had been signed by Cabiniss in 1855. When the plaintiff bought the land in 1869, the corporation had desisted from the work of construction for nine years before, and during the five years that had then elapsed after the close of the war, had asserted no claim to the right of way, and had taken no steps looking to the completion of its road over it. Its conduct had been such as to induce the reasonable belief in his

mind that their claim had been extinguished, and that he would take the land discharged from any right to subject it to the servitude without compensation by the subsequent completion of the road over it. The predecessor of the defendant had allowed an unreasonable time to elapse without evincing any intention to resume control of the right of way, and after the plaintiff paid his money for land apparently subject to no such right, it would be inequitable to allow the defendant to appropriate his land without compensation. *Hooker v. Turnpike Co.,* 12 Wend., 371. Even if mere nonuser would not, as between the original parties to the contract, have extinguished the right (which is not (438) admitted) the rule is different where the land is sold to a purchaser for value who is misled by the conduct of the corporation. *Corning v. Gould, supra.* It appears as a fact agreed that the contract signed by Cabiniss was not registered until 28 June, 1886, while it does not appear that the plaintiff had actual notice that any agreement had been entered into between the Wilmington, Charlotte and Rutherford Railroad Company and Cabiniss when he purchased. The deserted excavation was not in the actual possession of the corporation. The plaintiff, seeing the unfinished grading done upon the land, might naturally infer, in the absence of any record of condemnation proceedings or registration of a conveyance (if such registration would have been noticed) that Cabiniss was awaiting the completion of the road over the land to institute proceedings for damages, and that the right to exact compensation, if the work should be resumed, passed with the title to the land to him. *Hendrick v. R. R., supra.* Being misled by the long delay of said corporation, and having no actual notice of the equitable interest claimed by it, we think that the plaintiff took the title free from any right growing out of said contract to subject it to the servitude without compensation other than the benefit arising from completing the road. *Francis v. Love,* 56 N. C., 321.

As we have already stated that the defendant could not, at best, claim that he held a deed of conveyance for the right of way, but only the equitable right to demand a conveyance upon the completion of the road over the plaintiff's land. He might, in order to determine his rights, have taken the initiative when the portion of the road on plaintiff's land was finished, and have brought an action to compel the plaintiff to convey the easement or he might have taken the chances of acquiring the easement, by the laches of the plaintiff if the latter failed to file his petition within two years, and when the latter instituted pro- (439) ceedings have set up the contract as a defense, as he has done. But, in either event, whether the corporation is the actor or not, its claim is equivalent to a prayer for the specific performance of the contract. It is well settled that delay on the part of a vendee or proposed

purchaser, accompanied by acts apparently inconsistent with the purpose of performing the contract will, if not waived by the vendor, deprive the former of the right to demand a specific performance of the contract. *Francis v. Love,* 56 N. C., 321; *Love v. Welch,* 97 N. C., 200; *Holden v. Purefoy, ante,* 163; *Mizell v. Burnett,* 49 N. C., 249.

In *Crain v. Fox,* 15 Bush (N. Y.), 187, it was held that plowing over a right of way was an act inconsistent with the claim to the easement, and in *Corning v. Gould, supra,* that the erection of a fence across it constituted an adverse holding. See also *Pope v. Devereux,* 5 Gray, 409. 3 Kent Com., 552, says: "If the act which prevents the servitude be incompatible with the nature or exercise of it, and be by the party to whom the servitude is done it is sufficient to extinguish it, and when it is extinguished for a moment it is gone forever." The same principle is laid down in numerous cases. *Canny v. Andrews,* 123 Mass., 155. In *Hendrick v. R. R., supra,* it was held that nonuser for ten years was an abandonment by a river company of its right of way. *Horner v. Stillwell,* 35 N. J., 307; *Voight v. R. R.,* 19 N. J., 143; *Mills, supra,* sec. 57. We have not overlooked the fact that the statute of limitations was not running from May, 1861, till 1 January, 1871. But we forbear to pass up the effect of the adverse possession as a bar to the assertion of defendant's claim under the contract, or to point out a particular statute as applicable, and rest our decision upon other ground—

1. The conduct of the company, through which defendant claims, had been such as reasonably to lead the plaintiff to believe, when he bought in 1869, that it had abandoned the purpose of completing the road.

2. The plaintiff bought without actual notice of the contract
(440) with Cabiniss, and the fact that grading had been done on the land did not preclude the idea that the damages might be assessed if it should be completed under the charter.

3. If Cabiniss were substituted as plaintiff in place of Beattie, or if it appeared that the latter had actual notice of the contract, we think the courts should not, in the wise and just exercise of their discretionary power, enforce the agreement with Cabiniss for the benefit of the defendant, after so long a delay on the part of the latter, and those through whom it claims, in performing its implied stipulation to finish the road within a reasonable time, and when their conduct was calculated to lead the owner to believe that the claim of an equitable right in his land, under the contract, had been abandoned. There is no error, and the judgment must be

Affirmed.

Cited: Tunstall v. Cobb, 109 N. C., 326; *Hanes v. R. R., ib.,* 493; *Hodges v. Wilkinson,* 111 N. C., 63; *Hargrove v. Adcock, ib.,* 169;

Dargan v. R. R., 113 N. C., 599, 603; *Hemphill v. Annis*, 119 N. C., 519; *R. R. v. Olive*, 142 N. C., 269; *May v. R. R.*, 151 N. C., 389; *R. R. v. Bunting*, 168 N. C., 580.

J. A. WORTHY v. JAMES BRADY ET AL.

PETITION to rehear.

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

MERRIMON, C. J. This is an application to rehear the case of *Worthy v. Brady*, 91 N. C., 265. We have reëxamined the grounds of the decision in that case, particularly in the respect complained of, with care and scrutiny, and are satisfied that the instructions in question given to the jury were substantially correct, and for the reasons clearly stated by the late *Chief Justice Smith*, the petition must, therefore, be Dismissed.

Cited: Rodman v. Robinson, 134 N. C., 506.

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(441)

J. N. GILLIS v. WILMINGTON, ONSLOW AND EAST CAROLINA RAILROAD COMPANY.

Evidence, Secondary—Lost Instrument—"Diligent Search"—Agency.

1. Whether the loss of an instrument is sufficiently proved to admit secondary evidence of its contents is not a question for the jury, but is left to the sound discretion of the court.

2. If the finding of the trial court upon the question of the loss and diligent search for the instrument is general, the appellate court will assume that it acted upon plenary proof of those facts; but where the facts are set out the conclusion of the court below thereon may be reviewed.

3. Where the proof of diligent search for the lost instrument is sufficient to satisfy a reasonable person, the decision of the trial judge to admit secondary evidence of its contents is not reviewable.

4. When secondary testimony is admitted it should be clear and convincing that the instrument once existed, and that its contents supported the allegations in aid of which it is invoked.

5. Whether there has been diligent search for the alleged lost instrument depends very much upon the nature of the document—a more rigid rule prevailing in respect of records and deeds than letters and papers of less importance.

6. It is not within the scope of the authority of a chief engineer of a railway company to enter into contracts, on behalf of his employer with subordinate agents or servants in respect to their wages.

ACTION for damages for breach of contract, tried before *MacRae, J.*, at November Term, 1890, of CUMBERLAND.

The single issue submitted, with the response thereto, was as follows: "Is the defendant indebted to the plaintiff as alleged; if so, in what sum? Answer: The defendant is indebted $275."

Rule for new trial for errors alleged as to the admission of testimony and upon the following exceptions to the charge:

The defendant excepted to his Honor's charge—

(442) 1. For that his Honor assumed in said charge that there was sufficient evidence of the search of the plaintiff for the alleged letters containing the alleged contract, and their loss, to justify the admission of secondary evidence of contents, although the plaintiff said he himself had destroyed them, or might have destroyed them, and afterwards said "they may have been destroyed; I don't know."

2. For that his Honor charged that "if the (secondary) testimony satisfied the jury that Mr. Lamb was the chief engineer of the defendant and wrote to plaintiff and offered him $60 per month and board for one year for his work, and that plaintiff accepted this offer and went to work, the jury would be warranted in finding that there was a contract in writing as required by the statute," thus assuming that because he was chief engineer he was "authorized thereto," and did not advert to the fact, sworn to by Lamb, that he had no authority to make such a contract as is required by statute, which was the *only* evidence as to his authority.

3. For that his Honor charged the jury that "if the testimony satisfied them that Mr. Lamb was chief engineer of the defendant and wrote to plaintiff and offered him $60 per month and board for one year for his work, and that plaintiff accepted this offer and went to work, the jury would be warranted in finding that there was a contract in writing as required by the statute," and did not charge the jury as requested, that they must be clearly satisfied by more than a preponderance of testimony that said Lamb did write to the plaintiff making said offer,

and that said offer was accepted by plaintiff and said correspondence was lost or destroyed—before they could find a verdict for plaintiff.

Motion denied; judgment, from which defendant appealed. The other material facts are stated in the opinion.

T. H. Sutton for plaintiff. (443)
A. M. Waddell for defendant.

AVERY, J. It is within the sound discretion of the court to determine what is sufficient evidence of the loss or destruction of an original paper to make testimony as to its contents competent, and this Court will assume, where nothing appears to the contrary, that the court below acted, in admitting secondary evidence to show the words or substance of the instrument, upon plenary proof that a sufficiently diligent but fruitless search was made, and that there was no testimony tending to show that it was fraudulently destroyed or withheld by the party proposing to prove its contents. *Bonds v. Smith,* 106 N. C., 564; 1 Wharton Ev., sec. 141; 1 Greenleaf Ev., sec. 558; 1 Taylor Ev., sec. 22. Mr. Greenleaf says: "The question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury."

Taylor says: "In like manner, if the question be whether a document has been duly executed or stamped, or whether it comes from the right of custody, whether sufficient search has been made for it to admit secondary evidence of its contents, etc., . . . in all these, and the like cases, the preliminary question of admissibility must, in the first instance, be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses in order to arrive at a just conclusion."

In *Mauney v. Crowell,* 84 N. C., 314, it was held that a general finding by the judge, without setting out the testimony, that no sufficient search had been made, would have been conclusive, thus recognizing the discretionary power of the court.

But where the facts upon which the *nisi prius* judge acted are found, it is competent for this Court to review his ruling, and determine whether the testimony was sufficient in law to justify his conclusion. The degree of diligence that must be shown depends largely upon the (444) nature and circumstances of the case, and especially upon the character of the paper, as a useless document may be presumed to have been lost or destroyed, on proof of much less search and for a much shorter time than an important one. Best Ev., sec. 482; 1 Wharton Ev., sec. 140. As a rule, it is expected that deeds and records that are evi-

dence of title will be more carefully kept than letters or papers which may or may not become material as testimony tending to establish one's rights. In *Gathercole v. Miall,* 15 M. & W., 335, *Alderson, B.,* says: "The question whether there has been a loss and whether there has been sufficient search, must depend very much on the nature of the instrument searched for. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers; I cannot find it,' surely that would be sufficient. So with respect to an old newspaper which had been at a public coffee-room; if the party who kept the public coffee-room had searched for it where he would naturally find it, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then you ought to go to A. B. But," he concluded, "it would be very unreasonable to require you to go to every member of the club."

Where a reasonable person might be satisfied, from the testimony offered, that an effort had been made in good faith to find and produce a letter, the decision of the trial judge to admit proof of its contents is not reviewable in the appellate court. Best Ev., p. 451. "The object in offering the proof is to establish a reasonable presumption of the loss of the instrument, and this is a preliminary inquiry addressed to the discretion of the judge." 1 Greenleaf Ev., sec. 558.

The first exception is stated in the record as follows:

"The plaintiff resumed and testified: 'Richard Lamb said he
(445) was chief engineer of defendant, and he was acting as such, and I got this letter from him. I got other letters from him before I went there. I have lost them. I have made search for them; have looked over my trunk. I had changed about so much till I could not find them. I reckon I lost them.' "

Plaintiff was cross-examined upon this point, and testified: "I kept them in my trunk, and sometimes in my wife's trunk. We would change them about, and sometimes when we got too many letters we would destroy them. These letters may have been destroyed. I don't know."

The defendant objected to plaintiff testifying as to the contents of the letters. The court, being of opinion that the witness had laid the foundation for the offer of secondary evidence by his testimony of the loss or destruction of the papers, permitted the plaintiff to testify as to their contents, and defendant excepted.

We do not think, when it appears that the plaintiff usually kept his letters in his trunk and searched for them there without finding them, that the judge was in error in allowing him to testify as to the contents merely because he said that *sometimes* the letters were changed into his wife's trunk, and it did not appear that it had also been examined, nor because the witness said, in his examination in chief, "I reckon I lost

them," and on his cross-examination, "These letters may have been destroyed; I don't know." We think that his Honor was warranted in drawing the inference that the letter had been lost or destroyed, and in either event its contents could be proven by parol. It is not essential that the testimony should have excluded the possibility that the letter was still in existence, as it was not necessary, in the case already cited, that every member of a club who had privilege of reading, or carrying off a newspaper should be offered to negative the possibility that he had it in his possession. In *Mauney v. Crowell, supra,* it was declared error to exclude a copy of an original contract to sell land (446) which had been shown to have been lost, because it did not appear that the registry of the county in which the law required it to be registered had been examined.

In passing upon the evidence as to the preliminary question, the judge is not required to find that there is clear and satisfactory proof that a paper has been lost or destroyed before admitting testimony to show its contents. In *Fisher v. Carroll,* 41 N. C., 488, *Judge Pearson,* speaking of a case where the *execution* and *contents* of *an alleged* lost note were denied, said: "In such a case, although equity would not refuse to consider the mere affidavit as *sufficient to account for not producing the original note, the strictest and clearest* proof of *the execution and contents* would be required." See also *Mobley v. Watts,* 98 N. C., 284, and *Clifton v. Fort,* 98 N. C., 178. It is settled by a line of authorities that, although the loss of a deed or paper relied on to prove a contract may have been sufficiently shown to justify the judge in admitting secondary evidence, such testimony must amount to clear and convincing proof that the deed or paper embodying the contract once existed, and that its contents were such as to sustain the material allegations of the complaint or answer in support of which they are offered. *Loftin v. Loftin,* 96 N. C., 94; *Fisher v. Carroll, supra.* We think, therefore, that there was error in refusing to give the third instruction prayed for, for which a new trial must be granted.

While it is unnecessary to pass upon the question raised by the second exception, it may be well to add that it would not follow from the fact that Lamb was chief engineer that it was within the scope of his authority to make contracts with subordinate managers employed in grading the roadbed, and the laborers under them, in reference to wages. Wood R. L., page 446, and note 2. There was no testimony offered as to the nature or extent of his authority, or tending to show a ratification of his agreement with the plaintiff by the corporation. (447)

SHEPHERD, J., concurring as to the conclusion and dissenting as to parts of the opinion: I concur in the disposition made of this appeal,

but I do not agree to the suggestion that what constitutes a diligent and reasonable search for an alleged lost paper-writing is in any case within the sole discretion of the trial judge and that his ruling is conclusive upon that question. If such be the law, it would be exceedingly difficult to account for the numerous decisions of appellate courts in the text-books and in our own Reports upon this important subject. The authorities cited do not, in my opinion, sustain such a principle, but on the contrary establish the very opposite view. When the testimony relating to the particulars of the search is conflicting, it is the duty of the court, upon the request of the objecting party, to find the facts, and if no such request is made, that aspect of the testimony which is most favorable to the other party will be taken by this Court in passing upon the ruling of the trial judge. *Holden v. Purefoy, ante,* 163.

The findings as to the facts are conclusive, but the legal inferences are reviewable.

Neither do I agree that a diligent search was made in the present case and that oral testimony should have been admitted. 1 Greenleaf Ev., 558, says, "that the evidence must show that a *bona fide* and diligent search has been unsuccessfully made (for the lost instrument) *in the place where it is most likely to be found* if the nature of the case admits of such proof." The party must "exhaust in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." *Ib.,*

Dumas v. Powell, 14 N. C., 103; *Murphy v. McNiel,* 19 N. C.,
(448) 244; *Harper v. Hancock,* 28 N. C., 124; *Threadgill v. White,* 33 N. C., 591; *McCracken v. McCrary,* 50 N. C., 399. The foregoing cases and many others to be found in our Reports, exemplify in a high degree the very strict application by this Court of the general principle above stated.

So far from the witness in this case having exhausted all of his sources of information, his examination reveals the two depositories of these very letters, and yet he has examined but one of them. He says, "I kept them in my trunk and sometimes in my wife's trunk"; that is to say, either in one trunk or the other, and it is but fair to assume in the absence of an examination that the letters were in his wife's trunk at the time of the trial. It does seem very clear to me that there has been no such diligent search as is required by the law and that if oral testimony can be substituted for contractual writings under such circumstances, the rule as to the primariness of documentary evidence will be practically abrogated.

If, as in *Davidson v. Norment,* 27 N. C., 555, a party was required to go to another State and get his deed, it would seem but reasonable that this witness should have taken a few steps, presumably in his own house,

and looked into his wife's trunk for the letters in question. *Dumas v. Powell,* 14 N. C., 103, also illustrates the great particularity of the Court in applying this most salutary rule of practice.

When contracts have been reduced to writing, there is an implied agreement between the parties, which the law recognizes and enforces, that such contracts shall only be proved by the selected medium of proof, and the "slippery memory of witnesses" should never be substituted, except upon the most imperative demands of necessity and justice.

As to the intensity of proof, I have never understood that in the case of a writing evidencing a purely simple contract, where the writing is lost or destroyed, and there is no evidence of fraudulent suppression or spoliation, a party is compelled, in a court of law, to (449) establish its contents by the same degree of proof as is required in equity where lost bonds and other deeds are sought to be set up or corrected, as in the cases cited. The degree of proof mentioned is only applied in cases of equitable cognizance. See discussion in *Harding v. Long,* 103 N. C., 7.

CLARK, J., dissenting: Agreeing in the conclusion reached, I cannot concur with so much of the opinion as holds that such sufficient search had been made for the missing documents as would admit of parol evidence of their contents. The judge, in this case, having set out the facts, his conclusion thereon was one of law, and subject to review. There were two depositories, in both of which the papers were sometimes kept, and, I think, it was error to admit parol proof of their contents, unless it had been shown that, after search in both the trunks, the papers could not be found.

Per Curiam. Error.

Cited: McKesson v. Smart, ante, 19; *Hendon v. R. R.,* 125 N. C., 127; *Avery v. Stewart,* 134 N. C., 291, 293.

H. B. SPRAGINS ET AL. v. JAMES R. WHITE.

Contract—Construction—Province of the Jury and the Court—Instructions.

1. Where the terms of a contract are fixed, the court and not the jury is its proper interpreter.

2. In an action for the price of a certain lot of shoes, the defense was that they were not delivered at the time agreed on, the agreement being that

the defendant bought the goods upon plaintiffs' promise to have them at a fixed place in two weeks, so the instruction of the court that the jury must inquire what was meant by it was error.

MERRIMON, C. J., dissented.

(450) ACTION, tried on appeal from a justice by *Armfield, J.*, at Spring Term, 1890, of BERTIE.

The plaintiffs brought this action in the court of a justice of the peace to recover the price of certain goods—shoes—sold by them to the defendants. The latter denied the allegations of the complaint, and alleged that, by a special agreement, the plaintiffs promised to sell and deliver to them certain shoes at their place of business within a time specified, which they failed to do; that they were not bound to receive the shoes, and did not do so, etc.

On the trial in the Superior Court the plaintiffs produced evidence tending to prove their cause of action as alleged by them.

One of the defendants testified in their own behalf, among other things, as follows: "About the last of February, 1889, A. R. Benton, representing the plaintiffs, came to my store in Aulander, and, after some conversation, I agreed to buy of him a bill of shoes upon his promise to have them in Aulander in two weeks. That was the main inducement to the bargain. Without this promise I would not have taken the goods. I had a contract to fill within two weeks. Plaintiffs sent me an invoice of the goods and shipped them, which I have. I also took down a memorandum of the order given Mr. Benton. I have that memorandum."

The court having directed the attention of the jury to the evidence and view of the case favorable to the plaintiffs, instructed them further as follows:

"But the defendant contends that, at the time he purchased of plaintiffs' agent, there was an express bargain and agreement that the goods should be delivered at his house in two weeks. This the plaintiffs deny. But if you should believe that this agreement and bargain were made, then you must inquire and determine what was meant and understood by it by the parties making it. Did it mean that the plaintiffs

(451) were to insure, at all events, the delivery by the transportation company of the goods in two weeks, and that in failure of such delivery in two weeks the sale was to be void at the option of the defendant, and he might return the goods to plaintiffs? If so, plaintiffs are not entitled to recover.

"But if it meant that plaintiffs were to use all due diligence in forwarding the order, in packing and shipping the goods by the common carrier, and plaintiffs did all these things, then plaintiffs are entitled to recover the bill and interest, as before stated."

The defendant excepted upon the ground that "the court erred in leaving the interpretation of the contract to the jury." There was a verdict and judgment for the plaintiffs, and the defendants appealed to this Court.

D. C. Winston for plaintiffs.
F. D. Winston (by brief) for defendants.

SHEPHERD, J. "Where a contract (says *Judge Gaston* in *Young v. Jeffreys,* 20 N. C., 357), is wholly in writing, and the intention of the framers is by law to be collected from the document itself, then the entire construction of the contract—that is, the ascertainment of the intention of the parties, as well as the effect of that intention, is a pure question of law; and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol (that is, oral) the terms of the agreement are of course a matter of fact, and if those terms be obscure, or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written agreement."

In speaking of oral contracts, *Nash, J.,* remarks, in *Festerman* (452) *v. Parker,* 32 N. C., 474, that "if there be no dispute as to the terms and they be precise and explicit, it is for the court to declare their effect." See also *Rhodes v. Chesson,* 44 N. C., 336; *Pendleton v. Jones,* 82 N. C., 249.

"Unless this were so (says *Parke, B.,* in *Neilson v. Harford,* 8 M. & W., 806) there would be no certainty in the law; for a misconstruction by the jury cannot be set right at all effectually." We are sure that the learned judge was entirely familiar with the above principles, but we think that they were not properly applied in the present case.

The terms of an oral contract must necessarily be ascertained from the testimony of the witnesses, and it is the duty of the court to instruct the jury as to the law applicable to the various phases arising upon such testimony. But where the court presents to the jury a particular view of the facts, and this embodies the terms of a contract which are in themselves precise and explicit, the court should declare their legal effect, and it would be error to leave this to be determined by the jury. In such a case the rule is the same as if the contract were in writing. After charging the jury upon the testimony of the plaintiffs, his Honor presented the contention of the defendants, which was founded upon the evidence of one of their number as follows: "I agreed to buy of him (the agent of plaintiffs) a bill of shoes upon his promise to have them

in Aulander in two weeks." According to the defense this was the entire agreement as to the shipment and delivery, and it is not varied in any manner because it induced the defendant to purchase the goods. It was the *contract* resulting from the "express bargain and agreement" that formed the inducement, and it is *this* contract alone that was to be interpreted. The language used is clear and precise. It is not unusual or equivocal, nor does it involve any scientific exposition by experts, nor is it doubtful in the sense that it may be explained by evidence (453) of usage or other extraneous circumstances. If the language, being thus free from ambiguity, leaves the meaning of the parties in doubt, it is the duty of the court, and not the jury, to determine its legal effect; and if no definite meaning can be attached to such language, then it is the duty of the court to so hold. *Silverthorne v. Fowle,* 49 N. C., 362. His Honor, after stating the terms of the contract, instructed the jury that if *such* was the contract, they must further inquire and determine what was meant and understood by it by the parties making it. Now, the charge assumes that the terms of the contract are ascertained, but at the same time leaves its interpretation to the jury. The court should have interpreted this meaning according to the terms of the assumed contract, and not according to absent terms incorporated into the same by what the jury were to infer was the meaning of the parties. In this we think there was error.

MERRIMON, C. J., dissenting: The special contract alleged by the defendants was not in writing. If it had been so, and the writing had been admitted or proven by proper evidence, the court would have interpreted its meaning. The proper construction of contracts is matter of law, and it is the province of the court to interpret its meaning. When they are written, and cannot be explained or modified by parol, as in some cases they may be, their terms are settled, and their meaning is simply a question of law to be determined by the court.

When, also, a contract has not been reduced to writing, but its terms appear—are precise, clear and explicit—the court must interpret their meaning and legal effect. If, however, the parties to an unwritten contract dispute about its terms, and these are not clear nor definite, are obscure or equivocal, or their use is not certain and determinate, or it must be inferred from the conduct of the parties, such contract— (454) what its terms are—must be ascertained by the jury. And so, also, if the terms used are technical or unusual, and their meaning must be gathered from experts or persons acquainted with the particular act or business to which such terms refer, and in the like cases the jury must ascertain the meaning of such terms as used by the parties; still, when their use, and what they are, are ascertained by the jury, it

is the duty of the court to interpret the contract ascertained as matter of fact by the jury. The jury must ascertain, as matter of fact, what the contract is, and the court must determine what is its legal import and effect. In such cases the court should generally give the jury instructions as to the meaning and effect of the contract, according as they may find it to be, carefully pointing out their duty in ascertaining what the contract in question is. *Young v. Jeffreys,* 20 N. C., 357; *Massey v. Belisle,* 24 N. C., 170; *Festerman v. Parker,* 32 N. C., 474; *Silverthorn v. Fowle,* 49 N. C., 362.

In this case the exception is based upon a misapprehension of the instruction complained of. The court did not intend to leave it to the jury to interpret the contract in question, nor did it do so in effect. The contract alleged was not in writing; the principal evidence—that of one of the defendants—tending to prove it, was not very explicit, unequivocal and determinate. On the contrary, it left the real agreement to inference in material respects. The witness said: "I agreed to buy of him (the plaintiffs' agent) a bill of shoes upon his promise to have them in Aulander in two weeks"; but he did not say, certainly in terms, that the agent agreed on his part to deliver the shoes at the place mentioned within that time; that this was a substantial part of the contract, and that it was understood that the defendants would not be bound to take the shoes if they were not so delivered. This was left in doubt—to inference. He said "that this was the main inducement to the bargain; without this promise I would not have taken the goods." He does not say, in terms, that the agent so understood and agreed—that he did was left to inference. He did not say, in terms, that the contract (455) was special—out of the ordinary course of trade in such cases. That was left to inference. Hence the court told the jury to inquire whether there was such special contract, and, if so, what was meant—not as matter of law, but as matter of fact, by it, by what was said and mutually understood and agreed upon by the parties. That is, the court instructed the jury to ascertain, from the uncertain, indeterminate evidence of such contract, what it was, as matter of fact. It submitted to them, not what was the legal meaning of the words used by the defendants, or by either party, but whether the parties, in fact, mutually understood and agreed that the shoes should be delivered "in two weeks" at the defendants' place of business, or whether, in fact, it was agreed that the plaintiffs, in the ordinary course of business, sold the defendants the shoes, and this was the fact of the agreement, and the plaintiffs' agent said—simply added—not as a part of the agreement, that he would deliver them "in two weeks," meaning no more than that he would be prompt in shipping them. The court further said, in substance, that if the jury should find the contract to be as contended by the defendant,

then, as a matter of law, the plaintiffs could not recover. Thus it interpreted the contract in that view. It further said, in effect, that if the jury should find the contract to be, in fact, as contended by the plaintiffs, then the latter could recover. Thus it interpreted the meaning and legal effect of it in the view favorable to the plaintiffs.

The evidence in this case left the terms of the contract much more in doubt than did the evidence of the contract in question in *Massey v. Belisle, supra.* In that case "the plaintiff stated to the defendant, as a fact, that it had been discovered that her house was 2 feet upon his lot.

Upon this information she promised to pay him $4 per annum
(456) while it remained there. At the expiration of the first year, when the rent was demanded, she refused to pay, alleging that the house was altogether upon her own land. After this refusal, she did pay $4, upon his express promise to refund it if it should turn out that the house was not upon his lot. The parties then agreed upon a mode by which the boundaries of their respective lots should be determined. Unfortunately, the attempt thus to determine their boundaries failed, and the plaintiff sued for the next year's rent. Now, it seems to us clear that upon what terms and upon what consideration the defendant promised to pay rent was an inquiry of fact for the determination of a jury." The court said that, the terms of fact being doubtful, it was the provice of the jury to ascertain the same. They certainly were more definite than the terms in question in the present case.

Perhaps the instruction given to the jury might have been more precise, but it was quite intelligible and substantially in all respects correct. The court interpreted the contract as to its legal import and effect accordingly as the jury might ascertain it to be as matter of fact, and it gave them proper instructions as to their duty.

The other exceptions are without merit, and it would serve no useful purpose to advert further to them.

Per Curiam. New trial.

Cited: Simpson v. Pegram, 112 N. C., 545; *Wilson v. Cotton Mills,* 140 N. C., 56; *Elks v. Ins. Co.,* 159 N. C., 626; *Patton v. Lumber Co.,* 179 N. C., 108.

(457)

ESTHER JONES v. ANDREW COTTEN.

Habeas Corpus—Custody of Children—Practice—Insanity—Pending Litigation.

A plaintiff suing for the possession of her children by writ of *habeas corpus* obtained judgment for their recovery, and the defendant appealed under sec. 1662 of The Code. After the appeal, and before the hearing in this Court, the plaintiff became insane and was committed to an asylum: *Held*, the case must be remanded to the judge now riding the judicial district in which the case was tried, to the end that he may take such action as his jurisdiction over minor children confers.

ACTION tried at February Term, 1890, of CRAVEN, by *Womack, J.*

This is a proceeding in which the plaintiff applied for a writ of *habeas corpus* to obtain possession of three of her minor children, named, alleged to be in the possession of the defendant. The writ was issued and served, and return thereof made. At the hearing of the matter the court gave judgment that the children be delivered to the plaintiff, whereupon the defendant appealed to this Court, as allowed by the statute (The Code, sec. 1662) in such cases.

It appears at this term that, since the appeal was taken, the plaintiff has become insane and has been committed to, and is now in, the appropriate insane asylum. The counsel for the defendant asks the Court to make such disposition of the appeal as it may deem appropriate and proper.

No counsel for plaintiff.
C. R. Thomas for defendant.

MERRIMON, C. J. We are of opinion that the case must be remanded to the judge now riding the Second Judicial District, to the end that he shall have and take jurisdiction of, and take such further action in the matter as the condition of the children mentioned and the (458) circumstances of the case may warrant and require, according to law. Such proceedings and matters are largely summary in their nature, and may be conducted in the sound discretion of the court, in such way as, in view of the variant circumstances of the case, will promote the ends of justice, secure the rights of parties, and afford adequate protection to the children whose custody may be in question. The statute (The Code, sec. 965) contemplates that, with a view to justice, a case may be remanded. The other statute (The Code, sec. 1661) confers upon the court below very large powers to "promote the interest and welfare of the children." *Holley v. Holley,* 96 N. C., 229; *Knott v. Taylor, ib.,* 553.

Remanded.

Cited: In re Alderman, 157 N. C., 512.

WILLIAM WHITEHEAD ET AL. v. M. D. WHITEHURST, ADMR.

Consent Reference—Evidence—Purchase at One's Own Sale, When Voidable—Agreement of Counsel—Order of Court.

1. It is well settled that this Court will not disturb the findings under a consent reference where there is any evidence to sustain them.

2. A sale under mortgage, at which the mortgagee purchases through a third party, is not void, but voidable, and at the instance of the mortgagor or his heirs; and when the property sold brought a fair price, it does not appear that the creditors of a deceased mortgagor have any right to complain.

3. Mere agreement of counsel, filed with the clerk, that the order of sale for assets should be set aside, made after sale was confirmed, purchase-money paid and title made to purchaser, and without any order of court to that effect, is ineffectual for such purpose.

4. Where, under such reference, the findings of fact are pertinent, so far as this Court can see, it will not set them aside, the burden being on the party complaining to show error.

(459) ACTION heard by *Whitaker, J.*, upon exception to a referee's report, at October Term, 1890, of EDGECOMBE.

This action was brought by creditors of the intestate of the defendant to compel him to an account of his administration and to pay the creditors what may be payable to them, respectively. The pleadings raised issues of fact and law. In the course of the action, "the case" was, by consent of parties, referred to a referee "to find the facts and state the accounts, and report the result of his findings," etc. Afterwards, the referee made report as directed, and the defendant filed divers exceptions thereto. Afterwards, the court overruled all these exceptions and gave judgment for the plaintiff. The defendant, having excepted, appealed to this Court, assigning error as follows:

1. That he has failed to credit the defendant with his account of $570 for rent of mill under the contract of milling, as established by the testimony of D. C. Moore and G. A. Vick.

2. That he has failed to credit the defendant with exhibits "R" and "S," as representing the indebtedness of B. C. Highsmith, defendant's intestate, to G. A. Vick, arising under the milling contract aforesaid, and paid by M. D. Whitehurst, the defendant, amounting to $648.68.

3. That he has charged the defendant with $1,211 as of 1883, proceeds from sale of land, whereas the amount proper to have been charged was $800, 6 May, 1889.

The defendant excepts to the referee's conclusions of law numbered, respectively, 1, 2, 5, 6, 11.

The findings of law thus referred to are the following:

(1) That while purchase by a mortgagee at his own sale is voidable, it is not void, but when the price is reasonable and no exception taken by the mortgagee, it becomes valid; and therefore, by virtue of the sale made by William Whitehead, under his mortgage, on 24 February, 1883, he became the legal owner of the lands purchased by him, and is not chargeable with rents. (460)

(2) That the defendant is chargeable with the proceeds of the first sale of the lands.

5. That the debt mentioned in the twenty-first finding is not a proper charge.

6. That none of the items embraced in voucher "T," except that of Asa Bullock, are proper charges against the estate.

11. That the plaintiffs are entitled to judgment that the sum of $1,261.57, remaining in the hands of the defendant administrator and liable to the demands of the plaintiff creditors, be distributed among the several plaintiffs, as follows: the plaintiff William Whitehead to recover the sum of $1,204.60; the plaintiff Piney Highsmith to recover the sum of $58.64; and the plaintiff M. G. Bryan the sum of $28.64.

R. H. Battle for plaintiff.
No counsel contra.

MERRIMON, C. J. In effect the court approved and sustained the findings of fact and law by the referee. The reference was by consent of parties. Hence, it is not the province of this Court to review the findings of fact, although this action is equitable in its nature, if there is any evidence to sustain them. This is settled by many decisions. There was clearly some evidence to sustain such findings of fact, and accepting them, as we must do, the exceptions as to them cannot be sustained. The credits claimed were, for the reasons stated by the referee, properly disallowed, and the charge complained of was a proper one.

The intestate of the defendant in his lifetime owed the plaintiff Whitehead certain debts, and to secure the same executed to the latter two mortgages of the land therein specified. Under a power of (461) sale in these mortgages the land was sold, and the mortgagee, indirectly through a third party, purchased the same at a "fair" sale, and they sold for their full value. This appears. This sale was made in February of 1883, and the money, the proceeds of the sale, properly applied. The mortgagor died shortly before the sale, but, so far as appears, the heir at law did not and does not at all complain of the same, nor did the defendant until he filed his exceptions to the report; nor does it appear that he is interested in opposition to it as adminis-

trator or otherwise. This sale was not void; it was voidable at the instance of the heir, and in possible cases, it may be that the administrator might in some proper way avoid it, but this does not appear to be such a case. It does not appear that the creditors of the intestate are or can be prejudiced by it, and the defendant is not—does not profess to be—interested in their behalf. *Joyner v. Farmer,* 78 N. C., 196; *Sumner v. Sessoms,* 94 N. C., 371; *Gibson v. Barbour,* 100 N. C., 192.

In 1883 the defendant applied to a proper court for a license to sell certain of the lands of his intestate to make assets to pay debts. Such license was granted; the sale was made; the purchaser at the same paid the purchase-money; the sale was confirmed by the court and the defendant was directed to make title to the purchaser, which he accordingly did. Afterwards, in 1887, the counsel for the defendants and counsel for the plaintiff Whitehead agreed to set aside the sale last above mentioned, and this stipulation was handed to the clerk of the Superior Court in which the license to sell the land was granted; but the clerk made no such order, nor did the court in term time, or at all. What purported to be a resale of the same land was made in 1889, after this action began, and eight hundred dollars was bid for the same. The defendant insists that the referee should have charged him with this sum, and not that bid and paid for the land at the sale thereof under license from the court, as he did do. The license to sell the land, (462) the sale thereof and the confirmation of the sale was not set aside—it remained and remains in full force and effect, and the defendant is properly charged with the price bid and paid for it. The second supposed sale had no judicial or authoritative sanction and was ineffectual, certainly as to the purposes of this action.

As to the exceptions five, six and eleven to the conclusions of law, we are of opinion that they are unfounded. The findings of fact pertinent, certainly so far as we can see, warrant them. If there is error, the burden is upon the defendant to make it appear. None is pointed out and none appears upon the face of the record.

Affirmed.

JAMES S. GRANT v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Negligence—Damages—Accident—Charge—Evidence—Collateral Facts—Expert—Railroad—Sidetrack—Section Master.

1. On the trial the court refused to allow a witness of the plaintiff to testify as to an accident other than that in question, but subsequently a witness

of the defendant testified that another accident happened, the plaintiff's counsel declaring that it was the same he sought to prove by the plaintiff's witness. It was not questioned that the accident occurred: *Held*, that if there was error in rejecting the evidence as offered by the plaintiff, the same was harmless.

2. A witness not qualified to testify as an expert should not be allowed to give his opinion based upon a hypothetical state of facts.

3. Evidence as to the condition of the defendant's road and its switches at places other than the place at which the accident happened, was not competent to prove negligence at the latter place.

4. The court, among other pertinent instructions, told the jury that if the plaintiff's "injury was occasioned by an act which, with proper care, or by machinery, which with proper use and care, would not ordinarily produce damage," then the burden was on the defendant to prove that it was not chargeable with negligence: *Held*, that this was clearly sufficient and in harmony with numerous decisions of this Court, citing several cases.

5. Leaving cars standing on a side-track is not of itself negligence; certainly it is not when the cars are not in the way of trains passing on the main track.

6. The seventh special instruction asked for by the plaintiff was properly denied, because there was evidence from which the jury might find that the defendant was not chargeable with negligence.

APPEAL from *Womack, J.*, at March Term, 1890, of HALIFAX. (463)

The plaintiff brought this action to recover damages alleged to have been occasioned by the negligence of defendant, in that while he was in the regular discharge of his duty as mail agent in one of the cars attached to and forming part of one of defendant's regular passenger and mail trains, in motion, the same was thrown violently from the track, and he sustained serious physical injuries.

The defendant denied the material allegations of the complaint, and the following issues were submitted to the jury:

1. Was the plaintiff damaged by the negligence of the defendant?

2. What damage, if any, did plaintiff sustain by the negligence of the defendant?

It was in evidence from both plaintiff and defendant that plaintiff, while in the discharge of his duties as mail agent on one of the regular passenger trains of defendant, received injuries by the (464) train leaving the track at a switch about a half-mile from Johnson street station in Raleigh, on Friday, 6 February, 1889; that after the accident the pin which held the switch in place was missing, and has never been found; that at the place of the accident there is a decided curve, the switch being on the outside; there were three tracks: one called a spur track, built to hold idle cars, and unconnected with the

other tracks at its end nearest the scene of the accident; one a sidetrack, connected with the main track by the switch in question, and the main track; that at the time of the accident there were no cars on the spur track, but there were fourteen cars standing on the sidetrack, but far enough away to permit trains to pass on the main track with safety; that when the train left the main track at the switch, it ran for a short distance over the crossties and into the cars standing on the sidetrack with great force, badly breaking the engine and several of the standing cars; that prior to the accident the roadbed and switch at the place of accident, as well as the engine and cars, was in good condition, and the employees of the defendant company, whose duty it was to superintend and operate them, were competent and efficient.

Lewis Wrenn, who was conductor in charge of the train, was examined as a witness for the defendant. On the cross-examination, the witness was asked, "Was there not a similar accident near the same place a little before or after this accident by the train running off, run by the same engineer and conductor?" Objection by defendant. Objection sustained, and the plaintiff excepted.

Subsequently, Rufus Horton was examined as a witness for the defendant, and testified that he was the engineer in charge of the derailed train. On his cross-examination the plaintiff was permitted to ask this question: "Have you had another accident shortly prior to this accident?" To which he answered, "I have not for a number of years."

He was then asked, "Were there any accidents shortly after this
(465) one?" To which question answered, "I had an accident shortly afterwards, about two hundred yards above the place of this accident; at the other end of the switch. That switch was probably changed by mistake. I did not get off the track; I ran on the sidetrack and into cars standing on it. There was no switch broken; I was only turned on the wrong track by a mistake of some one changing the switch."

Counsel for the plaintiff stated that this was the accident they desired the witness Wrenn to testify to, who was admitted to have been the conductor in charge of the train on this occasion also.

On the cross-examination of T. H. Pleasants, a witness for the defendant, he was asked by the plaintiff, "If the end of the switch had worn, and the flanges of the wheels caught on it, might not the engine open the switch, coming from either direction?" Objection by the defendant, and objection sustained, for there was no evidence that this switch had worn, and the defendant excepted.

J. R. Thrower, a witness for the defendant, had previously stated, in explaining a model of the switch in use, "The point of the switch would wear after a long time, but would wear thinner."

Rufus Horton had testified that "the points of switches wear some."

W. A. Green had testified, "I examined the switch Wednesday before the accident, and it was in good order."

The plaintiff offered to prove the condition of the track at or near the "Round House" and within the yard limit presided over by the same section master as the road at the point of the accident. Objected to by the defendant. Objection sustained, and the plaintiff excepted.

The plaintiff asked a witness, "What is the present condition of the switches in the yard limit?" Objection by the defendant. Objection sustained, and the defendant excepted.

The plaintiff asked the following special instructions: (466)

1. That defendant railroad is a public carrier, and is required to use the greatest care and utmost diligence and good faith in providing for the safety of its passengers, both as to life and limb.

2. The defendant is required, by the nature of its calling, to provide the safest cars, the safest engines, the safest roads, the safest switches, and the safest and best and most competent employees and servants the nature of its business permits; and if it failed to provide them, or any of them, and the plaintiff was thereby injured, he is entitled to recover to the extent of injuries.

3. If the plaintiff has shown, and the jury believe, that he was injured in the manner described by him, by the accident, or wreck, on defendant's road, the law presumes that the injury was by the defendant's negligence, and the burden is upon the defendant to show that the wreck was not by his fault, and that he used the utmost care and diligence to prevent it.

4. The law requires that the defendant shall not only have efficient and competent servants, but should have them in sufficient numbers to provide against every reasonable contingency.

5. Switches are points and parts of a road at which accidents are liable to occur unless closely attended to, and defendant is held to the utmost diligence, care and watchfulness in selecting the safest patterns in the start and in keeping them in perfect order.

6. Leaving cars on such a sidetrack, so close to such a switch as that the train going at the usual speed of thirty or thirty-five miles an hour and rushing out upon such sidetracks could not have been stopped in time to prevent a collision, is negligence.

7. If the jury believe that the accident and injury to the (467) plaintiff occurred in consequence of a misplaced switch, then the evidence offered by the defendant is not sufficient to rebut the presumption of negligence, and the jury should find the first issue "Yes."

The court gave substantially the first, second, third, fourth and fifth special instructions asked by the plaintiff, and refused the sixth and seventh, and the plaintiff excepted.

The court charged the jury as follows: "In this case the burden of proof is upon the plaintiff to show, by a preponderance of the evidence, that he was injured by the negligence of the defendant, and if he has not so convinced the jury they will answer the first issue 'No.' Unless he has shown the jury by a preponderance of the evidence that the injury was occasioned by an act which, with proper care, or by machinery which, with proper use and care, would not ordinarily produce damage, if he has so satisfied the jury, then he has made what the law terms a *prima facie* case of negligence, and the laboring oar is shifted to the defendant, and the defendant must show by a preponderance of evidence that the company has not been guilty of negligence, and the reason for this is that it is much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence." To this instruction the plaintiff excepted.

The court further charged the jury: "To render the defendant liable, the injury must be the natural and probable consequence of the negligence, such a consequence as, under the circumstances, might or ought to have been foreseen by the wrongdoer as likely to result from his act." To this instruction the plaintiff excepted.

The court further charged the jury: "The defendant claims to have rebutted this presumption of negligence by showing that the only way the accident could have occurred was by the pin having been taken out of the switch by some evil-disposed person other than the defend-
(468) ant and its agents. If the defendant has satisfied the jury that this is true, then the defendant has not been guilty of negligence, and the plaintiff cannot recover." To this charge the plaintiff excepted.

The court further charged the jury: "If the defendant has not so satisfied the jury, and the jury believe that the accident may have occurred in some other manner than by the switch-pin having been so removed, then the defendant must satisfy the jury that it has not in other respects been negligent; and in that view, the court charges the jury that it is not negligence in the defendant company not to have a guard or watchman at the switch." To which charge the plaintiff excepted.

The court further charged: "It was not negligence to place box-cars on the sidetrack, unless they were near enough to interfere with travel on the main track." To which charge the plaintiff excepted.

The court further charged: "If the jury believe that the defendant used the safest and best switches obtainable, and other safest machinery; employed competent officials in their respective capacities; caused the switch and road to be examined carefully every two or three days; that this switch was examined carefully on Wednesday preceding the accident; that a number of trains passed over the switch the same day; that

the switch was operated successfully that morning and nothing was discovered to be wrong with it; that the engineer, in his proper place, noticed and saw that the signal showed the main track to be open, and that only human agency could enable the target to show safety when the switch was partly open, which caused the wreck, then the defendant has not been guilty of negligence, and the plaintiff cannot recover, for the defendant must use the highest degree of care that a reasonable man could use." To which charge the plaintiff excepted. "But if the jury are not so satisfied by the defendant they will answer the first issue 'Yes,' and will proceed to the second issue." (469)

There was a verdict for the defendant.

Rule for a new trial and *venire de novo* by the plaintiff for error in the rejection of evidence set out in exceptions one, two, three and four, and for refusing the special instructions asked for and set out in exceptions five and six, and in those given as set out in exceptions seven, eight, nine, ten, eleven and twelve. Rule discharged. Judgment, upon the verdict, for the defendant. Appeal by the plaintiff.

R. B. Peebles and W. J. Peele for plaintiff.
J. B. Batchelor, John Devereux, Jr., and W. H. Day for defendant.

MERRIMON, C. J. As to the first exception, if it be granted, that the court should have allowed the question to be answered, it appears that another witness of the defendant upon cross-examination, was afterwards allowed to testify that an accident, subsequent to that alleged in the complaint, had happened, and the counsel for the plaintiff said this was the one he desired the first witness to give evidence of. It was not questioned by the defendant that such second accident did occur, and hence the plaintiff had the benefit of the evidence in as full measure, in every aspect of the case, as if the first witness referred to had given the same. The exception is, therefore, without force.

Nor has the second exception any merit. The witness referred to was not examined as an expert, nor does it appear that he was an expert, or that he was skilled in such matters as the question had reference to. The question he was not allowed to answer was based upon a hypothetical state of facts and was intended to elicit his opinion. The answer, if the same had been received, could have served no proper purpose, because "there was no evidence that this switch had worn." It is (470) so stated in the case, and no such evidence appears. There was evidence going to prove that the switch was in good condition. Evidence that trains had passed over the same for about two years did not of itself constitute evidence to prove that the switch had worn so thin as to prove negligence in that respect.

The evidence to which the third and fourth exceptions refer was properly excluded. The condition of the defendant's railroad track at places other than that at which the accident in question happened could not prove or disprove the condition of the track at the latter place. Such evidence would afford ground only for uncertain inference, mere conjecture, and it would certainly tend to mislead and confuse the jury. The same may be said of the evidence of the "condition of the switches in the yard limit," at the time of the trial.

We think the plaintiff has no just ground of exception to the instructions complained of that the court gave the jury. Indeed, it is questionable whether, in some respects, they were not too favorable to him.

The evidence went to prove the accident whereby the plaintiff sustained injury, and that it may have been, and probably was, occasioned by the absence of an important bolt, the purpose and use of which were to hold the "switch" in its proper place. There was no evidence going to show what otherwise could have given rise to it. The principal inquiry was whether the defendant negligently allowed that bolt to be out of its place.

It seems that only such parts of the instructions to the jury as were excepted to are set forth in the record. But it certainly appears that the court very fully, in substance, told the jury that if the plaintiff had satisfied them that his "injury was occasioned by an act which, with proper care or by machinery, which with proper use and care,
(471) would not, ordinarily, produce damage," then the burden was on the defendant to prove that it was not chargeable with negligence. This was clearly sufficient and in harmony with numerous decisions of this Court. *Ellis v. R. R.*, 24 N. C., 138; *Aycock v. R. R.*, 89 N. C., 321, and cases there cited; *Moore v. Parker*, 91 N. C., 275; Railroad Accident Law, 433 *et seq.;* 3 Lawson Rights and Remedies, sec. 1213; *Lawrence v. Green*, 70 Cal., 417.

The court properly declined to give the jury the sixth special instruction asked for by the plaintiff. Leaving cars standing on a sidetrack is not of itself negligence; certainly it is not when the cars are not in the way of trains passing on the main track. A train moving on the main track of a railroad cannot go upon a sidetrack if the two tracks are respectively in order. It is not negligence to do what may be done in the regular course of business, if, in the nature of the matter, harm does not arise therefrom, unless occasioned by some negligence. *Sellars v. R. R.*, 94 N. C., 654. The plaintiff was not entitled to the seventh instruction asked for by him, because, clearly, there was evidence from which the jury might find that the defendant was not chargeable with negligence. Indeed, the evidence went strongly to prove its active diligence.

Other minor objections to the instructions given are groundless, and are fully met by *Sellars v. R. R., supra,* and *Doggett v. R. R.,* 78 N. C., 305.

No error.

Cited: Ice Co. v. R. R., 126 N. C., 797, 800; *Williams v. R. R.,* 130 N. C., 121; *Cheek v. Lumber Co.,* 134 N. C., 228; *Stewart v. R. R.,* 137 N. C., 689; *Hemphill v. Lumber Co.,* 141 N. C., 489; *Winslow v. Hardware Co.,* 147 N. C., 279; *Skipper v. Lumber Co.,* 158 N. C., 323; *Forbes v. Rocky Mount,* 165 N. C., 15.

(472)

*W. F. GRUBBS ET AL. V. THE NORTH CAROLINA HOME INSURANCE COMPANY.

Insurance Companies—Waiver of Condition—Power of Agents, Subagents—Evidence—Adjuster—Estoppel — Notice — Requests for Instruction—Measure of Damages—Comment of Counsel.

1. An agent of an insurance company authorized to take risks and issue policies is empowered to waive by parol a condition in a policy issued by him.

2. In an action against an insurance company for damages for loss by fire, it was shown that there was, within the knowledge of the plaintiff, a condition in the policy to the effect that the insurance company should not be liable for loss, if there was any prior or subsequent insurance, whether valid or invalid, without the written consent of the company endorsed. There was evidence that the plaintiff, shortly before taking out additional insurance in other companies, mentioned such intention to the company's subagent, who had issued its policy to plaintiff, and he said it would be all right. The court told the jury, in effect, that this was a waiver, and they so found: *Held,* no error.

3. Where, after a fire, the adjuster of an insurance company joins the agents of other companies in their efforts to adjust the loss, requires the production of the books and invoices, or duplicates in case of their destruction, and objects to settling only on the ground that he cannot agree with the insured as to the amount of loss, the company represented by such adjuster is estopped from insisting on a forfeiture by reason of the breach of any of the conditions relating to additional insurance.

4. If the acts of the adjuster were, in effect, a waiver of the condition, the defendant could not complain of the refusal of the court to submit an issue of *notice* of the additional insurance.

*CLARK, J., did not sit.

5. It is not error to refuse to consider written requests for instructions, unless presented to the court at or before the close of the testimony.

6. The measure of damages is the fair cash value of the property destroyed at the time and place of its destruction.

7. The fact that a witness, who was present at a conversation had between the plaintiff and defendant's agent, was not called to contradict the plaintiff, though present in court assisting defendant in the trial, is a legitimate subject for counsel's comment.

MERRIMON, C. J., dissented.

(473) ACTION tried before *Womack, J.*, at January Term, 1890, of NORTHAMPTON, to recover damages against the defendant for the loss by fire of certain property insured by the defendant, as set forth in the pleadings. The defendant tendered, among others, the following issue:

"5. Was the insurance in the Pelican Insurance Company, Liverpool, London and Globe Insurance Company, Virginia Fire and Marine Insurance Company, and in the Mt. Vernon Insurance Company made known to the defendant?"

The issues submitted, with the responses to each, were as follows:

1. "Did the defendant make the contract of insurance set out in the complaint? Answer: 'Yes, by consent.'"

2. "What was the value of the goods destroyed by the fire? Answer: '$7,400.'"

3. "Did the plaintiff furnish to the defendant the proof of loss, in compliance with the conditions of the policy? Answer: 'Yes.'"

4. "Did the plaintiff procure the additional subsequent insurance upon the insured property alleged in the answer? Answer: 'Yes.'"

5. "Was the defendant's consent to such additional insurance, if any, endorsed on said policy? Answer: 'No.'"

6. "Did defendant waive such written consent, if none was endorsed? Answer: 'Yes.'"

7. "Did the plaintiff comply with the other conditions of the policy on their part? Answer: 'Yes.'"

8. "Was said policy, after the fire, assigned to the plaintiff Hardy as alleged in the complaint? Answer: 'Yes.'"

Judgment was rendered for plaintiffs. Defendants appealed.

(474) The other facts are sufficiently set out in the opinion.

R. O. Burton, Jr., R. B. Peebles, and W. C. Bowen for plaintiff.

J. W. Hinsdale, T. W. Mason, and B. S. Gay for defendant.

AVERY, J., after stating the facts: The defendant asked the court to instruct the jury that, upon consideration of all the evidence, there was

no waiver of the condition of the policy, requiring the written consent of the defendant to be endorsed upon it provided the plaintiff should take out additional insurance in other companies. This request was equivalent to a demurrer to the whole of the evidence, it being admitted that additional insurance was taken out in other companies after the policy sued on was issued, without first securing the written endorsement of the defendant's consent upon it in accordance with the express requirement of one of its conditions.

If Dr. Ramsey, the agent with whom the plaintiff treated, was authorized to take fire-risks and issue policies, he was empowered to waive by parol a condition in a policy issued by him. *Winans v. Ins. Co.,* 38 Wis., 342; *Miner v. Ins. Co.,* 27 Wis., 693; *Gore v. Ins. Co.,* 53 Wis., 108; *Phoenix Ins. Co. v. Spiers,* 87 Ky., 285; *Kitchin v. Ins. Co.,* 57 Mich., 135; *Ins. Co. v. Earle,* 33 Mich., 143; *Viele v. Ins. Co.,* 26 Iowa, 63; Wood Fire Insurance, sec. 391; *Sherman v. Ins. Co.,* 46 N. Y., 526; *Fishbeck v. Ins. Co.,* 54 Cal., 422.

Where a general agent permits a subagent acting under his direction to receive premiums from, and to fill up and deliver policies to be insured, the acts of the subagent are regarded as the acts of the general agent. *Ins. Co. v. Ruckman,* 127 Ill., 365. The powers of an agent are *prima facie* coextensive with the apparent authority given him, and persons dealing with him may judge of their extent from the (475) nature of the business entrusted to his care. Wood on Insurance, sec. 500; *Hornthal v. Ins. Co.,* 88 N. C., 71; *Beall v. Ins. Co.,* 16 Wis., 241; *Davenport v. Ins. Co.,* 17 Iowa, 276.

Though the authorities are conflicting upon many questions that have arisen as to the powers of insurance agents generally to bind the companies for which they act, there is a growing tendency to abrogate rules laid down by some of the courts when the insured sought the principal officers of these corporations in the larger towns and asked the agents to forward applications for insurance, instead of waiting at their homes for agents sent to solicit their patronage and stimulated to active and persistent effort by their employers. We concur with the judge below in the opinion that if Dr. Ramsey was entrusted by the defendant (as he testified that he was) with the blank applications, and with its policies duly signed by its officers, and was authorized to take risks without consulting the company, to issue policies by simply signing his name as agent, to collect premiums and cancel policies, then he was empowered, as agent, to waive the condition that no additional insurance should be taken. In *Ins. Co. v. Earle, supra,* an agent, when asked about the taking of additional insurance, said, in substance, that it would make no difference, but, without saying it in so many words, left the inference that consent in writing was not necessary, and the court held that the agent had

waived a condition in the policy similar to that in plaintiff's policy, and that the insurers could not avoid liability under the contract because additional insurance was subsequently taken in another company without asking for or securing the endorsement of its written consent on the original policy. See also *Gore v. Ins. Co., supra.* After testifying that he was permitted by the defendant to exercise all of the powers enumerated by the court in the foregoing instructions, Dr. Ramsey stated also that Grubbs did say to him that he would want further insur-
(476) ance, and that he (Ramsey) replied *that he thought* Grubbs could get it if he wished; *that he did not remember any more of the conversation on that subject.* The witness Gay testified that Ramsey said to Grubbs, when asked about further insurance, that it was all right, so that he did not insure for more than three-fourths the value of the stock. Grubbs testified that he told Ramsey the exact amount of insurance that he proposed to place, and did take, in each of the other companies, which did not in the aggregate exceed three-fourths of the value of the property insured. So that the facts in our case would more naturally warrant the inference that the agent did not require his assent to be endorsed in writing on the policy than the evidence in the Michigan authority cited above, because Ramsey not only conveyed the idea that it would be all right to get additional insurance, but added the condition that the whole insurance should not in the aggregate exceed three-fourths of the value of the property insured, thereby excluding the inference that he would insist upon any other condition. But, even upon his own testimony, Ramsey was empowered to waive the endorsement, and if, after Grubbs notified him of the amount which he proposed to take, and did afterwards take, in each of the other companies, Ramsey, by his language, left Grubbs to infer that no objection would be made unless the aggregate amount of insurance in all of the companies should exceed three-fourths of the value of the insured property, and Grubbs did not exceed that limit; then, if Grubbs was induced to believe that the forfeiture would not be insisted on unless the limit in the amount of insurance should be transcended, and acted under that impression in effecting additional insurance, that condition of the policy would be considered as waived by the company. We think, therefore, that there was no error in the rulings of the judge below upon which the sixth, fourteenth, fifteenth, sixteenth and seventeenth exceptions are founded. It seems that some of the counsel abandoned, while other counsel insisted
(477) upon, the exceptions numbered from one to eight inclusive, and so much of exception ten as referred to the refusal of the court to give special instructions asked by the defendant, and numbered seven. If, after a breach of the conditions of a policy, the insurers, with a knowledge of the facts constituting it, by their conduct led the insured

to believe that they still recognize the validity of the policy and consider him as protected by it, and induce him under such impression to incur expense, they will be deemed to have waived the forfeiture, and will be estopped from setting it up as a defense. *Viele v. Ins. Co.,* 26 Iowa, 9, and *ib.,* note, p. 68; *The Oskosh Co. v. Ins. Co.,* 71 Wis., 454.

Where, with a knowledge of the facts constituting the alleged waiver, the insurer, after the insured property had been destroyed by fire, requires the insured to furnish invoice of goods destroyed, proofs of loss, or plans and specifications of the building burned, or to appear for examination, such acts of its adjuster amount to a concession that the forfeiture for failure to secure the endorsement of additional risks will not be insisted upon. *Ins. Co. v. Kittle,* 39 Mich., 51; *Titus v. Ins. Co.,* 81 N. Y., 410; *Conner v. Ins. Co.,* 53 Wis., 585; *Webster v. Ins. Co.,* 26 Wis., 67. Where, after a fire, the adjuster of a company joins the agents of other companies in the effort to adjust the loss, requires the production of books for examination, and asks for invoices from the time the insured went into business, and, the invoices not being furnished because of their destruction by fire, then asks for duplicates, which the insured endeavored, by correspondence with creditors, to get, and objects to settling on the ground only that he cannot agree with the insured as to the amount of loss, and offers to pay for his company its proportion of the loss as estimated by him, the company represented by such adjuster is estopped from insisting upon a forfeiture by reason of the breach of any conditions in the policy in reference to taking additional insurance. *Fishbeck v. Ins. Co., supra; Argall v. Ins. Co.,* 84 N. C., 353. See especially opinion of *Cooley, J.,* in (478) *Ins. Co. v. Kittle, supra.*

The testimony admitted after objection, and constituting the ground of exceptions four, five and seven, will therefore appear at a glance to be competent, if our view of the law in reference to waiver by conduct subsequent to the loss, and inconsistent with the idea of insisting upon a forfeiture for failure to comply with the conditions set forth in the policy, be correct. It would follow also, from the principle laid down by us, that there was no error in so much of his Honor's charge as relates to the doctrine of waiver by the acts of the defendant's agents after the property was destroyed, and this applies to the thirteenth, eighteenth and nineteenth exceptions.

The defendant excepted to the refusal of the court to submit an issue involving the question whether the fact that plaintiff had obtained additional insurance in the other four companies was made known to the defendant before the fire occurred. It does not appear that the refusal of the court to allow the jury to answer such an issue, specifically, deprived the defendant of the opportunity to have presented to the jury

any view of the law arising out of the testimony that was material to his defense, and there was, therefore, no error in the ruling complained of. *McAdoo v. R. R.*, 105 N. C., 151; *Emry v. R. R.*, 102 N. C., 209; *Lineberger v. Tidwell*, 104 N. C., 510; *Bonds v. Smith*, 106 N. C., 564. Indeed, it is apparent that, according to our view of the law governing this case, it is not material whether Primrose and Cowper, the president and adjuster of the defendant company, or the agent Ramsey had notice of the additional insurance before the loss, since it is not denied that they had actual notice after the fire, and when Cowper, according to the testimony, so acted as to waive the right of the company to insist upon a forfeiture of the policy. Besides, it seems that, in order to make
(479) the issue tendered subserve the proposed purpose, it would be necessary now to amend it by interpolating the words "prior to the loss," and it is rather late to amend defective exceptions in this Court.

The ninth exception is stated in the record as follows:

"During the morning session of the court, and pending the argument of counsel, the court gave notice to counsel that no special instructions would be considered which were not presented at the convening of court for the afternoon session. Near the conclusion of the speech of Mr. Mason, who closed for the defendant, just at night, the defendant presented an additional special instruction, which was not considered for the reason that it was not presented in apt time. Upon the conclusion of the speech of Mr. Mason the court took a recess until after supper, when Mr. Burton closed for the plaintiff."

It was not error to refuse to consider written requests for instructions unless presented to the court at or before the close of the testimony. *Marsh v. Richardson*, 106 N. C., 548; *Taylor v. Plummer*, 105 N. C., 56; *Powell v. R. R.*, 68 N. C., 395.

The eleventh exception is stated in the record as follows:

"There was evidence tending to support the eleventh and twelfth instructions asked by the defendant. The plaintiff's evidence tended to show that the cost of the goods with five per cent added for cost of transportation, amounted to $8,218.31, made up of the amount of inventory taken of 8 August, 1889, $5,852.71; and subsequent purchases show by his ledger account, and certain stocks of goods purchased from assignees, etc. (about $475 worth), $4,007.68, deducting the amount of sales from 8 August to the time of fire, $1,478.01 in cash sales, and $1,582.10 in credit sales, upon which there was an average profit of thirty per cent; that his purchases were upon thirty days and four months, and that a discount of from one to two per cent could have been obtained
(480) by purchasing in cash; that the value was, at least, $7,400.

"The defendant's evidence tended to show that the value of the stock of goods did not exceed $3,500 or $4,000 at the time of the fire.

"His Honor charged the jury, on the second issue, that the measure of damages was the fair cash value of goods at the time and place of the fire, and recapitulated the evidence *in extenso* as to the respective contentions of the parties on the question of damages. The defendant excepted."

The rule laid down in this Court is substantially the same as that stated for the Court by *Justice Reade* in *Fowler v. Ins. Co.*, 74 N. C., 89, and is expressed in almost identical language. In that case, as in ours, a stock of goods had been destroyed by fire, and the court held that "the measure of damages against the defendant is the *market value* of the goods (within the amount insured) *at the time and place of the fire.*" His Honor substituted "fair cash value" for "market value." We can see no material difference between the words used in the opinion referred to and the language of the charge. This Court in that case cited May on Insurance, sec. 424, and the authority fully sustains the rule announced. Wood Insurance, sec. 445, says that one who takes out a policy on a stock of goods can recover "only *such sum* as the goods were actually worth *at* the time of the loss, not what they cost him, *not necessarily what it would cost him to replace the goods,* but the *sum which the goods* were worth when they were destroyed by the casualty insured against." The cost of the property in the market may be shown as one of the elements, but not the test, of its value when destroyed, and, on the other hand, it is competent for the insurer to prove that there was a deterioration in the value of the goods after the purchase and before the loss, which, if not resulting merely from temporary depression in the market, will tend to establish the value at the time of the fire.

The damage depends upon the ascertainment of the amount for (481) which the property can be sold, and that in turn depends upon its actual value at the time and place of the fire. Wood on Insurance, p. 765, sec. 445; *Ins. Co. v. Transportation Co.*, 12 Wall., 201. In *Wynne v. Ins. Co.*, 71 N. C., 125, the Court construed the statement that the jury had found "the value of the stock on hand to be $2,600," to mean just the same as if they had found that "the damage on account of the destruction of the goods" was $2,600, thus indirectly giving sanction to the rule laid down by the judge below in this case.

In *Bobbitt v. Ins. Co.*, 66 N. C., 70, the Court said, "the value of the tobacco was what it *was worth then and there*—what it would have sold for then and there"—and it would seem that there is no material difference between this rule and the charge of the judge that the "measure of damage was the fair cash value at the time and place of the fire." It is not material that the Court declared that the value of a staple, like

tobacco, at any particular point might be determined as well in another way by ascertaining the price in the usual markets, and deducting stamp duty, the cost of transportation, and other usual and necessary expenses. But it was not in fact necessary to have passed upon the question of the *quantum* of damages in that case at all.

The fact that Mr. Johnson, who was a witness for the defendant, and who was present in the bar and aiding the defendant's counsel in the conduct of the case, was not examined to contradict the plaintiff Grubbs as to what occurred when he and Cowper came to adjust the loss, was a legitimate subject of comment, and it was not error to refuse to stop counsel from using the fact as an argument to show that the testimony of Grubbs should be believed.

We understand that the twelfth exception was abandoned. It was, at any rate, a waste of time to discuss it.

Upon a review of all the assignments of error, we think that there is not sufficient ground for a new trial.

(482) No error.

MERRIMON, C. J., dissenting: The policy upon which this action is founded contains this provision, which is expressly made a material part of the contract of insurance: "This company will not be liable for . . . loss if there be any prior or subsequent insurance, whether valid or invalid, without *written consent* of the company endorsed hereon." The plaintiffs were not inadvertent to this provision. It clearly appears that they had actual knowledge of and understood its meaning and purpose. It is clear that it was a material part of the contract.

It is contended, however, by the plaintiffs that the defendant *waived* this provision and the condition embodied by it, and this contention is founded upon this evidence: "The witness (one of the plaintiffs) then proceeded to say, that after insuring in the defendant company he had a conversation with Dr. J. N. Ramsey, agent of the defendant company, before he took out additional insurance, telling him that he wanted additional insurance, and that Dr. Ramsey said it would be all right." This witness, in reply to further interrogatories, objected to by the defendant, said "he told Ramsey that he wanted additional insurance in the Pelican Insurance Company and the Virginia Fire and Marine Insurance Company; the conversation was in his store; that later on he said he wanted additional insurance in the Liverpool, London and Globe Insurance Company, and in the Mt. Vernon Insurance Company; that he did not know who was present, except his clerk, R. T. Gay; that Ramsey said it would be all right, so that he did not take out policies over three-fourths value of the goods; that he had two conversations with Ramsey, and told him that he had an idea of taking additional insur-

ance; that he said it was all right; that he told him that he (483) wanted $2,000 in the Virginia Fire and Marine, and $1,000 in the Pelican; the second conversation he told him that he wanted $500 in the Liverpool, London and Globe, and $500 in the Mt. Vernon; that these conversations were before the additional insurance was effected." Another witness said he "heard the conversations between Grubbs and Ramsey; Grubbs said that he did not have insurance sufficient; that Ramsey said it was all right, so that he did not get more than three-fourths value of his stock."

Dr. J. N. Ramsey, mentioned, testified "that a few days after he issued the policy to the plaintiff sued on, Grubbs said to him that he would want further insurance; that he said to him that he thought he could get it if he wished it; . . . that he did not know that Grubbs was insured in any other company until after the fire."

The plaintiffs obtained additional insurance in other companies, and it was admitted that no written consent was endorsed upon the policy sued upon that the plaintiffs might take such or any additional insurance upon the property insured by the defendant.

Now, it seems to me, that putting aside all question as to the authority of Ramsey, as agent of the defendant, to waive the condition in question, the evidence accepted as true did not, in any fair view of it, constitute such waiver. The plaintiffs knew of the condition that if they took other further insurance without consent on the part of the defendant written on the policy sued upon, the latter would be void. They did not ask Ramsey, the agent, to waive the condition, to say that further insurance might be taken without consent written on the policy, nor did they give him or the defendant notice that they had taken further insurance, nor did the defendant, or its agent, have such notice until after the loss; at most, they only suggested their desire and purpose to obtain more. Nor did Ramsey tell them that they might take other insurance without having consent of the defendant endorsed on the policy sued upon, and that they might do so without notice to him or the defend- (484) ant. The fair and just interpretation of what and all that was said by the plaintiffs and Ramsey is, that the former suggested their wish and purpose to obtain further insurance, and the latter said, in reply, they might do so, not exceeding two-thirds of the value of the property insured, in the way and as contemplated by the policy of the defendant held by the plaintiffs. Ramsey did not say they they might do otherwise. What motive or reason had he to waive the condition? And what reasonable ground was there to merely infer that he did? And what just reason had the plaintiffs to believe that the agent consented to or intended such waiver? And is it not clear that plaintiffs carelessly and negligently failed to have the defendant's consent written

on the policy, or that they felt apprehensive that the defendant would not consent? *Collins v. Ins. Co.,* 79 N. C., 279; *Sugg v. Ins. Co.,* 98 N. C., 143; *Hansus v. Ins. Co.,* 111 Ind., 90; *Henly v. Ins. Co.,* 5 Nev., 268; May Insurance, secs. 369, 372; Wood on Insurance, sec. 496.

It is further contended that the defendant, after the plaintiffs sustained the loss, waived the condition in question, or is estopped to claim and have benefit of the same, in that its agents took steps to ascertain the extent of the loss, with a view to pay what it might be liable for upon the policy. But the defendant's agents did not say their purpose was to waive the condition; nor was there any fair implication that they did; nor was there any consideration for such waiver. The mere fact that such inquiry was made could not reasonably or justly be treated as such waiver or an estoppel. The defendant might, without waiving any right, or defense, make such inquiry in order to learn what it ought, without regard to its legal liability fairly to pay, if anything. It might by such inquiry ascertain whether the loss was fairly sustained—whether the insurance was too great—whether the stock of goods was as great as represented, or whether the same was over-valued, (485) etc. Simply such inquiry ought not to conclude the defendant as to any proper defense it might have. So far as appears there are no considerations, valuable or otherwise, that in their nature do or ought to so conclude the defendant. It does not appear that the defendant was not in some way prejudiced by the additional insurance. May Ins., sec. 507 (2 Ed.).

The contract of insurance is plain and unequivocal in the respect in question. The plaintiffs clearly understood its meaning and purpose. It is the duty of the court to uphold and enforce it in its integrity, as it affects the rights created by it of both parties. Reasonably and justly a waiver of any material part, provision or condition of it, to be effectual, should appear, not by mere conjecture or inference, but by evidence that reasonably tends to prove the same, and the burden in this respect is on the plaintiffs. I do not think there was such evidence in this case.

Per Curiam. Affirmed.

Cited: Posey v. Patton, 109 N. C., 456; *Dibbrell v. Ins. Co.,* 110 N. C., 204; *Bergeron v. Ins. Co.,* 111 N. C., 48; *Luttrell v. Martin,* 112 N. C., 607; *S. v. Hairston,* 121 N. C., 583; *Horton v. Ins. Co.,* 122 N. C., 504; *Perry v. Ins. Co.,* 132 N. C., 288; *Craddock v. Barnes,* 142 N. C., 99; *Hart v. R. R.,* 144 N. C., 92; *Black v. Ins. Co.,* 148 N. C., 172, 177; *Roper v. Ins. Co.,* 161 N. C., 156; *Lumber Co. v. Johnson,* 177 N. C., 51.

R. H. AND P. E. GATLIN v. J. H. HARRELL AND WIFE.

Deceit in Sale of Land—Damages—Sufficient Cause of Action.

In an action for damages for deceit practiced in the sale of some land, the proof was that the defendant pointed out some lines and boundaries some of which were not true, and said a survey showed a certain number of acres. There was no proof that defendants knew they were untrue or intended to deceive plaintiff, or that the survey did not show the alleged number of acres: *Held*, the action could not be maintained.

ACTION tried at Fall Term, 1890, of EDGECOMBE, by *Whitaker, J.*

Its purpose was to recover damages occasioned by the alleged fraud and deceit of the defendants perpetrated upon the *feme* plaintiff in the sale to her of the tract of land mentioned in the com- (486) plaint. The pleadings raised issues of fact.

The only evidence produced on the trial was as follows:

R. H. Gatlin, for plaintiff: "Bought land from John H. Harrell, the defendant, about 27 July, 1888; before the time, he was to see me two or three times in regard to it; he described the land to me. I walked down the canal with him and he pointed out to me a corner between him and his brother George Harrell; he said the other corner was a pine stump on the road near an old steam-mill; before that time he pointed out two trees—a pine and a maple—on the line between him and Fred Boyett; these were the lines of the land he sold me; he gave me an obligation to make title upon payment of purchase-money, and he made a deed; before deed was made he also showed me another corner, on the west of this tract, or, in other words, the corner between him and Boyett; he also showed me some line-trees between him and his brother George, the corner on the road from Tarboro to Goose Nest; Boyett's land on the south of this corner; land since sold me by Boyett on the west; he said the tract had been surveyed and contained 115 acres. These corners and lines pointed out to me were not the true corners and lines, except the line on the east side of this land between him and George Harrell." Deed from John H. Harrell and Martha E. Harrell to Penelope E. Gatlin, dated 29 August, 1888, B. 65, p. 400, introduced. Grant of 640 acres land, John Smith, dated 1 March, 1780, introduced. Deed from John Smith to Blake B. Wiggins, dated 26 January, 1785, introduced. Deed from Blake B. Wiggins and wife to John Burnett, 19 February, 1782, introduced. Deed from John Burnett to Thomas Bryan, 26 September, 1805, introduced. Deed from John Burnett to Arthur Staton, April, 1798, introduced. Deed from John Burnett to Wm. Jones, B. 8, p. 72, Edgecombe Record, introduced. Here, in answer to a ques-

(487) tion from the court, and before plaintiffs had closed their case, it was admitted that the deed from John H. Harrell and Martha E. Harrell to Penelope E. Gatlin, dated 22 August, 1888, was taken by grantees in execution of previous contract to convey land as pointed out to them by grantors. It thereupon was suggested by the court that plaintiffs could not recover in this action. The plaintiffs submitted to a nonsuit and appealed to the Supreme Court.

G. M. T. Fountain (by brief) for plaintiffs.
R. H. Battle for defendant.

MERRIMON, C. J. The gist, and largely the substance of the plaintiffs' alleged cause of action consists in the false and fraudulent representations of the defendants to the *feme* plaintiff, in which she confided and on which she acted, as to the lines, corner and line-trees and the quantity of the tract of land they sold and conveyed to her as alleged. The defendants in their answer broadly and much in detail denied the material allegations of the complaint. No question was raised before or on the trial as to whether the plaintiffs alleged, or sufficiently alleged, a good cause of action, as their counsel now seems to suppose. The nonsuit was not founded upon such ground, certainly so far as appears. The plaintiffs produced such evidence as they could, or saw fit to do, and thereupon the court intimated the opinion that they could not recover, and they submitted to a judgment of nonsuit, as they might do.

We think the suggestion of the court was well founded. The whole of the evidence accepted as true did not in any reasonable view of it prove the alleged fraud and deceit. The proof was that the defendants pointed out to the plaintiff certain corners and line-trees and lines of the tract so sold, and that these or some of them were not the true (488) ones; but there is nothing to prove that the defendants knew that they were not the true ones, nor that they fraudulently intended to mislead, deceive and get advantage of the *feme* plaintiff. The proof further was that the defendants "said the tract had been surveyed and contained one hundred and fifteen acres." There was nothing to prove that it had not been surveyed, or that it did not contain that quantity. The mere fact that the defendants pointed out corners and lines not the true ones, could not of itself prove fraud and deceit, especially in the total absence of proof that the tract conveyed did not contain the quantity of land specified in the deed as "containing 115 acres, more or less." Indeed, there was no proof, so far as appears, as to the quantity of land the defendants contracted to sell to the *feme* plaintiff, or what quantity they conveyed, otherwise than as shown by the deed put in evidence.

There was no proof to sustain the material allegations of the complaint. In the absence of such proof, it is obvious the plaintiffs could not recover, and the court hence properly intimated that they could not. There must be *probata* as well as *allegata.*

Affirmed.

Cited: Tarault v. Seip, 158 N. C., 368, 375.

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(489)

W. H. S. BURGWYN v. DANIEL HALL AND H. T. JENKINS.

Damages — False Arrest—Nonresidents — Insolvent Debtors—Constitution — Imprisonment for Debt — Assignment — Discharge—Fraud—Tort—Trustee—The Code—Homestead.

1. In an action for damages for a false arrest, the plaintiff obtained an order for the arrest of the defendants, who were nonresidents. They, being unable to give bail, filed their petition to be allowed the benefits of this statute relating to insolvent debtors: *Held*, they were entitled to the benefits of such statute.
2. There is, under the Constitution, no imprisonment for debt in this State, except in cases of fraud, and in such cases the defendant in arrest may be discharged, either by giving bail or surrendering his property for the benefit of creditors, as provided by statute.
3. The statute entitled "Insolvent Debtors" protects from future arrest for the same such as have surrendered their property, though after-acquired property may be subject to execution and sale, in proper cases.
4. Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action, and every person taken or charged in execution or arrest for any debt or damage rendered in any action whatsoever, is entitled to the benefits of the chapter entitled "Insolvent Debtors."
5. The benefits of the statute extend as well to those arrested for torts as for debt, and the debt growing out of one is no more a debt and no more entitled to extraordinary process for its collection than the other.
6. In order to prevent undue preference in favor of parties whose debts are already ascertained, the proper remedy of the party seeking to establish and secure his damages for tort is to have a trustee appointed, under The Code, secs. 2957, 2977, and 2981, to hold and distribute among creditors when and as soon as all debts are ascertained.
7. The benefits of the statute are not confined to the residents of this State, but nonresidents cannot take the benefits of the homestead and personal property exemptions; nor are they entitled here to any exemptions given by the laws of their own State.

DAVIS, J., and AVERY, J., dissented.

(490) APPEAL from an order made by *Whitaker, J.*, in an action pending in VANCE.

The plaintiff brought his action against the defendants, who are nonresidents of this State, to recover damages for an alleged injury to his person, done and procured to be done by them. In the course of the action he obtained an order for their arrest, and they were duly arrested, and, failing to give bail, as allowed by law, they are held in the common jail of the county of Vance, in which county the action was brought. The defendants filed their petition, therein alleging the material facts in the Superior Court of said county, in which the action mentioned is pending, praying that they may be allowed the benefit of the statute (The Code, ch. 27) entitled "Insolvent Debtors." The plaintiff opposes the application of the defendants, denies that they are insolvent, and insists that, inasmuch as it appears that they are nonresidents of this State, and the cause of action on account whereof they are arrested and held is a tort, they are not entitled to the benefits of the statute they invoke.

The court gave judgment denying the application of the defendants to be discharged from custody, and they appealed to this Court.

W. H. Cheek, A. C. Zollicoffer, and W. R. Henry for plaintiffs.
T. T. Hicks and Pittman & Shaw for defendants.

MERRIMON, C. J. The Constitution (Art. I, sec. 16) provides that "There shall be no imprisonment for debt in this State, except in cases of fraud." The Legislature, observing this provision, has provided by statute (The Code, sec. 291) that in civil actions, founded upon particular causes of action specified, the defendant may, under an order of arrest duly obtained, be arrested and held in custody, unless he shall, as he may do in the way prescribed, give bail "by causing a written
(491) undertaking, payable to the plaintiff, to be executed by sufficient surety, to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein"; and he may likewise be arrested in execution upon a judgment in the cases specified, as prescribed by the statute (The Code, secs. 442, 447, 448, par. 3); otherwise, parties in civil actions cannot be arrested unless for contempt.

But another statute, entitled "Insolvent Debtors" (The Code, secs. 2942, 2981), provides, generally, that every insolvent debtor may, in the way prescribed, "assign"—surrender—his estate for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of

any debts previously contracted. It would seem that this statute is unnecessary as to honest debtors, because the constitutional provision above recited relieves such debtors from imprisonment. Such surrender of his property by an insolvent debtor for the benefit of his creditors, as to debts and judgments existing before such surrender, would relieve him from possible future annoyance and arrest on account of such debts, although property he might thereafter acquire might be liable to levy and sale to pay the same in proper cases. But the benefits of this chapter are not confined to simply insolvent debtors so designated; such benefits are extended to other classes of persons held in arrest in civil actions. The statute cited (The Code, sec. 2951) prescribes that "the following persons are entitled to the benefits of this chapter:

"1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

"2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever."

It is to be observed that this provision enlarges the general purpose of the statute by extending the same to the classes of persons specified: First, to "every person taken or charged (not yet arrested) on any order of arrest for default of bail"; secondly, to every person (492) whose bail has surrendered him, as allowed by the statute; thirdly, to "every person taken or charged (but not yet taken) in execution of arrest for any debt or damages rendered in any action whatever," as allowed by the statute (The Code, secs. 442, 447, 448, par. 3). The terms—all of them—thus extending the purpose of the statute are as broad and sweeping as they well can be. They do not, in any view of them as to the purpose intended, imply limitation or discrimination. They plainly embrace "every person" taken or charged to be arrested by virtue of "any order of arrest"—not specially for a tort, or for fraud, or other particular cause of action as to which a person may be arrested, but for *any cause of action,* no matter what may be its nature, if the person is arrested in a case wherein he may lawfully be so. They, in plain, strong terms, embrace any such arrest made or ordered to be made in any action whatever, that is, any action in which a person—a party—may be so arrested. There is a total absence of words or phraseology of limitation or discrimination in the section of the statute just recited, or in the statute, or elsewhere, that confines its benefits to persons so arrested or to be arrested as fraudulent debtors. Nor is there anything in the nature or purpose of the statute that reasonably, much less necessarily, implies such limitation. Its general purpose is to relieve honest insolvent debtors from arrest on account of debts and judgments against them existing at and before the time they make a surrender of their property as prescribed. The purpose of the particular section of the statute under

consideration is to relieve a party to an action arrested or presently subject to arrest, or "in execution of arrest for any debt or damage rendered in any action whatever," upon a surrender of his property in the way prescribed. In such case the party arrested and so seeking relief must notify the creditors or plaintiff at whose suit he is arrested, but
(493) he may or may not notify other creditors of his application to surrender his property and be discharged from arrest, and only such creditors as may be so notified will be affected by his discharge. The Code, sec. 2955. The principal relief sought in such case by the party arrested is to be discharged from arrest in the action brought by the creditor at whose instance he was arrested. And he is entitled to such discharge upon the honest surrender of his property in the way prescribed, whether the cause of action on account of which he was arrested was a fraudulent debt, or a tort, or of other nature as to which he might be arrested. The statute (The Code, sec. 2952) so expressly provides. It, in broadest terms, embraces "every person taken or charged as in the preceding section (that above described) specified."

It is insisted, however, that the several sections of the statute pertinent to that (section 2951) above recited, mention and refer in terms only to *debtors and creditors*, and do not in like express terms mention or refer to persons arrested or to be arrested for causes of action other than a fraudulent debt, and, therefore, persons arrested or to be arrested for such other causes of action are not entitled to the benefits of this statute. The terms "debtor and creditor" are employed generally in varying connections throughout the statute to designate the classes of persons to be affected by it, and such terms are not modified so as to make them pertinently and expressly applicable to persons *arrested* seeking benefit of the statute. It seems that the Legislature, in enlarging and extending the purpose of the statute so as to embrace all persons arrested and to be arrested in civil actions, probably by inadvertence, failed to use the most appropriate terms to effectuate and harmonize the details of its purpose; but such failure, and the use of the not very precise words, *debtor and creditor,* in matters of detail, cannot be allowed to modify and abridge by mere implication the meaning and application of the plain,
(494) strong and comprehensive words and phraseology employed in the section extending the benefit of the statute to all persons so arrested. As we have said, such purpose appears clearly by explicit and the most comprehensive terms; and, moreover, it appears from the nature of the matter. Why should a person guilty of fraud in contracting a debt on which an action is founded, when he shall be arrested on that account, as he may be, have the benefit of the statute under consideration, and another person arrested in an action brought to recover damages for an injury to person or character, or for injuring or for wrong-

fully taking, detaining or converting property, not have the like benefit? Can any just, or even plausible, reason be suggested for such distinction? Clearly, the Legislature had no intention to exclude any person arrested in a civil action for any of the causes specified in the statute (The Code, sec. 291) from such benefit. None appears from its terms or by reasonable inference or implication.

The term "debtor and creditor," employed generally and without precision in the statute as to persons arrested in civil actions, must be taken as meaning and applying to the plaintiff and defendant in the action in which the defendant shall be so arrested. They imply the plaintiff's claiming and suing for damages for which the defendant is liable to him. Such interpretation is allowable and reasonable, with a view to effectuate the intention of the statute as to persons so arrested.

When and as soon as the plaintiff obtains judgment for damages in such case, he at once becomes a judgment creditor of the defendant, and then he comes within the words of the section of the statute recited above. The second clause thereof expressly embraces "every person taken or charged in execution of arrest for any *debt or damages* rendered in any action whatever." Thus, persons "in execution of arrest" for fraudulent debts (they could not be arrested for or on account of honest debts) and for "damages rendered in any action what- (495) ever," are expressly put on the same footing.

It is further said that the plaintiff in an action for injury to the person, before trial, has no debt and may never obtain judgment; and, it is asked, to what end shall the defendant, arrested in such action, surrender his property as contemplated by the statute and be discharged, and how shall his property so surrendered, or the proceeds of the sale thereof by the trustee, be distributed as between the plaintiff (who has no debt or judgment) and other creditors of the defendant? It is hence insisted that the defendant is not entitled to the benefit of the statute. In such case the statute contemplates that the defendant may surrender his property and be discharged, and thus he may have the benefit of the principal object to be attained. His property so surrendered will pass to a trustee, to be appointed as prescribed by the statute (The Code, secs. 2957, 2977, 2981), to be applied for the benefit of his creditors, including the plaintiff in the action, when he shall obtain judgment. The distribution of the assets of the defendant may, if need be, be stayed until plaintiff's action shall be tried. If he shall obtain judgment, he will share in the distribution of the assets; if he shall not, then the assets will be distributed to the defendant's creditors; and if there be any surplus, the same will be returned to him. The statute so intends.

The difficulty and objection suggested are no greater, or otherwise, substantially, than it would have been if the cause of action sued upon

had been a fraudulent debt contracted by the defendant. Indeed, in any case or proceeding involving a distribution of the assets of an insolvent debtor, the distribution might be stayed until a disputed claim could be litigated and determined. Besides, provisions of a statute affecting its details, not altogether practicable, but not essential to its effectiveness, and the absence of like provisions, will not be allowed to defeat
(496) or abridge its purpose clearly appearing. It is the duty of the court to give it full effect, if this be at all practicable, and, to that end, to interpret its terms and phraseology in the light of, and with a view to, its purpose.

We think it clear that the provisions of the statute under consideration extend to and embrace every person arrested or to be arrested in a civil action on account of any cause of action specified in the statute (The Code, sec. 291). If the contention of the plaintiff should be allowed to prevail, no person arrested before judgment in the action could have benefit of the statute, unless he should be arrested on account of a fraudulent debt. If the purpose had been to so limit its application, it would have so declared—it certainly would not have employed such explicit and comprehensive terms to express its narrow and exclusive meaning.

Nor are the benefits of the statute confined to residents of this State. There is no provision in it, or any other statute, within our knowledge, that in terms or by reasonable implication declares that a nonresident shall not be discharged from arrest in a civil action if he makes the complete surrender of his estate as prescribed.

The defendants, being nonresidents, are not entitled to homestead and personal property exemptions. Such exemptions are allowed only in favor of persons having residence in this State. *Baker v. Legget,* 98 N. C., 304; *Finley v. Saunders, ib.,* 462. Nor are they entitled to such exemptions here, under any statute of the State of Georgia, they being citizens of that State. Such statute could not secure to them in this State exemptions of property against the rights of creditors. In some respects, the courts of this State, upon principles of comity, will administer the laws of another State in the distribution of the property of deceased persons who were citizens of the latter State, but they
(497) will do so subject to the rights of citizens of this State. *Medley v. Dunlap,* 90 N. C., 527; *Simpson v. Cureton,* 97 N. C., 112.

The defendants are entitled to be discharged from arrest when they make surrender of their property as specified in their respective accounts of the same. To the end the same may be received and disposed of according to law, the court should appoint a trustee for that purpose, as prescribed by the statute (The Code, secs. 2957, 2977, 2980).

No harm can come from the construction we have given the statute, because it is always in the power of the plaintiff to suggest fraud and have an issue submitted and defendant held (in default of bail) till it is found that a full disclosure has been made.

There is error. The defendants are entitled to make surrender of their property and be discharged from arrest according to law.

Reversed.

DAVIS, J., dissenting: I cannot concur in the opinion that the defendants are entitled, *before judgment rendered,* to the benefit of chapter 27 of The Code. It is manifest and, I suppose, will be conceded that the relation of creditor and debtor cannot exist, if ever, till *"after judgment,"* when, if the plaintiff shall recover damages, he will become "a judgment *creditor*" and the defendants will become "judgment *debtors.*" I think chapter 27 of The Code can only apply when the relation of *creditor* and *debtor* exists by reason of a contract, *express or implied,* or when the relation is established by a "judgment rendered" for the recovery of unliquidated damages, or in an action *ex delicto.* I think this plainly appears from the title of the original act (Laws 1868-69, ch. 162) and the context of the act. This Court can only construe and declare the law; it cannot make law, and section 2951 of The Code is to receive the broad construction given to it, without reference to the context or subject-matter of the chapter; then it must apply to any action whatever; and the person under arrest, whether debtor, (498) tort-feasor, or criminal, is entitled to discharge, for there is nothing but the context and subject-matter that restricts the section to civil actions, and these plainly restrict it to insolvents against whom there is a "previously" rendered "judgment" or a "previously contracted debt." No one would insist that a person under arrest in a *criminal* action would be entitled to the benefit of the act, and yet, it seems to me, this would be no more in conflict with the chapter relating to crimes than with the chapter on arrest and bail. I think it is inconsistent with either. When any unadjudicated claim, whether *ex contractu* or *ex delicto,* becomes a debt by the ascertainment and judgment of court, the relation of creditor is established, and the debtor is entitled to the benefit of the act. Section 2952 provides only for the discharge upon compliance with chapter 27 of The Code; and, without enumerating the provisions to be complied with, there is not one of them that is not predicated upon a previously contracted debt or a previously *rendered* judgment. If these defendants had been arrested at the suit of some creditor (the plaintiff cannot be a creditor until and unless he becomes such by judgment yet to be *rendered*), there can nowhere be found in the statute a provision by which they can notify the plaintiff in this action, or any one else

against whom they may have committed a tort, and obtain their discharge as against the claim for damages which the person wronged may have till after *judgment rendered.*

It is well settled that the constitutional provision prohibiting imprisonment for debt, except for fraud, has no application to actions for torts. *Long v. McLean,* 88 N. C., 3, and cases cited; *Kinney v. Laughenour,* 97 N. C., 326, and cases cited. If a person arrested upon a charge of *fraud* is not entitled to discharge before trial, why should one arrested for tort be so entitled? Before an order of arrest can be made, the plain-
(499) tiff is required to give bond, with security, for the protection of the defendant, and upon which he may have redress if it shall be found by the judgment that the plaintiff is not entitled to recover. Would the condition of this bond be canceled by the discharge of the defendant *before* judgment? I think not; and if the defendant is held to bail for a tort, I think he can only be discharged, *before judgment,* by complying with section 298 of The Code, as a criminal punished by fine and costs can only be discharged after judgment for fine and costs.

Section 2951 is the only section relied on for the discharge of the defendants. That section declares what "persons shall be entitled to the benefit of this chapter." The first section of the chapter (section 2942 of The Code) provides that the insolvent may file his petition, etc., praying that his estate may be assigned for the benefit of all his *creditors,* and "that his person may thereafter be exempt from arrest or imprisonment on account of *any judgment previously rendered or of any debt previously contracted.*" Section 2950 provides that the person of the insolvent, by the *order of discharge,* "shall forever *thereafter be exempted from arrest or imprisonment on account of any judgment or debt due at the time of such order, or contracted for before that time, though payable afterwards,*" except the provision in section 2967 in favor of the putative father of a bastard, or person committed for fine and costs in criminal actions. I am unable, after a careful examination of the statute which we are called upon to construe, to find a section or sentence that will extend its *"benefit"* to any insolvent person on account of any judgment not yet rendered, or any *debt not yet contracted.* There is as yet *no judgment rendered* or debt existing against the defendants, and (give to section 2951 the broadest possible construction and the *"benefit"* prescribed in sections 2942 and 2950 does not extend to them), I think, unless we mean to extend the "benefit" of a statute which, by its clear and unmistakable language, limits it to judgments *previously*
(500) rendered or debts *previously* contracted to *judgment* for damages *hereafter* to be *rendered,* the defendants do not come within its "benefit." If the language of the statute limits the "benefit," I do not think we can extend it by construction so as to include the defendants,

unless persons against whom damages are claimed and sought to be recovered for alleged torts, however grievous they may be, are to find, *before judgment* (and by the action of a debtor) a benefit that can nowhere be found in favor of an insolvent debtor.

The defendants have been lawfully arrested, *before judgment,* in action *ex delicto* for a tort, and the action is still pending, which distinguishes it from *Houston v. Walsh,* 79 N. C., 35, which, I think, by the clearest implication, sustains the view presented by me. Being lawfully in arrest for a *tort,* they cannot be discharged, except as allowed in the chapter on arrest and bail, or until it is determined by judgment whether there are damages or not, when, of course, they will be discharged, if there are none, or if there shall be judgment making them judgment debtors, when they will be entitled to the benefits of chapter 27 of The Code. In the present case the insolvent may have no assets to distribute, but if there were, I know of no provision by which they could be distributed, except among creditors existing at the time of the application for discharge, but cases may arise in which our decision may be of vast interest to persons who may be greatly damaged by tort-feasors; and, having a decided conviction as to the construction to be placed upon the statute, I have felt it my duty to enter my dissent to that placed upon it by the Court.

AVERY, J. I concur in the opinion of my brother, *Davis.*

Per Curiam. Reversed.

Cited: Fertilizer Co. v. Grubbs, 114 N. C., 472; *Oakley v. Lasater,* 172 N. C., 97.

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(501)

PASCHAL DAVIE ET AL. v. JONATHAN DAVIS

Res Judicata—Justice of the Peace—Nonsuit—Dismissing an Action—Merits of the Case—Pleading—Evidence.

1. A judgment of a justice of the peace dismissing an action is not necessarily a nonsuit; and evidence of what proceedings were had is admissible, to be inquired into upon a plea of *res judicata.*

2. There was a judgment in the court of a justice of the peace dismissing the action as to one of the defendants; in a subsequent action, upon the same note, there was an appeal to the Superior Court, which found the facts, by consent, that in the first action there had been a trial on the merits, and a judgment rendered therein to the effect that there was no obligee in the

bond sued on. The court further found that the justice did not hear any evidence of the equitable claim of the plaintiffs: *Held*, that this finding is conclusive.

3. The fact that the plaintiffs had other merits in this case does not prevent the estoppel of *res judicata;* they should have developed their case in full in the first trial.

4. The judgment concludes the parties as to all matters which were pleaded, or should have been, in the first action.

ACTION tried before *Boykin, J.,* at January Term, 1891, of GRANVILLE, on an appeal from a justice of the peace.

By agreement, the case was withdrawn from the jury and submitted to his Honor to find the facts.

Plaintiffs introduced a bond for $200, signed by N. H. Whitfield and defendant Davis, which had been assigned to them. Defendant admitted that it was his signature, but alleged that the bond was void, for that there was no payee or obligee named on the bond when he signed it.

S. V. Ellis, witness for defendant, testified that in May, 1890, at request of plaintiffs, he issued summons against N. H. Whitfield and Jonathan Davis, the defendants in this action. On the trial of the cause, 9 June, 1890, both parties introduced witnesses, and, after
(502) hearing the testimony, he gave judgment against Whitfield and dismissed the cause as to Davis; that he based his judgment solely on the fact that there was no payee named in the bond at the time of its execution by defendant, and he did not take into consideration the fact that, though the bond was void, defendant had put it into the power of Whitfield to borrow money from a third party. Plaintiffs objected to witness testifying as to what occurred before him on trial, and his intention and reasons for rendering the judgment, as the judgment spoke for itself. Objection overruled. Exception.

J. W. Graham for plaintiffs.
L. C. Edwards and J. B. Batchelor for defendant.

CLARK, J. The defendant pleaded that the matter was *res judicata.* The former judgment was as follows: "This cause came on for trial; after hearing the evidence, it is adjudged that this warrant be dismissed as to Jonathan Davis." And there was further judgment that the plaintiffs recover of the other defendant, in that action, the amount of the bond sued on, with interest and costs. The plaintiff insisted that this was, as to Jonathan Davis, merely a judgment of nonsuit, and excepted to the admission of evidence as to the proceedings had before the justice. "Evidence of what a justice meant by the judgment in the former action

is improper, for the entry must speak for itself. But it is otherwise as to the fact whether the merits were inquired into upon rendering it." *Ferrell v. Underwood,* 13 N. C., 111. This was cited and approved in *Justice v. Justice,* 25 N. C., 58; *Massey v. Lemon,* 27 N. C., 557; *Carr v. Woodlief,* 51 N. C., 400, and in other cases.

By consent, the court found the facts. It found "that there had (503) been a trial on the merits upon the issues involved in this action, and a judgment heretofore had and rendered between the parties hereto, to wit, before a justice of the peace in this county, on 9 June, 1890; that said justice rendered his said judgment solely and entirely upon the ground that it was proven to his satisfaction that there was no obligee named in the bond at the time the defendant executed the same, and that said justice did not hear or consider any equitable claim that the plaintiffs had against the defendant on account of his having executed said bond." This is conclusive, nor is the latter part contradictory. Unless the former proceeding was terminated by a *nonsuit,* the judgment therein is conclusive, and it is not a nonsuit necessarily because in form a judgment against the plaintiffs. It is found that the plaintiffs failed on the merits, and, though they may have had other merits or an equitable ground of maintaining the action, it was their own fault they did not present it on the trial, nor appeal from the judgment.

The judgment not being a nonsuit, it concludes the parties, not only as to all matters pleaded, but as to all which could or should have been.

No error.

Cited: Hinson v. Powell, 109 N. C., 537; *Johnson v. Loftin,* 111 N. C., 323.

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(504)

PATTERSON, RENCHER & CO. v. A. L. GOOCH ET AL.

Married Woman—Contract to Bind Her Personal Property—Jurisdiction of a Justice of the Peace—Plea of Coverture, When Set Up—Practice—Equity.

1. The remedy for debt against a married woman, by which it is sought to charge her separate personal property, cannot be had in the court of a justice of the peace.

2. The plea of coverture may be set up for the first time in the Superior Court and after the lapse of several terms, when, at the trial before the justice of the peace, the defendant's counsel said he would enter all pleas to which the defendant (who was absent) might be entitled, and appealed.

3. The principle that it would be inequitable to allow a *feme* defendant to keep the goods, the price of which is the subject of the action, and at the same time resist an action for the recovery of such price, cannot be invoked where it is not shown that she still has possession of the goods.

ACTION tried on appeal from a justice of the peace at the January Term, 1891, of GRANVILLE, before *Boykin, J.*, a jury trial having been waived by the parties.

The plaintiffs brought two actions before a justice of the peace on 23 April, 1890, against the defendants A. L. Gooch and E. C. Gooch, trading as A. L. Gooch & Co., one to recover $167.20 and interest from 14 October, 1889, and the other to recover $82.20, with interest from 12 November, 1889, due by open account.

The defendants did not appear at the trial, except by counsel, who said, as defendants were not present and he had just been retained, he would enter all defenses to which they might be entitled, and judgments were rendered against them, from which they afterwards appealed to the Superior Court, and the defendant E. C. Gooch gave an undertaking to stay execution on appeal.

In the Superior Court the plaintiffs moved to dismiss the appeal, because the notice of appeal served referred to only one judgment, and that as having been rendered 23 April, 1890, whereas two judgments were rendered, and both of these on 24 April and none on 23 April. His Honor overruled the motion, and plaintiffs excepted. Thereupon a jury trial was waived in both cases, and both cases were tried as one by his Honor, by consent of the parties.

Plaintiffs proved their claims, and when the constable went to levy the execution obtained on his judgments upon the stock of goods of the defendants, they were claimed by defendant E. C. Gooch, and (505) then introduced the following correspondence:

BALTIMORE, 3 October, 1889.

MR. A. L. GOOCH, Dabney, N. C.

DEAR SIR:—We respectfully ask you to make a statement of your financial condition by answering the questions on the other side as a basis of credit for any present or future transaction you may have with us. PATTERSON, RENSHAW & Co.

Received 11 October, 1889.

The questions and answers were answered entirely by A. L. Gooch, there being no evidence that E. C. Gooch knew anything about them. Plaintiffs also proved that this statement had been made and delivered to plaintiffs by defendant A. L. Gooch, and that the goods, the price of which was here sued for, were sold to defendants on the faith of this statement, and rested his case.

The defendants' counsel then stated that they would make no objection to judgments being entered against A. L. Gooch, but offered to show that defendant E. C. Gooch was a married woman, the wife of A. L. Gooch. Plaintiff objected to this evidence, because the plea of coverture, not having been set up in the justice's court, ought not to be allowed to be set up in the Superior Court, or that it was, at most, in the discretion of his Honor to allow it, or not, to be set up, and that this was the third term since the appeal had been docketed. His Honor held that he had no discretion in the matter and was bound to admit the plea and receive the evidence, as it appeared from the return to the notice of appeal that defendants' attorney had put in before the justice of the peace all defenses to which defendants might be entitled. Plaintiffs ex- (506) cepted. Defendants then proved that A. L. Gooch and E. C. Gooch were husband and wife, and were so on and since 3 October, 1889. Plaintiffs insisted that, the defendants being husband and wife and partners in trade, the husband was, as partner, the agent of the wife, and, as such agent and partner, had power to bind her, and that the letter to plaintiffs was such written consent to her entering into the contract as the statute law requires; that it would be a fraud upon creditors to allow her, after such representations on the part of her husband, plainly implying that she was either a man or a *feme sole,* to set up the defense of coverture; that the statutes and law against a *feme covert* binding herself, and against her being sued in the court of a justice of the peace, do not apply to a case like the present, where she is engaged with her husband as a partner in trade, and, when sued on a debt contracted by representations that she was a man, or *feme sole.*

His Honor was of opinion that the action could not be maintained against the defendant E. C. Gooch on account of her coverture, and plaintiffs, having excepted to his rulings, assigned the same as error, and appealed.

T. T. Hicks (by brief) for plaintiffs.
John W. Graham for defendants.

CLARK, J. The plaintiff contends that the statement set out in the record is in effect a written consent on the part of the husband, and, the nature of the contract being such as necessarily to imply a charge upon the wife's personal estate, that the *feme* defendant is liable by virtue of The Code, sec. 1826. We need not decide how that may be, for if we concede that it is so, the remedy cannot be sought in a court of a justice of the peace. *Dougherty v. Sprinkle,* 88 N. C., 300; *Farthing v. Shields,* 106 N. C., 289.

(507) The cases cited by the appellant in support of his position that it was in the discretion of the court below to allow or refuse the plea of coverture because not made at the first term (*Neville v. Pope,* 95 N. C., 346, and *Vick v. Pope,* 81 N. C., 22) only go to the extent that after judgment it is too late for the coverture to be set up, unless there has been excusable neglect, mistake, fraud, or the like.

Nor will the principle laid down in *Burns v. McGregor,* 90 N. C., 225, that it would be a fraud to let the *feme* defendant keep the goods and set up the defense of coverture against an action for recovery of the price of them, avail the plaintiff, for it is not shown that the *feme* defendant, or the firm of which she is a member, now has in possession any of the goods for the price of which this action is brought, nor is this an action of claim and delivery for the specific goods. It was competent for the judge to refuse to dismiss the appeal. *Marsh v. Cohen,* 68 N. C., 243; *Richardson v. R. R.,* 82 N. C., 243.

Per Curiam. No error.

Cited: Cotton Mills v. Cotton Mills, 116 N. C., 649; *McLeod v. Williams,* 122 N. C., 458; *Harvey v. Johnson,* 133 N. C., 360; *Rutherford v. Ray,* 147 N. C., 260.

C. M. EULISS v. JOSEPH MCADAMS.

Deed—Description—Parol Evidence to Locate Boundaries—Surveyor—Junior Deed.

1. Designating land by the name it is called is a sufficient description to enable its location to be determined by parol proof.

2. Reference to one deed in another for purpose of description is equivalent to incorporating and setting out its description in full.

3. For the purpose of showing lines and boundaries, it is competent to show where the surveyor actually ran.

4. A junior deed is not competent to establish the corner of a tract described in an older deed.

ACTION to recover damage for trespass, and involving title, tried at Fall Term, 1890, of ALAMANCE, before *MacRae, J.*

The descriptions contained in the deeds offered by the plaintiff to show title are set forth in the opinion. The defendant contended (508) that the deeds were void for uncertainty in all of the descriptions.

It was admitted that the defendant owned the land joining this tract, and, while the plaintiff was required to prove his title, the main contention between the parties was as to the location of their adjoining lines, as will appear by the plat attached to the record.

Plaintiff also offered a deed from D. W. Huffman and wife to defendant for 105 acres, 8 April, 1870, and another deed from same to same for 100 acres, more or less, 21 March, 1874, and a grant to William Mebane for 400 acres, March, 1795, and a deed from John Huffman to Daniel Huffman in 1808, and much testimony as to the location of defendant's land, for the purpose of establishing as a fact that the defendant's land stopped at X on the plat, and not at Y, as claimed by defendant.

The defendant, during the cross-examination of one of plaintiff's witnesses, offered a grant to Benj. Rainy, 1799; and a deed from Benj. Rainy to Neill B. Rose, 1807; and a deed from William Mebane to Jos. Murray, 1799; and a deed from William Mebane to Thomas Cole, 1796; and a deed from Thomas Cole to John Huffman, 1797; and a deed from John Huffman to Daniel Huffman, 1808; and the will of Daniel Huffman, devising to John Huffman the same land, and the two deeds offered by plaintiff Huffman to McAdams; all of these for the purpose of locating defendant's land.

John J. Trollinger was examined as a witness by plaintiff for the purpose of locating defendant's southwest corner at X instead of at Y, and testified that at one time he had owned the land lying west of the defendant; that he understood that Sellars' land joined his (witness'); that Jeffries now owns the land which witness formerly owned; that Jeffries' corner is the same as witness' corner was, though witness does not know where Jeffries claims to; that Jeffries bought from the Holts the land witness owned—no more and no less; all that (509) witness owned was conveyed to Holt.

Defendant then proposed to offer a deed from Holt to Jeffries, in 1887, to locate this corner.

Objected to by the plaintiff, upon the ground that this deed was junior to plaintiff's deed and could not be offered to locate an older tract. Objection sustained. Defendant excepted.

After much evidence on both sides, the defendant offered a deed from Murray, sheriff, to E. M. Holt for the Jeffries land, 10 January, 1872, for the purpose of locating the Jeffries corner at Y, and by this means locate defendant's corner at Y. Defendant's deed for this tract was dated 1870.

Plaintiff objected, because an older deed cannot be located by a junior. Objection sustained. Defendant excepted.

The jury found the issues in favor of the plaintiff.

Rule for new trial, for errors alleged. Rule discharged. Judgment for plaintiff. Defendant appealed.

J. A. Long for plaintiff.

F. H. Whitaker and L. M. Scott (by brief) for defendant.

AVERY, J., after stating the facts: The plaintiff offered two deeds, the first, from A. Murray and wife to the Falls of Neuse Manufacturing Company; and the second, from W. J. Murray and wife to the same company. The defendant objected to the introduction of both, on the ground that the descriptive clauses were too vague to admit of explanation by extrinsic evidence.

The descriptions were, respectively, in the following words:

First. "A tract of land in Alamance County, State of North Carolina, adjoining the lands of John Staley, David Staley, and Joseph McAdams, *known as the Sellars* tract, subject to whatever rights the widow (510) Sellars may have in it, containing 140 acres, more or less."

Second. Seven tracts, or interest in seven tracts, conveyed by one deed, as follows: "The following tracts of land in Alamance County, State of North Carolina, *their dwelling-house* and *the land on which the same is situated,* containing about 8 acres, more or less, adjoining Big Falls Water-Power lands and the lands heretofore owned by Albert Murray, *being the place* on which we now reside. *For a more specific description reference is made to our title papers.*

"Also, our undivided half of the following lands, situate in said county of Alamance, to wit:

"1. *The John Dixon tract,* containing about 130 acres, more or less, adjoining the lands of Austin Isley, Jesse Rippey, Jesse Grant and others.

"2. *The Long tract,* containing about 110 acres, more or less, situated on the east side of Haw River, adjoining the lands of W. T. Wilkins, Mrs. Kirkpatrick and others.

"3. *The Sellars tract,* containing about 116 acres, more or less, situated on the southwest side of Haw River, adjoining the lands of Joseph McAdams, John Staley and others.

"4. *The Staley tract,* containing 27 acres, more or less, adjoining the lands of Mebane Morrow, Joseph McAdams and others.

"Tracts Nos. 3 and 4, above named, are subject to the dower rights, if any, which the widow, Nancy Sellars, may have therein.

"5. A tract containing about 6 acres, *called Morrow tract, for which an exchange was made with Mebane Morrow.*

"6. And also *their interest, being a half interest, in all their lands lying between Haw River and Stony Creek, up to the line* of J. H. and W. E. Holt & Co., including the Big Falls Water-Power and Mills, and all the rights, privileges, and appurtenances thereto belonging, *which lands were heretofore owned* by W. J. and A. Murray as (511) partners and tenants in common, and also all of the rights, privileges, and interests of said W. J. Murray, whether as copartners or tenants in common or in his own right, in and to the bed of Haw River and Stony Creek, or either of them, and the waters thereof. For a more particular description of tracts 1, 2, 3, 4, 5, and 6 reference is hereby made to the title papers therefor to W. J. Murray and W. J. and A. Murray."

The descriptive words, "known as the Sellars tract" (omitting as surplusage the residue of the description), pointed with sufficient certainty to possible proof of the existence and location of a body of land which, according to general reputation, was so designated, and rendered parol proof competent to fit it to the thing. *Henly v. Wilson,* 81 N. C., 405; *Smith v. Low,* 24 N. C., 457. In the case last cited, *Chief Justice Ruffin* says that, by the description, "Mount Vernon, the late residence of General Washington," the place referred to is better known than by setting forth the metes and bounds of the tract on which his dwelling-house was located.

A reference to the title papers of the grantors in the other deed from William J. Murray and wife is equivalent to incorporating the full descriptions set forth in the papers referred to in the former deed, and, of course, made the conveyance mentioned, together with competent evidence to locate the land aliened by them, competent. *Everitt v. Thomas,* 23 N. C., 252. It is unnecessary, in order to settle the question of law whether this part of the deed is void for vagueness, that we should go further and pass upon the sufficiency of the additional designations, as "their dwelling-house and the land on which the same is situated," etc., or "the place on which we now reside." *Carson v. Ray,* 52 N. C., 610; *Murdock v. Anderson,* 57 N. C., 77.

The descriptive words, *"the John Dixon tract," "the Long* (512) *tract," "the Sellars tract,"* and *"the Staley tract,"* used in the second deed, were sufficient to point to proof *aliunde* that these distinct bodies of land were generally known by such designations. *Smith v. Low, supra; Scull v. Pruden,* 92 N. C., 168; *Henly v. Wilson, supra.* Evidence was unquestionably admissible, not only to show the location of the tract "called the Morrow tract," but to identify the boundaries by a deed of exchange from Mebane Morrow and to consider such metes and bounds as if they were incorporated into the descriptive clause of the deed from W. J. Murray and wife. *Henly v. Wilson, supra; Everitt v. Thomas, supra.*

The description numbered 6 is not too indefinite, because it was competent for the plaintiff, under its terms, to identify the land as lying *between* Haw River and Stony Creek, and extending up to the lines of J. H. and W. E. Holt & Co., so as to include the Big Falls Water-Power. *Horton v. Cook,* 54 N. C., 270.

The further designation of the land as that "owned by W. J. Murray and A. Murray as partners and tenants in common," together with the reference to title papers, which follows and applies to all of the tracts numbered from 1 to 6, opens the door for the admission of testimony to identify the land lying between those rivers by written evidences tracing title to the two Murrays as tenants in common. It was likewise competent to show title as tenants in common, or sole seizin for the beds of Haw River and Stony Creek in W. J. Murray, all title and interest in these localities proven to have been in him having passed, by the deed, to the Falls of Neuse Company.

The judge states that the plaintiff offered the testimony of several witnesses tending to prove his contention as to the location of the land claimed by him, and as to the alleged trespass; but this evidence is not set forth in detail in the statement. The defendant did not except, in the court below, to the sufficiency of the whole of the testimony to go to the jury as tending to fit any or all of the descriptions to the land
(513) claimed by the plaintiff, and to show it to be identical with that described in the complaint. We cannot, therefore, consider the exception raised here, for the first time, that the evidence was not, in fact, sufficient to locate the land. With notice of such an assignment of error, we assume that the judge would have sent up much additional testimony bearing upon this question. *McKinnon v. Morrison,* 104 N. C., 357.

We find in the brief of the defendant some statements in conflict with those in the case on appeal, and much addenda to the record, which, of course, we cannot consider. The case on appeal states that the defendant purposed to offer a deed from Holt to Jeffries, dated in 1887, to locate his southwest corner, and not, as contended by defendant, simply to contradict Trollinger. It is competent to establish the lines and courses of a tract of land by showing where the surveyor actually ran when making the boundaries at the instance of the parties to the conveyance, and with a view to its execution, as it is to locate a patent by showing marks, corresponding in age and course with the calls of the deed, upon a line of trees. *Ingram v. Colson,* 14 N. C., 520; *Topping v. Saddler,* 50 N. C., 357; *Roberts v. Preston,* 100 N. C., 248. But the junior deed from Holt to Jeffries, dated in 1887, was not competent as evidence to locate the corner of the deed previously made to the plaintiff. *Sasser v. Herring,* 14 N. C., 341. The objection of the plaintiff is based upon the ground of

incompetency as evidence of the location of the corner of an older deed. It is too late to set up other grounds of exception in this Court.

There is no error in either of the rulings of the court excepted to, and the judgment must be

Affirmed.

Cited: Hardy v. Galloway, 111 N. C., 524; *Johnston v. Case,* 131 N. C., 498; *Hill v. Dalton,* 136 N. C., 341; *Grimes v. Bryan,* 149 N. C., 250; *Board of Education v. Remick,* 160 N. C., 569; *Byrd v. Sexton,* 161 N. C., 572; *Pate v. Lumber Co.,* 165 N. C., 187; *Elizabeth City v. Commander,* 176 N. C., 30; *Williams v. Bailey,* 178 N. C., 632.

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(514)

G. S. WATTS ET AL. v. W. A. WARREN, ADMR., ET AL.

Assignment—Fraud—Creditors—Evidence—Practice—Administrator—Account and Settlement—The Code—Transactions with Deceased Persons.

1. When the facts intended to be elicited by questions are not specifically set forth, still if the questions themselves suggest such facts with distinctness, their relevancy and materiality will be passed upon by this Court.
2. In an action by the creditors of an intestate against his administrator to compel an account and settlement of the estate, it was alleged that the transfer by the intestate, before his death, of a certain insurance policy to his brothers "for value received," was in fraud of creditors, or, at most, was only intended to secure them for certain debts and the payment of premiums upon the policy; the fraud was denied and the assignment alleged to be in good faith, without notice and for fair value: *Held,* it was competent to show what sums the intestate owed his said brothers, for the purpose of sustaining the *bona fides* of the assignment.
3. The persons to whom the assignment was made were clearly incompetent to testify thereof, under section 590 of The Code, but any other persons than those interested do not come within the inhibition of this section.
4. The mere fact of the *interest* of the witness does not exclude him from testifying of transactions with third persons which affect the *property* of the deceased.
5. The reason that evidence of "personal transactions" with a person since deceased is excluded, is that the mouth of such person is closed.
6. Transactions with third persons, even though they involve or throw light upon transactions with deceased persons, will not be excluded on the ground of interest, under section 590 of The Code, because such third persons, being disinterested, may be called to contradict any misstatement.

(515) APPEAL at October Term, 1890, of DURHAM, from *MacRae, J.*

It appears that Julius B. Warren died intestate in the county of Durham in June, 1889, and the defendant W. A. Warren duly became the administrator of his estate. This action is brought by the creditors of the intestate to compel the defendant administrator to an account of his administration, and to pay the creditors what may be payable to them respectively. The other defendants are brought into the action, to the end they may be concluded in respects not necessary to be particularly mentioned here.

In the lifetime of this intestate he obtained from the Provident Savings Assurance Society of New York a policy of insurance on his own life, payable to him and for his own benefit, dated 15 March, 1888, for the sum of $15,000. On 29 March, 1889, he assigned, transferred and delivered this policy of insurance to his two brothers, the defendants W. A. Warren and Frank Warren, "for value received." No particular consideration is recited.

At the time of the death of the intestate he was largely indebted to divers creditors, and it is alleged that the assets of his estate are insufficient to pay his debts and the costs of administration.

It is further alleged, among other things, that such assignment of the policy of insurance was made in fraud of, and to defraud, the creditors of the intestate, etc., and that, at most, such assignment was intended only to secure certain debts and the payment of premiums upon the policy as the same might come due, etc. The plaintiffs allege that the policy belongs to and constitutes part of the assets of the estate, and they demand judgment that it be so declared, etc. The defendants deny the alleged fraud, and aver that such assignment was made in good faith, and for a just and fair consideration, and they further contend that, at all events, they bought the insurance policy for a just consideration, in good faith and without knowledge or notice of any such fraudulent intent or purpose of the said intestate.

The court submitted to the jury the following issues, and the (516) jury responded to the same as indicated at the end of each:

1. Was the assignment by J. B. Warren to W. A. Warren and F. R. Warren absolute and for full value? Answer: No.

2. Was said assignment intended as a security for indebtedness of J. B. Warren as executor of his father's estate or otherwise? Answer: No.

3. Was such assignment made simply as a security for premiums paid out and to be paid thereon by W. A. Warren and F. R. Warren? Answer: No.

4. Was such assignment made by J. B. Warren with intent to hinder, delay and defraud his creditors? Answer: Yes.

5. Did the defendants W. A. Warren and F. R. Warren have notice of such intent when the assignment was made? There was no response to this issue.

On the trial there was evidence tending to prove that the intestate and the defendant administrator were executors of their deceased father's will, and that the intestate in his lifetime had used very considerable sums of money—how much did not definitely appear—that belonged to legatees of the will, and that the defendant W. A. Warren had paid, and had to pay, the same, etc., and that such payments constituted part of the consideration paid by him for the policy of insurance.

The defendant administrator was examined as a witness in his own behalf, and his counsel, among others, put to him questions as follows:

"What payments have you made to other persons than J. B. Warren in consideration of that assignment?"

(Ex. 7.) This was objected to by the plaintiffs, and, the objection being sustained, the defendants excepted.

Defendants' counsel asked:

"What sums of money have you paid out by reason of your (517) liability as coexecutor with J. B. Warren of F. L. Warren, deceased?"

(Ex. 8.) Objection by plaintiffs. Sustained, and defendants excepted.

The defendant F. R. Warren was also examined as a witness for the defendants, and, among others, this question was put to him: "State if you have made any payment—if so, to whom—on debts of J. B. Warren?"

(Ex. 12.) The plaintiffs objected, and, objection being sustained, the defendants excepted.

There were numerous other exceptions, but they need not be reported. The court gave judgment, upon the verdict, for the plaintiffs, and the defendants thereupon appealed to this Court.

J. Parker, W. W. Fuller, F. L. Fuller and W. A. Guthrie for plaintiffs.
John W. Graham and James S. Manning for defendants.

MERRIMON, C. J. Assignments of error upon the ground that evidence tendered on the trial was improperly rejected, should distinctly specify its relevancy and materiality. The Court must be able to see its nature and application with reasonable certainty. Otherwise, it cannot say that there is, or is not, error. The presumption is that the rul-

ings of the court are correct, until the contrary is made to appear in some appropriate way. *Whitesides v. Twitty,* 30 N. C., 431; *Knight v. Killebrew,* 86 N. C., 400; *Sumner v. Candler,* 92 N. C., 634.

Although the evidence which the defendants sought to elicit by the questions put to the witnesses in this case, and which the court declined to allow them to answer, is not specifically set forth in the assign-
(518) ments of error, still we think the questions themselves suggest with sufficient distinctness and certainty the nature, meaning, relevancy and materiality of the evidence proposed and rejected, as will presently appear.

The plaintiffs, creditors of the intestate of the defendant administrator, alleged that he assigned to the defendants, the Warrens, his brothers, the policy of insurance mentioned, in fraud of and to "hinder, delay and defraud his creditors"; and further, that if this was not so, then he assigned the same to them to the end they might pay the premiums that might, after the assignment, come due thereon, and, in the end, receive the money that might be paid in discharge of the policy and apply the same to reimburse themselves for such premiums as might be paid by them, and also to the payment and discharge of certain debts and liabilities of the intestate. This the defendants broadly denied, alleging, in substance, that they bought the policy so assigned to them in good faith, paying therefor its fair value. They allege further that their brother, the intestate, was, in his lifetime, the coexecutor of the defendant W. A. Warren of the will of their deceased father; that the intestate, while such executor, took and used for his own purposes, large sums of money that belonged to his father's estate and were devoted by the will to the payment of legacies, etc., for all which the defendant W. A. Warren was liable and was bound to pay the same; that they had paid other debts for their said brother; that the aggregate of the sums of money they so paid, and others they were obliged to pay for the intestate, was intended to be, and was, a fair and just price for the policy of insurance so assigned to them, and that the intestate assigned the same to them in good faith for such consideration.

It hence behooved the defendants (the Warrens) to prove on the trial, and to produce competent evidence for that purpose, that the intestate owed them as alleged, and what sums of money, what premiums
(519) they so paid on account of the policy of insurance, what of his debts they paid at his instance, and what sum or sums of money the defendant W. A. Warren had paid and was obliged to pay as such coexecutor on account of the default of the intestate as one of the executors of his father's will. There was some evidence produced on the trial by the defendants tending to prove that such matters and things constituted the consideration for the assignment of the policy of insur-

ance. There was likewise some evidence, in some aspects of the whole of the evidence produced, tending to prove that the assignment of the policy of insurance was made as a security for the reimbursement of the defendants (the Warrens) on account of premiums they might pay as required by the policy, and to pay certain debts and discharge certain liabilities of the intestate. Therefore, the evidence proposed by the defendants, and which was rejected, tending to prove what sums of money the defendant W. A. Warren had paid on account of the default of his brother, the intestate, as executor of his father's will, was relevant and material, as was also the other evidence so proposed and rejected tending to show what debts of the intestate the defendants (the Warrens) had paid for him. Such evidence, if it had been received, would have tended, in some measure, to prove a consideration, and the amount thereof, for the assignment of the policy, and that the same was made in good faith and for a lawful purpose. Although it was not very direct, its pertinency and bearing favorable to the defendants were plainly to be seen, and, taken in connection with the whole evidence produced on the trial (very much of it indefinite and unsatisfactory), it might have materially changed the verdict of the jury as to one or more of the issues submitted to them. In any view of the case, the defendants were entitled to have the benefit of it.

It was insisted, however, that the evidence so rejected came (520) within the inhibition of the statute (The Code, sec. 590), and was not competent, because the witnesses were interested in the event of the action adversely to the deceased person, and the evidence it was proposed they should give was "concerning a personal transaction or communication between the witness and deceased person," the intestate named. We think this contention cannot be allowed to prevail.

The court properly held that the witness W. A. Warren was not a competent witness to testify as to the contract of assignment of the policy of insurance and the consideration thereof agreed upon, because such testimony would clearly come within the inhibition of the statute just cited. But there was some evidence of the witnesses other than the defendants, the Warrens, whose proposed testimony was rejected, going to prove that the intestate made the assignment in question not for any fraudulent purpose, but for a valuable consideration, such as that above mentioned. The defendants, the Warrens, were not competent witnesses to testify as to the contract of assignment, because the deceased assignor could not testify in his own behalf and contradict them as to "a personal transaction or communication" between him and them. The obvious purpose of the statute is to prevent the surviving interested party, in such cases, from testifying as to such "personal transaction or communication" because the deceased party cannot.

The witnesses were not called upon to testify "concerning a personal transaction or communication" between them and the deceased person, their brother—they were asked to testify as to transactions and communications with persons other than the deceased, and as to which such third persons could testify, if need be. The statute does not, by its terms and purpose, prevent the surviving party from testifying concerning transactions and communications with third persons that may affect adversely the estate of the deceased person, or the rights of persons in and to the same. The questions put to the witnesses, which they were not allowed to answer, obviously had reference to the pleadings, the
(521) issues and the contentions of the parties on trial. They were intended to elicit from the witness W. A. Warren, first, an account of what money he had paid to persons other than his brother, deceased, for and on account of the latter; and, secondly, what sums of money he had paid to third persons, and for which he was liable on account of the default of his brother as executor of his father's will. The question put to F. R. Warren was intended to elicit from him an account of any sums of money he had paid "on debts" of his brother, deceased; and such evidence was intended to apply and have force on the trial in any pertinent aspect of the case. Such payments of money for the benefit of the deceased brother were not made to the latter, but to third persons, and he may, or may not, have had knowledge of the same; but, however this might be, the transactions and communications concerning the same were not with him. Nor was the purpose of the evidence to prove the contract of assignment of the policy of insurance, or "concerning a personal transaction or communication between the witness and the deceased person" about the same. The purpose was to prove the material facts and transactions distinctly with third persons, and to connect and apply them with other material facts and transactions by proper evidence for pertinent purposes on the trial. The evidence was material, not to prove the contract of assignment of the policy but to prove distinct transactions with third persons—persons other than the deceased party—that grew out of and were, in a sense, a consequence of such contract. In view of the pleadings, the issues submitted to the jury, the contentions of the parties, and the whole of the evidence produced on the trial, upon which the evidence rejected might have had some material bearing favorable to the defendants, the latter evidence was relative, material and competent, and ought to have been received by the court, unless
(522) the answers of the witnesses to the questions put to them had, contrary to expectation, been irrelevant and not such as their nature and purpose suggested and implied. The following cited authorities are, more or less, in point here: *Whitesides v. Green,* 64 N. C., 307; *Thompson v. Humphrey,* 83 N. C., 416; *Lockhart v. Bell,* 90 N. C., 499;

Peacock v. Stott, ib., 518; *Waddell v. Swann,* 91 N. C., 105; *Sikes v. Parker,* 95 N. C., 232; *Loftin v. Loftin,* 96 N. C., 94; *Carey v. Carey,* 104 N. C., 175; *Bunn v. Todd,* 107 N. C., 266.

There are numerous other assignments of error, but we do not deem it useful or necessary to advert to them, further than to say that most, if not all of them, cannot be sustained.

The defendants are entitled to a new trial.

Error.

Cited: In re Worth's Will, 129 N. C., 228; *Stout v. Turnpike Co.,* 157 N. C., 368.

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*LAURENCE POWERS ET AL. v. J. S. ERWIN AND T. P. MOORE.

Contract—Order—Shipment in Time—Agency.

In an action for the balance of the purchase-money due for certain machinery, the defense and counterclaim was plaintiffs' failure to comply with the terms of the contract by not shipping in time, nor according to order, a material part. The plaintiffs replied that they were defendants' agents, and, as to the part in question, it was not included in the order. There was evidence tending to support the defense. The court instructed the jury to render a verdict that plaintiffs had not failed to comply with their contract: *Held,* to be error.

ACTION tried at September Term, 1890, of ALAMANCE, before *MacRae, J.*

The complaint alleges that the plaintiffs sold to the defendants (523) certain machinery for the consideration alleged, and that there is a balance of the purchase-money due them for the same, which the defendants refuse to pay, etc. The answer admits that such balance was unpaid, but it alleges a counterclaim, the cause of action being damages sustained by reason of the failure of the plaintiffs to deliver promptly to the defendants a certain important piece of machinery specified, as they had agreed and bound themselves to do, which piece of machinery was part of the goods the defendants purchased from the plaintiffs, the price of which, in part, they seek to recover by this action. The reply denies the alleged counterclaim, and alleges that the plaintiffs were simply the agents of the defendants, charged to purchase from the manufacturers thereof the particular piece of machinery specified—that, as such agents, they purchased the same for the defendants, and are in no way or man-

*AVERY, J., did not sit.

ner responsible for the delay complained of in shipping and supplying it, or for its defective nature, or for the damages to the defendants occasioned by the delay complained of, etc.

The court submitted to a jury these issues:

1. Did the plaintiffs fail to comply with their contract with the defendants, as alleged in the answer?

2. What damages, if any, have defendants sustained?

The court, among other things, instructed the jury as follows:

"The contention of the plaintiffs, Powers & Co., is that the 'sunder' was ordered by them from the Berlin Machine Works at the instance of the defendants and not on their own account, and that they, the plaintiffs, are not responsible to the defendants for any delay in the shipment of the 'sunder' or for any defect in the 'sunder' itself. It appears by the evidence that the plaintiffs were not manufacturers of the piece of machinery called the 'sunder,' and, while they were to furnish this piece of machinery, they were not to send it direct, but were to
(524) order it to be sent at once to defendants from the Berlin Machine Works. If the plaintiff, then, promptly ordered the machine from the company at Berlin, Wisconsin, and did not assent to nor participate in the delay of the Berlin Machine Works to make prompt shipment, the plaintiffs are not responsible for the failure of the Berlin Works to send the machine forward at once. Neither are they responsible for any delay in the transportation after the same had been delivered to the railroad company.

"The plaintiffs being requested to order the machine from the Berlin Works would not be responsible to defendants for a defect, especially hidden defects, in that piece of it which broke soon after they put it in operation.

"So, upon all the testimony, I shall have to instruct you that your response to the first issue should be 'No.' "

To this charge the defendants excepted.

The jury responded "No" to the first issue, and judgment was rendered for plaintiffs.

Defendants appealed to the Supreme Court, and assign for error in the charge of his Honor—

1. That he erred in charging and instructing the jury to respond to the first issue "No."

J. A. Long for plaintiffs.
J. Parker for defendants.

MERRIMON, C. J. The exception must be sustained. There was evidence produced by the defendants on the trial tending directly to prove

that the plaintiffs were not the agents of the defendants, but that the latter purchased the piece of machinery in question directly from them, and not from the manufacturers thereof. One of the defendants so expressly testified; the bill of charges rendered by the plaintiffs to the defendants contained an item of charge for it, and the correspondence put in evidence tended likewise to prove the same fact. (525) There was evidence tending to prove delay in supplying the machinery in question, when, by the terms of the contract, it should have been shipped promptly, etc.

There was evidence—correspondence—going to show that the defendants had repeatedly written the manufacturers of the machine, urging them to hasten the shipment of the same, but this correspondence did not develop—certainly not in terms—any contract of sale on the part of the manufacturers to the defendants. The mere fact that the latter urged the former to hasten the shipment of the machine could not, necessarily, prove that the plaintiffs were the defendants' agents to purchase the same. In any view of the evidence, the court ought not to have instructed the jury to render a verdict in the negative upon the first issue submitted to them. At least it should have submitted the question of agency, with appropriate instructions.

There is error. The defendants are entitled to a new trial.

Error.

Cited: Spruill v. Ins. Co., 120 N. C., 149.

BANK OF OXFORD v. W. A. BOBBITT ET AL.

Covenants—Interest—Usury—Forfeiture—Practice—Appeal.

1. When there were executed by defendants independent collateral covenants intended to secure the plaintiff for the balance found to be due for advancements made by plaintiff to them, and it appeared that, upon such advancements and before the balance had been ascertained, plaintiff charged them usurious interest, to which no exception was made at the time of the referee's report and the court's confirmation thereof: *Held,* that the judgment of the court that the plaintiff recover no interest on balance found to be due was error.

2. Except as to questions of jurisdiction and sufficiency of complaint to constitute a cause of action, this Court will only consider questions presented by the appeal, and this even though the parties should agree that others should be passed upon.

3. If both parties appeal, the appeal of one will not bring up that of the other.

MERRIMON, C. J., dissenting.

(526) APPEAL by plaintiff from *Womack, J.*, at April Term, 1890, of GRANVILLE.

(533) *L. C. Edwards, J. B. Batchelor and John Devereux, Jr., for plaintiff.*

A. W. Graham for defendants.

DAVIS, J. We think the court below misapprehended the pur-
(534) pose of the several covenants upon which this action is brought and failed to interpret them correctly. They were independent covenants collateral to the agreement between the plaintiff bank and the defendants, Bobbitt & Hines, and were intended to secure the former in the payment of any balance that might be ascertained to be due to it for advancements which it might make from time to time to the latter in carrying on their business under an agreement which was to terminate on 31 October, 1886, (unless discontinued before that time upon notice as stipulated) with interest thereafter on such balance at the rate of 8 per cent per annum.

The balance found to be due from the firm of Bobbitt & Hines to the plaintiff on 31 October, 1886, as reported by the referee and affirmed by the court, was $5,031.82, which, as appears from the credits, was subsequently reduced to $4,043.73, 1 September, 1887, and the plaintiff insists that the covenants were to secure this balance, with interest thereon at the rate of 8 per cent per annum till paid, and that it is entitled to judgment accordingly.

The defendants, on the contrary, insist that the plaintiff exacted and received usury from the firm of Bobbitt & Hines, and thereby forfeited the interest on this balance, and, in accordance with this contention, and upon motion of counsel, for defendants, the court adjudged "that the plaintiff recover from the defendants no interest on the balance due from 31 October, 1886, until the first of this term (21 April, 1890)."

In this we think his Honor erred. Whether the balance ($4,043.73) found to be due was a correct balance, or whether it embraced any usurious interest or other item improperly charged, is not a question for our consideration, as that is the balance found to be due by the referee
(535) and affirmed by the court below, from which there was no appeal by the defendants; and the sole question presented by the plaintiff's appeal is: Was the plaintiff entitled to interest at 8 per centum on this balance under the covenants executed by the defendants to secure the same?

It is too well settled to need citation of authority that, except as to questions of jurisdiction and the sufficiency of the complaint to constitute a cause of action, this Court will only consider questions presented by the appeal of the appellant, and even if it were agreed that exceptions taken and errors alleged by the appellee should be heard and passed upon with the appellant's case on appeal, it could not be done without a departure from the settled practice of the Court. If both parties appeal, the appeal of one will not bring up the appeal of the other, and this rule cannot be waived by consent. *Perry v. Adams,* 96 N. C., 347, and cases cited. In the present case the defendants' exceptions are not before us.

The covenants stipulate that the obligors shall secure the Bank of Oxford in the advances made to Bobbitt & Hines, including "all amounts drawn by them for any purpose whatever." The fair and reasonable, in fact, the only legal interpretation that can be placed upon this is, that they shall secure the payment of all amounts ascertained to be legally due, and if any usurious advances, or advances upon any other illegal or improper consideration, were made, not only the defendants Bobbitt & Hines, but the sureties on the collateral covenants to secure the payment of any balance that might be ascertained, upon settlement, to be due the plaintiff, had a right to have any illegal item or items stricken from the account which would reduce, *pro tanto,* the balance; but that balance, when ascertained, would, under the agreement, bear interest from 31 October, 1886, at 8 per cent.

It is not pretended that the covenant contained any contract (536) or stipulation for the payment of a greater rate of interest than is allowed by law. On the contrary, it is found that there was no such stipulation or agreement; but it is said that the bank charged Bobbitt & Hines usurious interest on advancements made to them, and thereby forfeited all interest on the balance secured by the covenant. We are not called upon in the present case to say how it would be if the balance was increased by usurious interest; but even if it were so, and the referee and the court below erred in finding that there was a balance due of $4,043.73, the question is not presented in this appeal. If the court below failed or refused to strike any usurious or other illegal item from the account, whereby the balance due would be diminished, the defendants should have excepted and appealed, but they seem to have been satisfied with the judgment—at all events, failed to take and perfect an appeal therefrom, and we can only consider the error assigned by the appellant.

The defendants rely upon *Burwell v. Burgwyn,* 100 N. C., 389. In that case there was an usurious contract, as alleged and found, and the question was presented by the appeal. In the present case, we fail to see, in the covenants, any contract for the payment of usury; in fact, it is

found there was none; they only stipulate for the payment of the balance ascertained to be due, with interest thereon at 8 per cent till paid.

The judge below had the power to review the findings of fact, as well as the conclusions of law, of the referee and to overrule, change, alter or modify them as he might think just and proper; but the findings of fact, if upon sufficient and competent evidence, are conclusive upon this Court, which has no control over the facts, and can only review the question of law presented by the appeal.

The balance found to be due from Bobbitt & Hines to the plaintiff, after deducting payment made since 31 October, 1886, was $4,043.73,

(537) and this sum is accepted, without appeal, as the correct balance, and by the clear, explicit and unmistakable language of the covenants, bears interest at the rate of 8 per centum per annum till paid, and, without passing upon the plaintiff's exceptions *seriatim,* or considering in detail the points presented by the learned counsel by whom they were forcibly and ably pressed upon our attention, we think the court below erred in construing the covenants, and denying to the plaintiff interest at 8 per cent on the balance ascertained to be due, as stipulated therein.

This interest should be on $4,043.73 from 1 September, 1887, the balance having been reduced by credits subsequent to 31 October, 1886, to that amount on said day, and the judgment below will be made to conform to this opinion.

MERRIMON, C. J., dissenting: The court overruled all the exceptions of the defendants to the report of the referee. It, in effect, approved and adopted the latter's finding of fact, particularly and affirmatively, that the plaintiff had exacted usury from Bobbitt & Hines. There was no objection to the findings of fact. Then, upon the pleadings and the report, including the findings of fact, it gave judgment for the plaintiff for the balance ascertained to be due to it from Bobbitt & Hines on 31 October, 1886, less credits, but allowed no interest upon such balance, upon the ground that the plaintiff took usury from them from time to time on account of moneys advanced to them, and thereby forfeited its right to have interest on such balance agreed to be paid by the defendants. The plaintiff insists that the court erred in refusing to allow such interest.

The facts were ascertained, and the court seeing and considering the whole record should have given such judgment thereupon as the plaintiff was entitled to have, and it was erroneous to give any other. Then, did the court give the proper judgment? I think not; that it misapprehended the purpose of the several covenants sued upon, and failed to interpret them correctly. They were not part of the contract be-

tween the plaintiff and Bobbitt & Hones, whereby the former (538) agreed to advance money from time to time during the period specified to the latter; they were separate and collateral to that contract, and the simple purpose of them was to render the defendants responsible to the plaintiff for any balance of such advancements that might be due to it by virtue of the contract upon its termination, not exceeding the aggregate sums of money specified in the covenants, such balance to bear interest until paid at the rate of 8 per centum per annum. The covenants so expressly declare and provide. The plaintiff did not "advance" or lend to the defendants any money during the time specified by virtue of such covenants, or any stipulation contained in them, nor was it intended it should, nor did it, exact from them on such account any usury. The usury was exacted from Bobbitt & Hines, partners, on account of moneys advanced to them from time to time during the period specified under their contract as partners, with the plaintiff. Nor did the latter exact usury from them as to the present cause of action, but as to the contract between it and them as partners.

The liability of the defendants, the extent thereof, and particularly the measure thereof, must be determined by a just interpretation of the several covenants sued upon. They each contain this explanatory obligatory provision: "The foregoing obligation is made to secure the Bank of Oxford, in part, for an amount not exceeding $5,000, should it agree to advance to Bobbitt & Hines, copartners in the management of the Meadows Warehouse. The amount due at any time shall be evidenced by the account which the Bank of Oxford agrees to open with the said Bobbitt & Hines, and is to include and to secure all amounts drawn by them for any purpose whatsoever. . . .

"This agreement terminates on 31 October, 1886, and the (539) obligors hereto shall be held bound for whatever balance may then appear to be due the said Bank of Oxford, with interest thereafter at the rate of 8 per cent per annum, not to exceed the sum of $1,000."

Now, this plainly implies that it was contemplated by the parties that the plaintiff would from time to time, within the period designated, advance to Bobbitt & Hines, partners, money not exceeding $5,000, and if it should do so, then the defendants respectively would each be obliged to pay the plaintiff any balance of such advancements Bobbitt & Hines might owe it at the termination of that contract with it in that respect, not exceeding the sum each of the defendants covenanted to pay with interest at the rate stated. It was stipulated that the amount so due the plaintiff should be evidenced by the account it should open with Bobbitt & Hines, and that such account should "include and secure all amounts drawn by them for any purpose whatever." But the words "amounts drawn by them for any purpose whatever" do not imply for every pos-

sible purpose, or for any purpose legal or illegal; they imply, giving them their broadest meaning in favor of the plaintiff, amounts drawn in good faith for any legal purpose whatever; they do not imply amounts drawn for any illegal purpose within the knowledge of the plaintiff, and particularly any illegal purpose to be shared in or for the benefit of the plaintiff. It is not to be presumed or merely inferred that the parties to the covenants, whether covenantors or covenantees, contemplated or intended any such advancements of money or amounts to be drawn for illegal purposes or any illegal transactions, or that the plaintiff would knowingly make such advancements for illegal purposes. They contemplated and intended the utmost good faith on the part of the plaintiff toward the defendants, and the covenants of the latter are to be interpreted in that light. Hence the defendants did not covenant to pay to the plaintiff any usury charged against, exacted from or paid, or (540) agreed to be paid by Bobbitt & Hines under their contract with it, to which their covenants sued upon had reference and to which they had relation collaterally; nor did they covenant to pay a balance of money due from them to the plaintiff augmented by such charges, exactions, or payments of usury, or the same agreed to be paid. There is nothing in the covenants that indicates a purpose to pay a balance thus created in whole or in part.

The defendants covenanted to pay the plaintiff any such balance in its favor for money advanced. It might be contended that this implied money *actually* advanced—paid directly to Bobbitt & Hines; but it must be observed that the account which the plaintiff agreed to open with them was inteded to embrace "all amounts drawn by them for any purpose whatever." This fairly implies and embraces any "amount drawn" to pay the plaintiff lawful interest for the advances of money to them. The reasonable and just implication is that the defendants expected that the plaintiff would charge and require to be paid lawful interest upon such advances, and that they obliged themselves to be responsible on that account. The defendants were therefore liable, each to the plaintiff for a sum of money not exceeding that specified in the covenant executed by them on account of any balance of such advancements made to Bobbitt & Hines, partners, which balance should be ascertained by adding interest upon advancements, unpaid until 31 October, 1886, at the rate of 6 per cent per annum. The rate of 8 per cent per annum cannot be allowed, because there was no agreement in writing for that rate. The balance ascertained to be due to the plaintiff on the day last mentioned (that was the day after which further advancements could not be made as contempated by the covenant of defendants) bore interest until paid at the rate of 8 per cent per annum—the covenants so expressly provided. The court seeing the whole record and learning from the

report of the referee, approved by it, the amount of the balance (541) due the plaintiff, should have given judgment in its favor for that balance including interest as above indicated.

It will be observed that no question as to usury paid by Bobbitt & Hines, partners, to the plaintiff properly arises in this case. The action is founded upon the covenants specified in the complaint, and, as said above, the liability of the defendants is determined by a proper interpretation of those covenants.

Per Curiam. Error.

Cited: Mills v. Guaranty Co., 136 N. C., 256; *Caudle v. Morris,* 158 N. C., 595.

(542)

T. B. MITCHELL ET AL. v. SOPHIA MITCHELL ET AL.

Deed—Heirs—Fee Simple—Construction—Warranty—Premises—Habendum.

Wherever the word "heirs" in a conveyance excuted before 1879 is joined as a qualification to the name or designation of the bargainee, even in the clause of warranty, or where this covenant is confused with the premises or *habendum*, if, by transposition, parenthesis or punctuation, the word "heirs" can be made to qualify the apt words of conveyance, the instrument will be construed to convey a fee, and this though the words have to do duty in the warranty and in connection with the words of conveyance.

PETITION for partition sent up from the clerk. A trial by jury having been waived by consent, the case was heard, upon the facts agreed, at November Term, 1890, of GRANVILLE, by *MacRae, J.*

"It is agreed that if the presiding judge shall construe the said deed to convey a title in fee simple to Jack E. Mitchell, the judgment shall be for the defendants that they are seized, as set out in the answer. If the court shall hold that, by virtue of said deed, the grantee took only a life estate in the lands, the petitioners are tenants in common with defendants and entitled to partition, or a sale for partition, as may be proper."

Judgment for defendants. Plaintiffs appealed.

J. W. Graham for plaintiffs.
John W. Hays for defendants.

AVERY, J., after stating the facts: The material portion of the deed brought before us for construction by this appeal is as follows:

(543) "This indenture, etc., witnesseth, that for and in consideration that he, the said Jack E. Mitchell, is to live with me, the said John Mitchell, and take care of me, the said John Mitchell, and my wife Sally, so long as we both live, and that I, the said John Mitchell, doth give to the said Jack E. Mitchell all of the tract of land whereon I now live at my death; containing one hundred and sixty-nine acres and that I, the said John Mitchell, do hereby warrant and defend the right and title of said land to Jack E. Mitchell and his heirs forever against the claims of all persons whatsoever."

The courts, in order to carry out the intent of the grantor, where it could be gathered from the face of a deed, have, in a liberal spirit, construed conveyances as passing an estate of inheritance in all cases where the word "heirs" was joined as a qualification to the name or designation of the bargainee, even in the clause of warranty, or where the covenant of warranty was confused with the premises or *habendum,* if, by a transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word "heirs" could be made to qualify the apt words of conveyance in the premises, or the words "to have and to hold," etc., in the *habendum* and *tenendum, even* though it was made thereby to do double duty as a part of the covenant of warranty also. *Anderson v. Logan,* 105 N. C., 266; *Winborne v. Downing,* 105 N. C., 20; *Vickers v. Leigh,* 104 N. C., 257.

The words "his heirs forever," used in the connection in which they occur, bring the deed within the principle stated, and will be construed as operating both to pass the remainder in fee and to define the extent of the warranty. *Anderson v. Logan, supra.*

The judgment of the court below is

Affirmed.

Cited: Real Estate Co. v. Bland, 152 N. C., 230.

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(544)

V. BALLARD ET AL. v. WALTER GAY ET AL.

Dismissing Appeal—Justice of the Peace—Practice.

When defendant's appeal from a justice of the peace dismissed in the Superior Court for default in prosecuting it, had been, on his counsel's motion, reinstated, the plaintiff moved to dismiss thereupon for defendant's failure to cause it to be docketed at the term next succeeding the rendition of the judgment, such appearing to be the fact, and it further appearing that the

defendant had notice that the clerk would not docket his appeal until his fees were paid, there was no error in the judgment of the court that the appeal ought then to be dismissed.

MOTION to dismiss an appeal from the court of a justice of the peace, heard at October Term, 1890, of DURHAM, before *MacRae, J.*

The facts are stated in the opinion.

W. W. Fuller and F. L. Fuller for plaintiffs.
J. S. Manning for defendants.

AVERY, J. The judge below heard, at the October Term of the court, two motions. First, upon motion of the defendants, supported by numerous affidavits, he ordered that a judgment by default, entered against them at the previous June Term, be vacated on the ground that the failure to enter an appearance at last named term was excusable neglect. So soon as the appeal was reinstated upon the docket by this judgment and counsel had appeared for defendants, the plaintiffs moved the court to dismiss the appeal for failure of the defendants to cause it to be docketed before the term of Superior Court next after the trial in the court of the justice of the peace.

The plain purpose of the Legislature, as manifested in the (545) statute (The Code, sec. 565) was to expedite the disposition of appeals from the courts of justices of the peace, by providing that they should stand for trial *de novo* on the dockets of the Superior Courts at the first term after the appeal should be taken; that if both parties should appear, judgment should be tendered against the party cast, and that where the defendants should make default, the judgment in certain classes of cases should be final, and in other actions by default and inquiry "to be executed forthwith by a jury." This section was subsequently so amended (Laws of 1889, ch. 443) that where the party appealing should fail to cause his appeal to be docketed before the next term of Superior Court, the opposing party should have the right to procure a transcript of the justice's record, docket it and move to dismiss the appeal at said term. The amendment seems to have been enacted in furtherance of the same purpose to prevent unnecessary delay in disposing of those causes involving small amounts.

The case was tried before the justice on 26 October, 1889, and his return was handed to the clerk the same day. The next term of the Superior Court was held in January following. The defendants neglected to pay the clerk's fees for docketing until after that term, and consequently the appeal was not entered on the docket until the March Term, 1890. Just after handing the transcript to the clerk—on the same day—the justice of the peace told the defendants that the clerk would not docket

the appeal unless they should pay his fees. The clerk had the right, even under the common law, as he has under the statute (The Code, sec. 3758) to demand his fees in advance. *West v. Reynolds,* 94 N. C., 333; *Office v. Wagner,* 26 N. C., 131; *Andrews v. Whisnant,* 83 N. C., 446; *Long v. Walker,* 105 N. C., 97; *Martin v. Chasteen,* 75 N. C., 96. The clerk followed the suggestion of this Court made in *West v. Reynolds, supra,* in notifying the justice of the peace that he would not enter the case upon the docket until his fees should be paid, and the latter told the defendants on the same day of the clerk's demand and purpose. Both the original provision of The Code and the amendatory statute indicate an intent on the part of the Legislature to require litigants to be diligent in prosecuting appeals from justices of the peace. The purpose seems to have been to prevent parties from using their right to a new trial in an intermediate *nisi prius* court as a means of causing useless delay, and subjecting the successful party, meantime, to the risk of losing the fruits of his victory. The plaintiffs might have docketed and dismissed the appeal at the January Term under the Act of 1889. When it was entered by the clerk at the instance of the defendants at the next succeeding term, the plaintiff, seeing that counsel had not entered an appearance, elected to ask for a judgment by default, instead of moving to dismiss. When the court subsequently declared that the failure to appear was excusable negligence, the reinstated case stood upon the docket subject to the right of the plaintiffs to move to dismiss *then,* just as they could have substituted that motion for the demand for judgment by default at the previous term. After the judgment had been vacated and the parties were appearing before the court by counsel, the status of both in the court was the same as if the judgment by default had never been entered at all. There was no error in the judgment in dismissing the appeal, and, as that was a final disposition of the case it was subject to review in this Court.

(546)

No error.

Cited: S. v. Johnson, 109 N. C., 855; *Sondley v. Asheville,* 110 N. C., 89; *Davenport v. Grissom,* 113 N. C., 40, 41; *Pants Co. v. Smith,* 125 N. C., 590; *Johnson v. Reformers,* 135 N. C., 386; *Blair v. Coakley,* 136 N. C., 410; *Peltz v. Bailey,* 157 N. C., 167; *Abell v. Power Co.,* 159 N. C., 349; *Thompson v. Notion Co.,* 160 N. C., 525; *Dunn v. Clerk's Office,* 176 N. C., 51; *Barnes v. Saleeby,* 177 N. C., 259.

(547)

G. E. LEACH ET AL. v. C. F. LINDE.

County Commissioners—Jury—Term of Court—Judge—Code—Issues—Evidence—Damages—False Representation—Instruction.

1. Where the statute in express terms gives the county commissioners power to provide a jury for two weeks, and then afterwards the term of the court is lengthened to three weeks, they have power, by implication, to provide a jury for the third week also.
2. Where, upon failure of the county commissioners to draw a jury for such third week, the court orders the same to be drawn as prescribed by section 1732 of The Code, such jury is legal.
3. When the issues raised by the pleadings are comprehensive enough to allow the introduction of all the evidence material to the case, there is no ground of exception.
4. In an action for damages for having, by false representations, induced the plaintiffs to accept a certain ice machine and bonds representing the indebtedness of its owners thereon, the court refused to instruct the jury that if the plaintiffs could, in reasonable time and with reasonable outlay, put the machine in the condition required by the contract, they could not recover as damages the amount they paid for the bonds: *Held*, no error.
5. The court should not give instructions when there is no evidence to which they are pertinent.

APPEAL at October Term, 1890, of WAKE, from *Boykin, J.*

This action was brought to recover damages of the defendant for having induced the plaintiffs to accept a lease of a certain ice plant and machinery and purchase certain bonds, by false and fraudulent representations made by defendant, as set out in the complaint.

Issues were submitted by the court as follows:

1. At the time of the purchase of the bonds and acceptance of the lease by plaintiffs, did defendant falsely and fraudulently represent to plaintiffs that the plant and ice machinery, and every essential part thereof, was in good repair and condition, and that it would produce fifteen tons of ice per day at a cost of not more than $2.25 (548) per ton?

2. Did defendant know said representation to be false?

3. Were the plaintiffs induced by said representation to purchase said bonds and accept said lease?

4. What damage, if any, are plaintiffs entitled to recover?

The following prayers for instruction were refused, and defendant excepted:

1. If the plant mentioned in the complaint could have been, in a reasonable time, with a reasonable outlay of money, so repaired and

improved by the plaintiffs, after they took possession of the same, as to place it in the condition required by the contract, then the plaintiffs are not entitled to recover as damages the $4,000 paid for bonds, as alleged in said complaint.

2. If the plant mentioned in the complaint could have been, within a reasonable time, and with the outlay of $2,400 mentioned in this complaint, so repaired and improved by the plaintiffs, after they took possession of the same, as to place it in the condition required by their contract of 6 October, 1888, set forth in the complaint, then the plaintiffs are not entitled to recover damages the $4,000 paid for both, as alleged in said complaint.

10. Of the damages claimed by the plaintiffs, to wit, the sum paid for the bonds and the sum expended in repairing the plant, they are entitled to recover only such sum as was necessary to put the plant in good repair and make it capable of producing ice as required by the contract set forth in the complaint.

The defendant tendered the following issues:

1. Did the defendant make to the plaintiffs the representations alleged in the sixth article of the complaint?

2. If yes, were said representations false?

3. If false, were they false within the knowledge of the de-
(549) fendant?

4. Did the plaintiffs in accepting the lease and advancing the four thousand dollars for bonds, as alleged in the complaint, rely upon said representations?

5. If yes, was such reliance reasonable?

6. What damages, if any, hath the plaintiffs sustained?

The court refused to submit these issues, and the defendants excepted.

The plaintiff G. E. Leach was introduced, and testified as follows: "The contract between plaintiffs and Linde & Lawrence was made in New York; Linde & Lawrence represented that they owned nine hundred and eighty shares of the capital stock of the Raleigh Transparent Ice Company, a corporation existing under the laws of the State of New Jersey, the entire capital stock being one thousand shares, and they, Linde & Lawrence, agreed to put this plant, belonging to said corporation in the city of Raleigh, in good repair." The plaintiffs offered to show by the witness that the contract of 6 October, 1888, was drawn by one Clinch, the attorney for Linde & Lawrence, and executed in the office of said attorney in New York, for the purpose of showing that it was signed in plaintiff's presence, he being present in said attorney's office when all the parties signed the said contract, and further, for the purpose of showing that Clinch, the attorney and subscribing witness, was a citizen of New York. The defendant objected, the court overruled the objection,

and defendant excepted. This was when the said contract was offered in evidence—the witness Leach being upon the stand—and the court allowed the witness to testify that the contract was executed by all the parties in the office of Clinch in the city of New York, and that Clinch, the subscribing witness, was a citizen and resident of New York, and was not present at the trial.

R. H. Battle, S. F. Mordecai, and Armistead Jones for plain- (550) *tiffs.*

G. V. Strong for defendant.

MERRIMON, C. J. The statute (Laws 1885, ch. 180) prescribes, among other things, that certain of the terms of the Superior Court of the county of Wake shall continue for three weeks, "to be for the trial of civil business alone." These terms are to be devoted to the proper disposition of all kinds of civil actions and proceedings pending in the court, whether they be such as require trials by jury or not. Hence, the statute just cited, taken as it must be, in connection with the other statute (The Code, ch. 39, in respect to "jurors," especially sections 1727, 1732) contemplates and intends that a jury shall be provided for each week of the terms of the court to which reference is thus made. The third week of such terms, as well as the two preceding weeks thereof, is devoted to the disposition of civil business—actions that generally require jury trials. How can such trials be had without a jury? Is it not obvious that the statute creating these terms intended that each week of them should have provided for it a jury, drawn in the regular method prescribed? In extending the terms of the courts for such purpose, by plain implication the duty of the county commissioners was correspondingly enlarged so as to require them to provide regularly a jury for the third week of such terms.

It is true that the statute (The Code, sec. 1727) provides generally, in terms, for drawing for each week of the terms of the Superior Courts lasting two weeks, but its chief and leading purpose is to provide juries for the regular terms of the courts, and a jury for each week of them. At the time the general statute in respect to juries was first enacted, the regular terms of the Superior Courts did not extend beyond two weeks, and hence the county commissioners were required only to provide a jury for each week of a term of that length. Afterwards, when the terms of some of the courts were extended to three weeks, as in (551) the case of the county of Wake, the statute in respect to juries was not, in terms, in pertinent respect, correspondingly modified, but it was in effect. The two statutes are, in important respects, *in pari materia,* and must be taken and treated together. That in regard to jurors is

intended, in large measure, to effectuate that in respect to courts. Hence, when the statute first above cited extended the terms of the court one week, it had the effect to so modify the statute in respect to juries as to require a jury to be provided for that week in the regular method. In the nature of the matter, and in view of the purpose of the law, it would be impracticable, unreasonable and absurd to extend the terms of the court one week for general purposes and provide no jury for that week.

It appears in this case that the county commissioners, for some cause, failed to draw a jury for the third week of the term at which the action was tried. The court directed that a jury for the same be drawn as prescribed and allowed by the statute (The Code, sec. 1732) and a jury was so drawn and summoned accordingly. A jury thus drawn was not illegal; it was such as the law allowed, and to be so treated for all proper purposes. It is true the statute provides that a jury may be so drawn "if the commissioners, for any cause, fail to draw a jury for any term of the Superior Court, regular or special," etc. Here the commissioners provided juries for two weeks of the term, but not for the third week. Clearly, such failure came within the mischief provided against by the section of the statute just cited. The object of the statute is to provide, in an orderly method, unobjectionable jurors for the courts.

The defendant's challenge to the array cannot, therefore be allowed. Hence, his first exception is groundless.

The issues of fact submitted to the jury were clearly raised by allegations of the complaint broadly denied in the answer. They were
(552) comprehensive, and afforded the defendant ample opportunity to introduce on the trial all evidence material for his defense and to raise all questions of law in respect to the materiality, relevance and application of the same, and like opportunity as to the evidence of the plaintiffs. The verdict of the jury upon them would settle with sufficient fullness the material controverted, constituent facts. The issues tendered by the defendant might have served the like purpose, but scarcely so well, because they were unnecessarily more in number and subdivided the material inquiries to be made. This always tends, more or less, to confuse the jury. So the second exception is without force.

The evidence objected to and embraced by the third exception was of slight importance, not such as in its nature would prejudice the defendant. It tended, in some degree, to identify the contract alleged and set forth in the complaint, to show that the defendant had knowledge of its contents and meaning, and to account for the absence of the subscribing witness thereto. This exception has no substantial merit.

The defendant was not entitled to have the first, second and tenth special instructions asked for by him given to the jury, because the plaintiffs, in substance, alleged, and there was evidence tending to prove,

that they were induced to lease the ice manufactory mentioned, and in that connection to pay to the defendant four thousand dollars for certain bonds of little or no value, by the false and fraudulent representations made by him to them. The plaintiffs allege that the defendants falsely and fraudulently represented to them that the ice manufactory was a good one—in good repair—that it was capable of producing a certain quantity of ice per day at a cost not exceeding a specified sum; that the ice plant was of great value—forty thousand dollars. Hence, they believed that the bonds, whose value depended upon the facts thus falsely represented to exist, were of substantial value, and (553) were induced to buy them. It is alleged that the defendant knew that such representations made by him were false, and that he fraudulently induced the plaintiffs to take the lease and pay four thousand dollars for the bonds they received at his instance and solicitation, and for his benefit. If such allegations were true, the plaintiffs were entitled to recover damages upon the ground that they were, under the circumstances fraudulently induced by the defendant to buy the bonds, which he represented to be of great value, whereas in fact they were of no substantial value. The damage, in such respect, was a direct result of the fraud alleged, and the plaintiffs were entitled to recover on account of the same.

It is stated in the case that the evidence sent up was all that bore upon the special instructions asked for by the defendant. We have examined it carefully, and are of opinion that there was no evidence that could warrant the court in giving the third, fourth and fifth special instructions asked for. No part of the evidence, nor the whole of it together, accepted as true, in any reasonable view of it, was sufficient to prove that the plaintiffs "knew that the said plant (the ice manufactory) did not come up to the representations made by this defendant," nor that the plaintiffs would have taken the lease if they had known that the representations made by the defendant were false.

The court should not give instructions, special or otherwise, in the absence of evidence to which they are pertinent, and that warrant them. It would be error to do so, if they prejudiced the adverse party.

The court gave the eighth and ninth special instructions asked for, substantially and sufficiently, in its charge to the jury, to which there was no exception. Indeed, it was very fair and sufficiently explicit. It directed the attention of the jury particularly to the issues, their nature, and the evidence submitted to them. We are unable to discover that the defendant was prejudiced, as he complained, by any instructions the court gave or failed to give them. (554)

Judgment affirmed.

Cited: Humphrey v. Church, 109 N. C., 137; *Cornelius v. Brawley, ib.,* 548; *Carr v. Alexander,* 112 N. C., 789; *Penniman v. Alexander,* 115 N. C., 558.

W. O. BLACKNALL v. W. A. ROWLAND AND W. R. COOPER.

Damages—Contract—Constitution—Condition.

In an action to recover damages for fraud and deceit, by which plaintiff was induced to contract to purchase corporation stock of no value, it appeared that the contract contained a clause to the effect that the contract was "conditioned" upon the statements of defendants being verified by an expert, after the evidence was closed and counsel was addressing the jury, the court stated that as plaintiff had not had the statements of defendants verified by the expert, it would instruct the jury that the plaintiff was not entitled to recover: *Held,* to be error.

APPEAL Fall Term, 1890, of DURHAM, from *Boykin, J.*

This action is brought to recover damages occasioned by the false and fraudulent representations of the defendants to the plaintiff, whereby the latter was intentionally misled and induced to buy from the defendants certain shares of the capital stock, of no value, of a corporation named, and in consideration thereof to convey to the defendants his tract of land of great value, etc. Having in view the transaction referred to, the parties executed a paper-writing, whereof the following is a copy:

"W. H. Rowland and W. R. Cooper propose to sell, and W. O. Blacknall agrees to buy, the interest of said Rowland & Cooper in fifty shares of the capital stock of the Durham Sash, Door and Blind Manu-
(555) facturing Company. As the basis of the proposition and acceptance, it is represented and understood that said stock is of the par value of fifty dollars a share; that fifty per cent of the par value of each share has been paid thereon in cash, and twenty-five per cent of the par value thereof has been paid by declaration of dividend out of the net profits of the business and operations of the company, so that seventy-five per cent of the par value of the stock of said company is now legally paid up; that the company owes for machinery $2,000, for lumber about $....., and a floating debt of $600 to $700. That its assets are available and in good condition, and exceed its liabilities by $3,000; that Rowland & Cooper will be able to legally assign said stock or interest, and have the same duly transferred on the company's books to said Blacknall. In exchange for said stock or interest said Blacknall is to convey to said Rowland & Cooper and their heirs by good and sufficient deed in fee

simple an unencumbered title to twenty-eight acres of land in Durham County, adjoining T. B. Lyon on the east, North Carolina Railroad Company on the south, W. O. Blacknall on the west, S. J. Hester on the north, it being just east of the thirty acres now under mortgage.

"This trade is conditioned upon the representations above as to condition of business and stock of said company and other statements being verified upon examination of its affairs by an expert bookkeeper of Blacknall's selection and at his expense, and upon the condition that his title to the land named above is good. Witness the signatures of W. H. Rowland and W. R. Cooper and W. O. Blacknall, 4 October, 1888."

The defendants denied the material allegations of the complaint. On the trial, the plaintiff put in evidence the paper-writing above set forth, and much other evidence, oral and otherwise. The defendants also introduced several witnesses, who were examined.

After the evidence had closed, and one of the plaintiff's counsel (556) and two of the defendants' counsel had addressed the jury, his Honor stated to plaintiff's counsel that as the plaintiff had not had the books of the corporation examined by an expert bookkeeper, he would instruct the jury that the plaintiff was not entitled to recover upon the issues submitted by him to the jury. In deference to this opinion of his Honor the plaintiff submitted to a judgment of nonsuit. Judgment entered. Plaintiff appealed to Supreme Court.

J. S. Manning and E. C. Smith for plaintiff.
John W. Graham for defendant.

MERRIMON, C. J. The cause of action alleged in the complaint consists, in substance, of the alleged false and fraudulent representations of the defendants made to the plaintiff in the paper-writing, a copy of which is set forth above, and otherwise as to the condition, circumstances and solvency of the corporation therein named, which the plaintiff reasonably believed to be true, and whereby he was fraudulently misled and induced to buy the shares of stock mentioned of the defendants in that corporation, which were really of no value, and to convey to them his tract of land mentioned of large value; and further, of the false and fraudulent warranty of the truth of such representation made by the defendants to the plaintiff as additional inducement to him to buy such stock of no value.

There was evidence for the plaintiff, on the trial, tending to prove that the representations made by the defendant to him in the paper-writing and otherwise were not true; that the corporation was insolvent; that it was not prosperous, but declining; that its indebtedness was greater and its resources less than represented; that the dividend mentioned was not

(557) declared out of the net earnings of the corporation, and that the defendants knew these facts; that they encouraged and induced the plaintiff to believe these representations and to close the proposed transaction. There was evidence for the defendants tending to prove the contrary.

In this state of the case the presiding judge said "that, as the plaintiff had not had the books of the corporation examined by an expert bookkeeper, he would instruct the jury that the plaintiff was not entitled to recover." In this there is error. The plaintiff was not concluded by the fact that he did not have such examination made. He was not bound to verify the representations made; he might, as a matter of caution, have done so, but he might not unreasonably believe, rely and act upon the plain, pertinent and material statements made by the defendants to him in the paper-writing and otherwise. If the plaintiff believed them to be true, and acted upon them, and the defendants knew them to be false, and intended fraudulently thereby to induce the plaintiff to purchase their shares of stock, of no value, at the price he paid for them, he might recover, notwithstanding he did not cautiously have their representations verified. Such verification was not intended for the benefit of the defendants; much less was it intended to shield or relieve them from liability for fraud and deceit they might perpetrate upon the plaintiff. The paper-writing, and particularly the last clause of it in respect to the verification of its statements, might, taken in connection with other evidence favorable to the defendants, be evidence of their good faith and going to prove that the plaintiff did not rely upon their representations; but, on the other hand, the same might along with other evidence favorable to the plaintiff, be evidence of a fraudulent contrivance to deceive and mislead him. Fraud is protean in its devices and endless in its shifts and subterfuges. What is evidence of it, or its absence, oftentimes depends more or less upon the condition of matters and things material and the attending circumstances. In one aspect of the evidence in this case, accepted as true, the material representations in the paper-
(558) writing in effect made to the plaintiff, and other like representations otherwise made to him by the defendants, were grossly false and so within their knowledge. And it might be fairly inferred, from the nature of the matter and the evidence, that the paper-writing, and particularly the last clause of it, was an artful shift to mislead and deceive the plaintiff, a man little familiar with such matters, as to the sincerity and good faith of the defendants in respect to the proposed sale of the shares of stock mentioned. In another aspect of it more favorable to the defendants, the paper-writing, and especially the last clause of it, would be evidence tending to show their good faith, and that the plaintiff, in buying the shares of stock and the sale of his land, relied upon

his own judgment and information gathered from other sources than the defendants. If the defendants knew that the representations made by them in the paper-writing and otherwise, as in evidence, were false—as the evidence, much of it, tended to prove—it would be most unreasonable to infer that they intended or expected the same to be verified or scrutinized. On the other hand, in view of parts of the evidence, the reasonable and just inference would be that the last clause of the paper-writing was inserted to stimulate great fairness and candor on the part of the defendants, and thus the more successfully entrap, deceive and mislead the plaintiff, a man, as the evidence tended to show, not familiar with such matters. Such view of the evidence would be strengthened by the fact that the verification suggested was to be made by an expert bookkeeper, at the expense of the plaintiff. Shrewd men of experience might think and expect that a man of small experience, after such flattering representations, would not have such verification made at his own cost.

Hence, the paper-writing, including the last clause of it, was simply evidence. It did not conclude the plaintiff, as the court intimated it did.

There is, therefore, error. The judgment of nonsuit must be set aside. (559)

Error.

Cited: S. c., 116 N. C., 393; *S. c.,* 118 N. C., 419, 421; *Ferrell v. Hales,* 119 N. C., 213; *May v. Loomis,* 140 N. C., 357; *Helms v. Holton,* 152 N. C., 592.

CANDACE WILLIAMS v. ALONZO NEVILLE.

Removal of Administrator—Appointment of Next of Kin—Renunciation.

1. The next of kin of a deceased person has a right to administer upon his estate within six months after his death, or, in lieu thereof, within that time to have appointed such person as he may select, if in other respects qualified.

2. The Code requires that before any person other than the next of kin can be appointed administrator within six months from the decedent's death, a written renunciation of such next of kin must be filed with the clerk, unless after thirty days, upon citation to show cause, he is adjudged to have renounced; and the mere expressed intent of such person that he would not have anything to do with the administration is no valid renunciation.

3. If the next of kin, in answer to citation, name his appointee, and such person, after appointment, fails to qualify, then, though six months had not expired, the clerk would be authorized to appoint another.

4. In a proceeding to remove an administrator, one N, and have appointed in his stead E. W. T., instituted by the decedent's next of kin, W, it appeared that the decedent died in May, 1890; N was appointed in June, and after W had declared she would not have anything to do with the administration. In September W wrote to the clerk who made the appointment that she still claimed the right to administer and wished the appointment of one J. S. T., and J. S. T. wrote he would accept. In October W filed a paper formally renouncing her right to administer in favor of E. W. T., and the motion for the removal of N and the appointment of E. W. T. in his place was heard on 27 October, and refused on the ground that she (W) had already renounced in favor of J. S. T.: *Held*, to be error—(1) E. W. T. should have been appointed, and was not bound to go before the clerk to qualify within the six months from the decedent's death, nor at all, pending the appeal to the judge upon the clerk's refusal of the motion for removal and appointment, and after the clerk had adjudged that the plaintiff had not the right to administer; (2) the proper course of procedure is to allow E. W. T. reasonable time after N's removal, not less than thirty days, to qualify; (3) the clerk has no jurisdiction to appoint pending the appeal.

(560) APPEAL from an order of *Boykin, J.*, overruling an order previously made by Lassiter, clerk of the Superior Court of GRANVILLE, refusing to remove a creditor who had been appointed administrator and appoint a person designated by the next of kin of the decedent.

The order of the clerk appealed from was as follows:

"This motion to remove Alonzo Neville, administrator of Emily Knight, coming on to be heard and having been heard, and said Alonzo Neville having offered in evidence a letter of one Mrs. Candace Williams, dated 8 September, 1890, to R. W. Lassiter, C. S. C., also a letter of J. S. Timberlake to him, said clerk of said date, and the said Alonzo Neville admitting that the renunciation of said Mrs. Candace Williams was duly executed before F. P. Pierce, the subscribing witness, which paper is filed, and no charges being preferred against said administrator, the court is of opinion that he should not be removed from his office, and that said Mrs. Candace Williams had no right or power to name the administrator of Mrs. Knight. The court finds as a fact, and it is admitted, that said Emily Knight died 8 May, 1890, in Granville County, and that Mrs. Candace Williams is the next of kin of said deceased, and that said Alonzo Neville is the largest creditor of said estate. From this ruling said Candace Williams and her said appointee appealed," etc.

The facts appearing from the record and findings of the court below are set out in the opinion.

J. B. Batchelor for plaintiff. (561)
R. H. Battle, M. V. Lanier, and N. B. Cannady for defendant.

AVERY, J. It is conceded that Candace Williams, being the only sister of the decedent, who left neither husband, child nor brother surviving her, had the right to administer within six months after her sister's death. She had also the right within that time to select and recommend such person as she might prefer if she did not wish to administer herself, and if her nominee was suitable in character, habits and intellect, to demand his appointment. *Little v. Berry,* 94 N. C., 433; *Ritchie v. McAuslin,* 2 N. C., 220; *Pearce v. Castrix,* 53 N. C., 71; *Wallis v. Wallis,* 60 N. C., 78; Schouler on Exrs., sec. 113.

Emily Knight died in Granville County on 8 May, 1890. On 14 June, 1890, the clerk of the Superior Court in Granville County granted letters of administration to the defendant Alonzo Neville, who was the largest creditor. Candace Williams had not filed any paper renouncing her right, as next of kin, to administer, but the defendant had visited her at her home in Franklin County, after the death of her sister and before the said 14 June, and, in a conversation then had with her, she declared to him "that she would not have anything to do with, and would not administer upon," the estate of the decedent. The Code, sec. 1378, provides that "when any person applies for administration, and any other person has a prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk." It is manifest, therefore, that the language used by the plaintiff in conversation did not, in contemplation of law, amount to a renunciation. In *Hill v. Alspaugh,* 72 N. C., 404, the Court, construing sections 6, 7 and 8 of Battle's Revisal (The Code, secs. 1378 to 1380) said:
"We think the true intent and meaning of the statute is, that the (562) persons primarily entitled to administration, shall assert their right and comply with the law within six months after the death of the intestate; and that a party interested, wishing to quicken their diligence within that time, must do so by citation as prescribed by statute, or if a person not preferred applies for administration within six months he must produce the written renunciation of the person or persons having prior right." It was only after the lapse of six months that the clerk had the right to appoint the "most competent creditor," when plaintiff had neither renounced in writing nor applied for letters for herself or some suitable person selected by her. After the expiration of thirty days (after 8 June, 1890) the defendant might have applied to the clerk to issue a citation to the plaintiff to show cause why she should not be decreed to have renounced. It was his own folly, if, instead of pursuing the course plainly pointed out by the law, he applied for and obtained

letters of administration at the expiration of only thirty-six days after the death of Emily Knight. It was in his power to compel her to renounce or actively assert her right within twenty days. In the absence of such citation, the law gave the plaintiff six months to deliberate and determine whether she would apply for letters of administration to be issued either to herself or her appointee. The appointment of Neville having been made contrary to law, the clerk ought first to have revoked the letters illegally issued to him, upon the motion of the person entitled to administer or to nominate, and then to have allowed a reasonable time for her or her appointee to qualify. *Hughes v. Pipkin,* 61 N. C., 4. If the plaintiff, in answer to a citation issued in the manner indicated by the law, had claimed the right for herself or another, and the person named by her had been appointed by the court, and had failed or refused within a reasonable time to qualify, then, though the
(563) six months had not expired, the clerk would have been authorized by law to appoint another. *Stoker v. Kendall,* 44 N. C., 242.

On 8 September, 1890, Candace Williams wrote a letter to the clerk (R. W. Lassiter) stating that she claimed her right to administer within six months (four months only then having expired) from the death of her sister; that she had given that privilege to J. S. Timberlake, and wished him to revoke the letters of administration which, as she had ascertained from reading an advertisement, had been granted to the defendant. She insisted also that, as the larger part of the property was in Franklin County, letters ought to be granted by the clerk of the Superior Court of that county. On the same day (8 September), J. S. Timberlake also wrote to R. W. Lassiter, clerk, that, at the request of the plaintiff, he had consented to administer on the estate of her sister, Mrs. Knight, and would administer within six months, as he claimed a right to do, but, as the most of her estate was in Franklin County, he expected to administer there. It was evident that J. S. Timberlake had advised her, upon such information as he had, that the clerk of the Superior Court of Franklin County alone had jurisdiction, whereas, in fact, the court of Granville had acquired sole jurisdiction by first moving in the matter, though its order was subject to revocation on motion of plaintiff. The Code, sec. 1375; *Claywell v. Sudderth,* 77 N. C., 287.

On 1 October, 1890, the plaintiff filed before R. W. Lassiter, clerk of the Superior Court of Granville, the following paper, addressed to Lassiter, clerk:

"I, Candace Williams, sister of Mrs. Emily Knight, and entitled to administer on her estate, hereby renounce my right to qualify as such administrator, and request that the clerk of the Superior Court appoint E. W. Timberlake. I further certify that I am the only sister, living, of

the said Emily Knight, and that she had no brother at her death. (564) 1 October, 1890." (Signed by Candace Williams, and witnessed by F. P. Pierce.)

"I am well acquainted with Mrs. Candace Williams, and she is the only sister of Mrs. Emily Knight. I further know that she has no brother living." (Signed F. P. Pierce.)

On 27 October, 1890, the parties, with their attorneys, appeared before said R. W. Lassiter, clerk, when he refused the motion to remove Alonzo Neville, as administrator, resting his ruling in express terms upon the ground that the letter of Candace Williams, dated 8 September, and that of J. S. Timberlake of the same date, amounted to a total revocation on her part, and that "Mrs. Candace Williams had no right or power to name the administrator of Mrs. Knight." This ruling was palpably erroneous. In *Little v. Berry, supra,* this Court, conceding that no question had ever been raised as to the right of the next of kin to renounce in favor of a suitable person selected by them where a decedent had died intestate, went further, and overruling *Suttle v. Turner,* 53 N. C., 403, declared that the same rule applied in case of the appointment of an administrator *cum testamento annexo,* whether the will was proven and the executor qualified before 1 July, 1869, under the provisions of Revised Code, ch. 40, sec. 2, or after that date under the Code of Civil Procedure, which was then enacted. The Code, sec. 1376; Bat. Rev., ch. 45, sec. 1. The appeal in that case was from an explicit ruling of the judge below that the next of kin had no right to designate the person who should be appointed in their stead.

The refusal to appoint E. W. Timberlake, who was nominated on 1 October, was error on the part of the clerk, and after the appeal to the judge of the Superior Court on 27 October, 1890, the clerk had no further control over the matter. The previous notice, dated 8 August, to the effect that the plaintiff expected to renounce before the clerk in Franklin County in favor of J. S. Timberlake, and ask Lassiter to revoke the letters to Neville, was not, as it was not intended to be, a renunciation of a right to administer, such as would justify the order (565) made. The paper filed 1 October was a formal renunciation in favor of her own nominee, E. W. Timberlake, within less than five months after Mrs. Knight's death. It was the first renunciation filed, and it was a conditional one. E. W. Timberlake was not required to go before the clerk on 27 October, anticipating the action of the clerk, with a bond executed in the same sum named in Neville's bond. There is neither precedent nor reason for such practice. Upon his examination as an applicant, under section 1388 of The Code, the clerk might have valued the personal property at a higher figure after acquiring such information as he could give than he had previously done. So that the

framers of the statute must have contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person.

After the appeal to the Superior Court on 27 October, E. W. Timberlake was not required to appear before the clerk for the twelve days remaining after the expiration of the whole of the six months pending the appeal in the higher Court, and go through the vain ceremony of tendering a bond in a sum fixed by himself to a clerk who had solemnly declared, as a conclusion of law, that the plaintiff had no right to select him and demand his appointment and Neville's removal.

On 27 October, 1890, the attorneys of the plaintiff entered the motion, which appears of record, to appoint E. W. Timberlake in accordance with the request dated 1 October, 1890, and it was this motion which was refused on that day, and from which an appeal was then and there taken, as appears from the clerk's order. The fact that Candace Williams and her husband, pending that appeal, and before it was heard before *Boykin, J.*, at January Term, 1890, filed before the clerk
(566) a more formal renunciation in favor of E. W.Timberlake, does not affect his right, or her right for him, to insist upon the removal of Neville, and his appointment by reason of the designation on 1 October. After the controversy had been transferred to the Superior Court in term-time the clerk had no jurisdiction of the matter. The paper dated "November Term" purports to be only "a ratification of the power I (she) have heretofore given him, E. W. Timberlake," to act as such, evidently referring to the paper of 1 October.

The judge finds as a fact that E. W. Timberlake has never applied for letters of administration. It was a vain and foolish thing to apply after refusal of an application made in due time to have Neville removed. He could not be appointed till the defendant could be removed, and his removal was to be made, if at all, at the instance of the plaintiff. *Garrison v. Cox,* 95 N. C., 353.

It was error to refuse to remove Neville when he had been appointed contrary to law. The clerk ought to have removed him, and to have given notice to E. W. Timberlake to qualify within a reasonable time—say thirty days from service of notice—and such will be the proper order when this opinion shall be certified. *Wallis v. Wallis, supra.* In the case of *Stoker v. Kendall, supra,* the facts were that a creditor gave notice, as Neville should have done in this case, to one who was the next of kin of decedent, that he will make application at a certain term of the county court for letters of administration, and at said term the person so notified appeared before the court, and an order was entered appointing him, with the proviso that he should give bond in a sum named. This Court said in that case that three months after entering the order of

appointment was more than a reasonable time to allow him for filing bond, and on his failure to do so before the next February Term it was proper for the county court to then appoint the creditor. What is reasonable time, when the statutes does not fix it, is a question for the Court. *Hughes v. Pipkin, supra.* (567)

We think, for the reasons stated, that there was no error in the ruling of the court below that the clerk erred in refusing to remove the defendant, and that the plaintiff being entitled on 1 October to designate a suitable person to act as administrator, and her motion being then refused, has still the right to demand the appointment of E. W. Timberlake, if he be adjudged a suitable person, or to administer herself, or designate another person. There is no error.

Affirmed.

Cited: Boynton v. Heartt, 158 N. C., 491, 495.

L. C. HOWLAND ET AL. v. JOHN FORLAW.

Lessor and Lessee—Lien of Landlord—Distress—Tenant.

1. Except in case of landlord and tenant provided for specially by statute, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third persons before the rent is ascertained and set apart conveys a good title.

2. The common law remedy of lessors by distress does not obtain in this State.

ACTION brought to recover the value of certain fish-scrap and oil sold by B. T. Webb & Co., who were in charge of plaintiffs' mills, to the defendant, tried at Fall Term, 1890, of CARTERET, before *Armfield, J.*

His Honor refused to give instructions asked, and charged the jury as follows:

"That the contract between plaintiffs Howland and B. T. Webb & Co., was not a copartnership contract, but was a contract of rental of the property of plaintiffs for one-fourth of the product of the factory. That if the plaintiffs were in possession of the property in con- (568) troversy, under the contract introduced in evidence, the same having been delivered to them, and defendant purchased it and took it away, then, whether said property (scrap and oil) was divided or not, the plaintiffs are entitled to recover, that being the effect of the contract."

The defendant requested the court, among other prayers, to give the following instruction:

"4. If said Benjamin T. Webb was the lessee of plaintiff of 'The Steep Point Fish-Scrap and Oil Factory,' and was in possession of said factory and fish-scrap and oil therein, under an agreement to pay, as rent therefor, a portion or percentage of the profits or the gross products of scrap and oil, and the defendant Forlaw purchased from said Webb from said factory fish-scrap and oil *in bulk, or which had never been divided, or set apart to plaintiffs as rent,* then the plaintiffs are not entitled to recover any amount, as plaintiffs had no possession, or right of property, sufficient to maintain this action, nor any lien by statute or otherwise in the fish-scrap and oil until a division. The plaintiff's cause of action is against Benjamin T. Webb, if any one."

The defendant excepted to the instruction given, and to the refusal to charge as requested. Defendant appealed.

The other material facts are stated in the opinion of the case.

No counsel for plaintiff.
C. R. Thomas, Jr., for defendant.

AVERY, J., after stating the facts: By the terms of the covenant entered into between the plaintiffs Ralph Howland and L. C. Howland and B. T. Webb & Co., the plaintiffs agree to "furnish" the firm "a purse seine and two purse boats, also the fish-scrap and oil works, with appurtenances, situated on Steep Point on North River," while Webb & (569) Co. agreed to "deliver" to him "one-fourth of the gross product of oil and scrap of said factory, seine oil to be barreled and scrap in bulk in scrap-house, all to be in shipping order." B. T. Webb & Co. further covenanted to pay all of the expenses of catching fish and that incurred in running the factory during the year, and to fill certain engagements for furnishing scrap previously made by the plaintiffs with a customer.

Before it was declared by statute (The Code, sec. 1754) that crops raised on land leased for agricultural purposes should be deemed vested in the landlord to secure the payment of his rents, his advancements and expenditures for making and saving crops, and the performance on the part of the tenant of the stipulation in the lease, the title to the whole of the crop was, in contemplation of law, vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. *Deaver v. Rice,* 20 N. C., 567; *Gordon v. Armstrong,* 27 N. C., 409; *Biggs v. Ferrell,* 34 N. C., 1; *Ross v.*

Swarringer, 31 N. C., 481. This was an agreement to pay for the rent of the manufacturing establishment, the seine and boats, a certain proportion of the oil and scrap manufactured, instead of a rent in money, and constituted Webb & Co. neither partners nor servants (or croppers) of Howland, but simply renters. *Biggs v. Ferrell, supra,* and *Ross v. Swarringer, supra.* Webb & Co. were to divide the product of the mill and set apart Howland's share. The oil works, with all appurtenances, situated on Steep Point, were described with sufficient certainty to pass a definite interest. These provisions in the agreement are distinctive characteristics of a lease. *Harrison v. Ricks,* 71 N. C., 7, and *Haywood v. Rogers,* 73 N. C., 320. As the works, with appurtenances, were not demised for agricultural purposes, no lien in favor of the (570) lessor attached to the scrap and oil made. The plaintiffs have only their common law remedy. The common law right of distress or rent was held to be inconsistent with the spirit of our statutes in North Carolina. Taylor Landlord and Tenant, sec. 558; *Deaver v. Rice, supra.* Where a plaintiff recovered in an action of ejectment, the crop growing on the land when he was not in possession passed with the land, but he could neither recover specific articles (whether crops or trees) that had been severed from the land during the occupancy by the trespasser, in an action of replevin, nor their value in trover, of one who had bought from the latter. *Brothers v. Hurdle,* 32 N. C., 490; *Ray v. Gardner,* 82 N. C., 454; *Harrison v. Hoff,* 102 N. C., 128. The remedy in such cases was an action of trespass for mesne profits against the party evicted. The very forcible reason given by *Pearson, J.,* for adopting this rule was that in a country where there were no markets, overt public policy forbade that every one who purchased a load of wood or a bushel of corn should incur a liability to the owner of the land from which it had been severed, if it should afterwards appear that they had purchased from a tenant holding over or other trespasser. *Brothers v. Hurdle, supra.* The public would be subjected to the same inconvenience if every purchaser of fish-scrap or oil from the lessee of an establishment where it is made subjected himself to a liability equal to the value of the article purchased, in case of failure on the part of the lessee to pay the full amount of rent according to the stipulations of the lease. The plaintiffs abandoned the ancillary remedy (claim and delivery) and relied upon showing a conversion of their property by the defendant, who had bought a quantity of scrap and oil, the product of the works leased, from B. T. Webb & Co. It is manifest that they can neither maintain an action of trover against the purchaser from Webb & Co. for the value of the property, nor resort to the ancillary remedy and thereby establish a right to seize the specific article sold by said lessees. Cooley on Torts, page 445. Having no lien by virtue (571)

of The Code, sec. 1754, until the receipt of their rent in kind, plaintiffs can look only to the lessees to deliver it, or account for its value if they sell. The lessees, until the division was made under the contract with the lessor, were, in contemplation of law, the owners of all of the scrap and oil manufactured. The effect of a sale of any part of the scrap or oil made was to subject them to liability to the lessors *pro tanto* for the value of the landlord's proportion. There was error in the refusal of the judge to charge that, under the contract, B. T. Webb & Co. were lessees, and the defendant incurred no liability by buying scrap that had not been set apart and delivered to plaintiffs, or their agent, as rent, and that, by a sale of any portion of the undivided products of the manufacturing establishment leased to them, B. T. Webb & Co. passed a good title to the purchaser. For the error pointed out, a new trial must be awarded. It is useless to discuss the other assignments of error.

New trial.

Cited: Russell v. Hill, 125 N. C., 472; *White v. Fox, ib.,* 549; *Reynolds v. Taylor,* 144 N. C., 167.

L. WOODLIEF, ADMR., v. SARAH J. BRAGG ET AL.

Claims Against Estates—Creditors—Statute of Limitations.

1. When the creditor presented his claim against the estate of deceased person within one year, the same not being then barred by the statute of limitations, and the administrator, without having admitted its correctness in terms, filed his petition to make assets to pay the debts of the estate: *Held,* that the defendants in such proceedings could not be allowed to set up the statute of limitations in resistence to this claim.

2. The personal representative represents the deceased, and his admission of the correctness of a claim, unless impeached for fraud, will estop the heirs.

3. When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it.

(572) APPEAL from *Boykin, J.,* at January Term, 1891, of GRANVILLE.

The facts are sufficiently stated in the opinion.

J. W. Graham for plaintiff.
L. C. Edwards and J. B. Batchelor for defendants.

CLARK, J. The creditor presented the claims now in dispute to the administrator within one year of his qualification, and said claims were not barred by the statute of limitations at the death of the intestate. The administrator files this petition to condemn proceeds of sale of certain real estate in the clerk's office as assets to pay debts, there being an insufficiency of assets, and the defendants, the heirs at law, seek the benefit of the statute of limitations.

The Code, sec. 164, provides that if a claim is "filed with the personal representative within the time above specified (i. e. one year after grant of letters to the personal representative) and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar." The Code, sec. 1429, provides that if action should, notwithstanding, be brought, the plaintiff must pay the costs unless payment is unnecessarily delayed or neglected, or the defendant refuses to refer the matter. The first section above cited (164) provides generally that the statute under such circumstances ceases to run, and there is nothing which would seem to indicate a suspension of the statute as to the personal representative only, leaving the heir at law to be protected by the lapse of time. Action could only be brought against the personal representative, and the statute (sec. 1429) to discourage the bringing of such action, provides that the plaintiff shall pay the costs, except in certain instances, which do not apply to this case.

When judgment is obtained against the personal representative, (573) the heir at law cannot plead the statute of limitations unless there is fraud and collusion. *Speer v. James,* 94 N. C., 417; *Long v. Oxford, ante,* 280. The reason of this is that the personal representative represents the deceased, and hence, when a judgment is obtained against him, in the absence of fraud and collusion, it is conclusive as to the validity of the indebtedness against the heirs as well as against the distributee. For the same reason, since the amendment of The Code, sec. 164, by ch. 80, Laws 1881 (the provision above quoted) the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the claim in controversy in *Bevers v. Park,* 88 N. C., 456, was a cause of action accrued prior to the Code of Civil Procedure and section 164 did not apply to it at all. *Hall v. Gibbs,* 87 N. C., 4. Besides, a judgment had been obtained on that claim, and the amendatory act (ch. 80, Laws 1881) now before us, could have no application.

In the present case it is not expressly found that the administrator admitted the claim. In *Flemming v. Flemming,* 85 N. C., 127, where this provision was construed, *Smith, C. J.,* says the creditor had perhaps the right to "deem the acceptance (of the claim by the administrator) without remark as arresting the running of the statute." We do not hold that reception of claim by the administrator without objection is *per se* an "admission" of its correctness, but here not only the claim was filed in proper time and no objection was made, but the administrator files the petition to obtain assets to pay it. This is strong proof that he did not deny its correctness but "admitted" it—certainly it is so in the absence of any proof whatever to the contrary.

Per Curiam. No error.

Cited: Turner v. Shuffer, post, 647; *Lee v. McKoy,* 118 N. C., 522; *Hinton v. Pritchard,* 126 N. C., 10; *Justice v. Gallert,* 131 N. C., 396; *Harris v. Davenport,* 132 N. C., 701.

(574)

JUNIUS F. ROGERS ET AL. v. THE BANK OF OXFORD.

Interest—Usury—Contract—Bond—Consent—Rereference—Motion —Exception—Penalty for Usury—Statute of Limitations.

1. An order of reference entered by the court without objection from either side is "by consent." The facts found were approved by the court, and are not reviewable in this Court.

2. When, at the final report of a referee, a party moved to exclude certain charges or items, this will be treated as an exception thereto, and there can be no question as to the motion being in apt time, as no objection by the other side was made.

3. An action to recover the penalty for usury must be brought within two years from the time the usury was paid.

4. In an action by a firm and their surety to a contract to secure a balance due after advancements made, brought against a bank for an account and settlement, and also to stop the foreclosure of a mortgage executed by one of the firm to further secure the said balance: *Held,* (1) that more than two years having elapsed since the cause of action accrued, the penalty for usury could not be recovered; (2) that, as between the bank and the firm, the usurious transactions were separate and distinct from the indebtedness of the firm, not necessary to the ascertainment of the balance, and that relief to the extent of the usurious interest charged could not be granted; (3) that in ascertaining the balance for which the

obligors on the bonds are liable, as such, only six per cent interest can be charged, and after the balance is ascertained eight per cent thereon, according to the contract; (4) that, as against the surety, six per cent should be charged in ascertaining the balance, and eight per cent thereafter, according to the contract.

APPEAL at November Term, 1890, of GRANVILLE, from *MacRae, J.*

The plaintiffs executed to the defendant a bond whereof the following is a copy:

"$5,000. OXFORD, N. C., 1 Nov., 1886.

"For value received, we, John B. Booth, J. F. Rogers and C. M. Rogers, hereby acknowledge ourselves jointly and severally bound to the Bank of Oxford in the sum of $5,000, and hereby also bind (575) our heirs, executors, administrators and assigns.

"Witness our hands and seals, the day and date above written.

"The foregoing obligation is made to secure the Bank of Oxford for such amounts, not exceeding $5,000, as it may advance to said John B. Booth and J. F. Rogers, firm of Booth & Rogers, who propose to trade and deal in leaf tobacco. The amount due at any time shall be evidenced by the account which the Bank of Oxford agrees to open with said Booth & Rogers, and is to include and secure all amounts drawn by them for any purpose whatsoever. All advances under this agreement may be discontinued by the Bank of Oxford upon three days' notice, and the account shall stand for settlement in fifteen days thereafter, when the balance shall be considered due and payable. If not paid, interest thereafter shall be at eight per cent per annum. This agreement terminates on 31 October, 1887, and the obligors hereto shall be held bound for whatever balance may then appear to be due the said Bank of Oxford, with interest thereafter at the rate of eight per cent per annum.

"Witness:

"JOHN B. BOOTH, [Seal.]
"J. F. ROGERS, [Seal.]
"C. M. ROGERS." [Seal.]

The defendant had loaned to Booth & Rogers, the firm mentioned therein, large sums of money before the date of this bond, and it claimed a considerable balance as due it from them at that time on account of former dealings. As contemplated by the bond, the defendant advanced to the firm large sums of money between its date and the time the agreement therein specified terminated. It charged the firm interest for the money it loaned them from time to time at the rate of 12 per centum per annum, and this was charged and paid monthly. (576)

In addition to the bond above set forth, the plaintiff B. F. Rogers executed to the defendants a mortgage of a valuable tract of land to secure it as to moneys it might advance to the said firm.

The defendant claimed that the firm mentioned owed it a large balance on account of such advancements, and was proceeding to sell the land embraced by the mortgage referred to by virtue of a power of sale therein contained to pay such balance. The plaintiffs brought this action to prevent such sale and compel the defendant to an account and settlement of the dealings and transactions between them and it, alleging that they owed it very little, if anything, etc. The defendant admitted some of the allegations of the complaint, and denied many of the material ones. The sale of the land was stayed, pending the action by injunction.

The court in the course of the action, by order, appointed a referee to find the material facts and to take and state an account, and make report of the same. Accordingly the facts were found, the account stated and report thereof filed. The defendant filed exceptions thereto, which the court overruled. At a subsequent term, on the coming in of an amended report, the plaintiffs did not file formal exceptions, but filed a motion in writing, objecting to sundry items of charge, and among these, charges of usury exacted by the defendant, etc. The court overruled the motion thus made, confirmed the report, gave judgment in favor of the defendant for the balance as ascertained to be due from the plaintiffs, and directed a sale of the land, mentioned, etc. The plaintiffs having excepted, appealed to this Court.

R. H. Battle, M. V. Lanier and N. B. Cannady for plaintiffs.
L. C. Edwards and J. B. Batchelor for defendant.

(577) MERRIMON, C. J. The order of reference to find the material facts and state the necessary account was entered by the court without objection from either of the parties. It was, therefore, entered by consent. The referee filed his report and the defendant, having filed exceptions thereto, they were overruled. There was a rereference and an amended report. The court approved the findings of fact. These findings are not reviewable here. *Wadesboro v. Atkinson,* 107 N. C., 317, and cases there cited.

The plaintiffs did not formally file exceptions to the report of the referee, but at the term when the final amended report was filed they "moved" without objection, so far as appears, to exclude certain items of charge and other charges of interest, which the plaintiffs insisted represented certain usury exacted from them by the defendant. This motion in writing embraced several specified objections to the report,

and it was in effect exceptions thereto, and should have been so treated. It served the purpose of exceptions as effectually as if it had been so called. It was insisted on the argument that if it should be treated as exceptions they were not made in apt time. They were made at the term when the completed report was filed. But if it be granted that they should have been made when the report was at first filed, there was no objection to filing them on the part of the defendant and the court entertained and overruled them. This had the effect to cure any irregularity as to the time of filing the same, so that such exceptions must be treated for all pertinent purposes, as having been made.

But if such exceptions had not been filed, it was, nevertheless, competent for the plaintiffs to move, and insist before the court, that it should, upon the record, including the findings of fact and the report, enter a particular judgment asked for by them, and if the court had declined to grant the same they might have assigned error. The defendant might have done the like. This is so, because it was (578) the duty of the court to inspect the whole record and enter such judgment as it would properly warrant. Indeed, in such case the appellant might take advantage of error in the judgment in this Court, in the absence of any formal assignment of error, if the error appeared on the face of the record. The Code, sec. 957; *Thornton v. Brady,* 100 N. C., 38; *Bush v. Hall,* 95 N. C., 82; *S. v. Watkins,* 101 N. C., 702; *McKinnon v. Morrison,* 104 N. C., 354.

One leading purpose of this action is to compel an account and settlement of the dealings and transactions between the plaintiffs Booth and J. F. Rogers, trading and doing business as partners under the name of Booth & Rogers, and the defendant, during the whole period, beginning on the 11 November, 1885, and ending at the time of taking the account. Adverting now to this view of the case, it appears from the report of the referee that the defendant exacted from the firm considerable sums of usury. The plaintiffs insist that such sums shall be placed to their credit in stating the account. The defendant, on the contrary, objects and contends that this cannot be done, because, granting that the usury was exacted, it was actually paid by the firm more than two years next before this action began, and, moreover, its exaction and payment was a transaction concluded, distinct, separate and apart from the indebtedness of the firm to the defendant on account of money advanced to them from time to time. It certainly appears that the defendant charged the firm interest daily on balances in their favor at the rate of 12 per centum per annum, and at the end of each month they paid the same by their check on their deposit with the defendant. It is clear that the firm gave their check from time to time, and the defendant received the same as payment for the interest so exacted. The mere fact that the firm paid

(579) such rate of interest reluctantly—did not want to do so—could not defeat the purpose of payment and the legal character of the transaction. The exaction was illegal, and the firm might afterwards have recovered back twice the amount of interest so paid if it had brought its action for the purpose within two years next after such payment; but it did not do so, and it is now too late. The Code, sec. 3836. It was insisted on the argument that the court, in the exercise of its jurisdiction in equitable matters, could and would grant relief to the extent of the usury exacted. This it might do, if the interest had not been actually paid as a transaction separate and distinct from the indebtedness of the firm to the defendant. There was a clear purpose of the parties to treat the matter of interest as apart and distinct from the advancement of money to the firm, however reluctantly the latter paid the usurious rate. *Cobb v. Morgan,* 83 N. C., 211.

A second purpose of the action is to ascertain and determine the measure of liability of the plaintiffs to the defendant upon the bond specified in the pleadings. It was contemplated and expected by the parties that the defendant would, from time to time between 1 November, 1886, and 31 October, 1887, lend—"advance"—to the business firm of Booth & Rogers considerable sums of money, and the purpose of the bond in question was to secure to the defendant any balance, not exceeding $5,000, that the firm might owe it upon the termination of such loans as contemplated and provided by the bond. It did not, in terms or by just implication, embrace any balance or balances of money advanced to the firm before or after the period above specified—there is nothing in it that intimates such purpose. The obligation was to secure such balance of such sums of money as the defendant "may advance" to the firm—not of such sums as it had advanced—and the agreement, by its express terms, was to be at an end on a day specified.

(580) The provision of the condition of the bond, that "it is to include and secure all amounts drawn by them, (the firm) for any purpose whatsoever," does not imply for all possible purposes. It must be interpreted as extending to amounts drawn for any lawful purpose pertinent to and within the meaning of the business specified of the firm. It is not to be presumed that the parties contemplated any unlawful purpose, or business transactions or practices other than such as were legitimate, if the same were within the knowledge of the defendant. Hence it was not expected that the defendant would advance to the firm from time to time large sums of money and exact interest therefor at the rate of 12 per centum per annum. It was not within the meaning of the bond that the dealings between the defendant and the firm, as to the purpose specified, should be based upon such an unlawful rate of interest. Nor did the obligors in the bond agree to pay the balance of

such advances of money ascertained by the allowance of unlawful rates of interest. In view of the nature of the matter, it may be fairly said, in the absence of any stipulated rate of interest, that they expected the defendant would charge and receive for the use of its money so advanced the lawful interest—that is, interest at the rate of 6 per centum per annum. By reasonable implication it came within the scope of the agreement of the obligors of the bond that they would pay the balance of the money so advanced, allowing the defendant the lawful rate of interest. They certainly expected that the defendant would "advance"—lend—the firm money, and as certainly that the bank would demand and the firm would pay interest, and at the lawful rate.

Hence, in ascertaining the balance for which the obligors of the bond are liable as such, the defendant can only be allowed interest at the rate of 6 per centum per annum, and interest upon the balance ascertained at the rate of 8 per centum per annum, because the latter rate as to the balance was stipulated for in the bond.

The plaintiffs Booth and J. F. Rogers are before the court (581) as partners composing the firm of Booth & Rogers, and also as individuals, and the defendant is entitled to judgment against them for the balance of money due it upon their whole dealings and transactions with it, embraced by the pleadings, without regard to the usury paid, and to have the mortgage specified in the pleading foreclosed, and the land embraced by it sold to that end, if need be; but the defendant is entitled to have judgment against the plaintiff Clinton M. Rogers for the balance of moneys, not exceeding $5,000, advanced to the firm of Booth & Rogers during the period specified in the bond; that balance to be ascertained by allowing the defendant interest for the use of the money so advanced at the rate of 6 per centum per annum, and interest on such balance at the rate of 8 per centum per annum.

The account and judgment must be modified in accordance with this opinion, and as thus modified affirmed. To that end let the opinion be certified to the Superior Court. It is so ordered.

CLARK, J., dissents.

Per Curiam. Modified and affirmed.

REUBEN BARBEE ET AL. V. B. W. BARBEE ET AL.

Deed—Evidence—Parol Testimony to Vary Recitals—Recital of Payment of Purchase-money—Partition—The Code, Sec. 590—Interested Witness.

1. The recital in a deed of the receipt of the consideration is not contractual in its character, and is only *prima facie* evidence of the payment of the purchase-money, which may be rebutted by parol testimony.
2. In proceedings for partition of real estate the plaintiffs proposed to show that in the division of certain lands of G, the heirs of whom were the parties to these proceedings, an agreement was made between him and them by which some were to pay others for equality of partition: *Held*, that G being a witness and a party in interest, the testimony was incompetent.

(582) SPECIAL PROCEEDING for the partition of real estate between the heirs at law of one Gray Barbee, tried, upon appeal from the clerk, before *MacRae, J.*, at October Term, 1890, of DURHAM.

The question presented for review related to certain alleged advancements made by the said Barbee to several heirs mentioned in the petition.

The facts are set out in the opinion.

J. Parker, R. B. Boone and W. A. Guthrie for plaintiffs.
J. W. Graham and F. L. Fuller for defendants.

SHEPHERD, J. Although the record is very voluminous, containing the report of the referee, a very considerable amount of testimony and many exceptions, it seemed to be the understanding of counsel that, for the purposes of this appeal, but two questions were necessary to be argued by them, and decided by the Court.

1. The first question involves the correctness of his Honor's ruling that the recitals of the payment of the considerations set forth in the deeds executed by the said Barbee to several of his children were, in the absence of allegations and proof of mistake, fraud, etc., so far conclusive as to preclude the introduction of parol testimony to show the true character of the transactions, and thus rebut the presumption of a sale arising from such recitals. There was abundant testimony to sustain the findings of the referee that the conveyances were intended as advancements. Indeed, it was admitted by the parties examined, that they (583) had not, in fact, paid the considerations mentioned, and it also appears that Mr. Barbee had charged some of his children with the payment of certain amounts in favor of others for the purpose of equalizing the partial distribution of his property. There can really be no

question that such was his intention, but it is earnestly insisted that parol testimony cannot be heard to show such intention until the conveyances are corrected in respect to the recitals above mentioned. In support of this position we are referred to the case of *Wilkinson v. Wilkinson,* 17 N. C., 376. There a father conveyed land to his son by a deed of bargain and sale, which recited the payment of several hundred dollars as purchase-money. The court held that the proof offered to show that the consideration had not been paid was insufficient, but it was at the same time declared that had the testimony been satisfactory it would not have been heard to contradict the recital, unless it appeared "that by reason of some unfair practice, or through mistake, or by surprise, the deed was made to express an intention different from that which the bargainor believed it did declare." This part of the opinion was unnecessary to the determination of the case, and is in conflict with *Jones v. Spaight,* 6 N. C., 89, where, for the purpose of showing that a conveyance was intended as an advancement, parol evidence was admitted, without invoking any equitable element, to prove that a recited consideration of forty pounds, was, in fact, never paid, and was only mentioned, as alleged in the petition, "as a formal circumstance in the execution of the deed." The principle stated in *Wilkinson's case* is based entirely upon the idea that the recital of the payment of the consideration is a part of the contract, and, like other written contracts, cannot be contradicted or varied by parol testimony. Such seems to be the general current of the decisions in England, where it is held that the consideration cannot be recovered in a court of law in the face of a recital of this nature. This is also generally understood to be (584) the course of judicial decisions in North Carolina. *Brockett v. Foscue,* 8 N. C., 64; *Mendenhall v. Parish,* 53 N. C., 105, and the cases cited. On the other hand, the overwhelming weight of American authority is in favor of treating the recital as only *prima facie* evidence of payment, as in the case of a receipt, the only effect of the consideration clause being to estop the grantor from alleging that the deed was executed without consideration, in order to prevent a resulting trust. 1 Greenleaf Ev., 37, and note; 2 Wharton Ev., 1042, and note; Bigelow Estoppel, 318; 3 Wash. R. P., 321. The English doctrine was very reluctantly assented to by *Lord Mansfield,* and it is even now claimed, by some writers, that the decisions of the courts of that country are not entirely harmonious in its application. Without stopping to inquire how this may be, it is very manifest, from an examination of our own decisions, that the principle has not always been practically followed in North Carolina. If the recital is contractual in its nature, it is plain that it cannot be gotten rid of but by a correction of the deed in equity, on the grounds mentioned in *Wilkinson's case* (*supra*), and it would

seem equally clear that to obtain such relief, there must be allegation and proof that the clause was inserted by surprise, fraud, or mistake, etc.

Nevertheless, this Court, in *Shaw v. Williams,* 100 N. C., 272, permitted the recovery of the consideration money in the teeth of a recital of its payment, although there was "no pretense that the plaintiff was surprised into making the deed or was ignorant of what she was doing." "It was manifest" (says the Court) "that she executed it with full knowledge that it passed her estate in the land, and such was her purpose. The true inquiry should have been, whether it was the intent to exonerate the purchaser from his obligation to pay the consideration money by the introduction of this recital." It will be observed that the recital
(585) was pleaded as a release, and, being a part of the deed, necessarily showed the consideration upon which it was made. It will also be noted that there was no pleading whatever impeaching the said release (there being only the general denial to the answer implied by the law), and yet it was held that the recital could be contradicted by parol testimony as to the *intent* with which it was made. It is very difficult to reconcile the decision with the principle above stated, and there are other cases where, perhaps, in view of the hardship of a rigid enforcement of the rule, a similar departure has been made. It seems to be conceded everywhere that injustice must result, in some instances, from a strict and logical application of the doctrine; and it is in the struggle to administer substantial justice in such cases, and at the same time to adhere to the principle that such recitals are contractual, that we find the inconsistencies in this and other courts in their rulings upon the subject.

In *Michael v. Foil,* 100 N. C., 179, the deed recited a consideration of $500, but the Court, without any suggestion of fraud, surprise or mistake, admitted parol evidence to vary the recital by showing that it was agreed, at the time of the conveyance, that the grantor should have one-half of the proceeds of the sale of the mineral interest in the land if such a sale were made in his lifetime. Although the principle of *Manning v. Jones,* 44 N. C., 368, was applied in this case, the decision can hardly be reconciled with the theory that the recital of a consideration is contractual, and the Court quoted with approval a decision from the Supreme Court of Massachusetts, in which State the doctrine is repudiated. The non-contractual character of such recitals in executed contracts is distinctly asserted in *Harper v. Harper,* 92 N. C., 300, in which the following language is used: "It was contended on the argument that the parol evidence introduced by the appellees was incompetent because its effect was to explain and contradict the deed. This is a misapprehension of the purpose of the evidence. The deed was not in question at all. There was no purpose to contradict, or change, or modify
(586) its terms, or to change its meaning in any degree. Its office

was to convey the title to the land. The evidence was introduced in respect to a matter *outside of and independent of it;* it was intended to show with what intent the father and bargainor made it, apart from the purpose to convey land to his son. It was put in evidence not to prove title, but to show a particular intent on the part of the maker of it, in another respect distinct from it." Again, it was said, in *Melvin v. Bullard,* 82 N. C., 37, that "while a gift, in form, raises the presumption of an intent that the donee of any considerable portion of the parent's estate shall account therefor in a settlement with the heirs and distributees after his death, while a bargain and sale does not, it is clear that if, at the time of the conveyance by either mode, the parent did not intend it should operate as an advancement, and this intent appears from the instrument by which the transfer is effected, or from the facts of the transaction, or is shown *by other proof,* the property so conveyed is not an advancement, nor its value to be accounted for afterwards." In this unsatisfactory state of the authorities we must determine whether we shall return to the principle of some of the older decisions of this Court, and administer it in its original strictness and simplicity, or whether we shall continue to act upon the American doctrine as unmistakably indicated by our later cases. If the latter view is to prevail, it would seem better to distinctly recognize it at once, and thus avoid the anomaly, as shown by some of the cases, of denying a demand upon the ground that it can only be recovered in a Court of Equity, and granting the relief in that court without allegation or finding as to the existence of any equitable element whatever. While the writer is doubtful of the policy of departing from the old rule, the majority of the Court are of the opinion that we are committed to the American doctrine, which, (587) in their judgment, is founded upon correct reasoning, and better adapted to the proper administration of justice. The Court is, therefore, of the opinion that the recital in a deed of the receipt of the consideration is not contractual in its character, and is only *prima facie* evidence of the payment of the purchase-money which may be rebutted by parol testimony. In accordance with this view, we must conclude that parol evidence was competent in this case to show the real intent and purpose of Mr. Barbee in executing the several conveyances to his children, and especially should this be so when it seems that they do not pretend that any actual consideration was paid by them.

2. The remaining question to be considered is whether there was error in the exclusion of the testimony of Mrs. Ladd and others. The point is thus presented by his Honor in the case prepared for this Court: "The plaintiffs proposed to show by Mrs. C. A. Ladd, one of the defendants, that in the division of certain lands between his children by Gray Barbee, an agreement was made between them and Gray Barbee by

which some were to pay others certain sums for equality of partition. This was objected to by defendants, upon the ground that H. Tyler Barbee being dead and a party to the alleged agreement, the witness is incompetent under section 590 of The Code. Other parties to this action were also offered as witnesses by the plaintiffs for a similar purpose, to whose evidence similar objection was taken by the defendants." The court held "that the witness C. A. Ladd and other parties to this action are incompetent to testify to any transaction between herself and H. Tyler Barbee, now deceased, in which his estate is sought to be charged." We are of the opinion that the testimony, in so far as it affected the lands conveyed to H. Tyler Barbee, deceased, was incompetent under section 590, and that there was no error in its exclusion. The wit-
(588) nesses were parties to the action and if there was such an agreement as contended for between them and their father, it was clearly to their interest that the deceased brother should be included therein, so as to charge his estate.

We have carefully examined the cases cited by plaintiffs' counsel, but can find nothing in them which conflicts with the ruling of his Honor.

Error, and remanded.

Cited: *S. c.*, 109 N. C., 301; *Black v. Black,* 110 N. C., 402; *Cheek v. Nall,* 112 N. C., 373; *Blake v. Blake,* 120 N. C., 179; *Marcom v. Adams,* 122 N. C., 225; *Kendrick v. Ins. Co.,* 124 N. C., 318; *Boutten v. R. R.,* 128 N. C., 341; *Faust v. Faust,* 144 N. C., 387; *Gaylord v. Gaylord,* 150 N. C., 226; *Jones v. Jones,* 164 N. C., 324; *Campbell v. Sigmon,* 170 N. C., 351; *Price v. Harrington,* 171 N. C., 133; *Patton v. Lumber Co., ib.,* 839; *Walters v. Walters,* 172 N. C., 330.

J. B. STEWART ET AL. v. JOHN R. REGISTER ET AL.

Estoppel of Record—Judgment—Parties—Pleading—Deposition, When Competent—Evidence—Cross-examination.

1. A judgment that "plaintiffs are permitted to withdraw their action or special proceeding because the same was prematurely begun, and leave is given the defendants to withdraw their counterclaim," cannot be pleaded as estoppel as between the parties thereto in another action between the same. Such judgment is no final determination of the controversy.

2. It is not necessary, to render depositions competent to be read in evidence, that they should have been taken in the same action; it is sufficient if they were taken in another action or proceeding between the same parties

in relation to the same subject-matter, or involve the same material questions, and the adverse party had opportunity to cross-examine the witness making them; nor was it necessary that proceedings should have been taken in a court of law or equity to render them competent.

APPEAL at October Term, 1890, of SAMPSON, from *Armfield, J.*

The action was brought to have a deed of conveyance of land specified in the complaint corrected so as to insert therein at the pertinent and appropriate place, to pass the fee simple estate in the land conveyed, the words, "and their heirs," which, it is alleged, were (589) omitted from it by the inadvertence and mistake of the draftsman thereof. It is alleged that the deed conveyed but a life estate, whereas the grantor therein, a grandfather sustaining the relation of *loco parentis* to certain of his grandchildren, intended thereby to convey to them the fee in the land conveyed. The defendants deny the material allegations of the complaint, and allege also that the plaintiffs are estopped in the action by the determination of a *special proceeding* specified before this action began. That proceeding came before this Court by appeal, and the latter directed that the judgment appealed from be reversed. *Powell v. Morisey,* 98 N. C., 426. The judgment of this Court was duly certified to the Superior Court. Thereupon, that court at the October Term thereof of 1888 made this entry in the proceeding:

"The plaintiffs are permitted to withdraw their action or special proceeding because the same was prematurely begun, and leave is given the defendants to withdraw their counterclaim."

In this action the court submitted to the jury appropriate issues, and they found by their verdict that the maker of the deed in question did intend to convey the fee in the land conveyed thereby, and that the words "and their heirs" were omitted from it by mistake and inadvertence of the draftsman thereof; that the grantor of the deed at the time he executed the same had placed himself *in loco parentis* to the grantees in the deed, who were his grandchildren, and that the plaintiffs were the owners of the land. The court, on inspection of the record of the special proceeding above referred to, decided that the same did not estop the plaintiffs in this action, and the defendants excepted.

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

"On the trial the plaintiff offered as evidence a deposition of (590) A. A. McKoy, a copy of which is filed with this record, marked 'Exhibit A.' It was stated by the plaintiffs, and admitted by the defendants, that this deposition had been regularly taken and allowed to be read, and was read on the trial in the case set out in the defendants' answer in this action alleging a second defense. That said McKoy had died before the commencement of this action. The defendants objected

to this evidence on the ground that said deposition had not been regularly taken in this action, and no proceeding in law or equity had been taken to make the deposition competent. The court overruled this objection, and the defendants excepted."

The court gave judgment in favor of the plaintiffs, and the defendants, having excepted as above stated, appealed to this Court.

J. L. Stewart (by brief) and R. H. Battle for plaintiffs.
H. E. Faison and A. W. Haywood for defendants.

MERRIMON, C. J., after stating the facts: The special proceeding relied upon by the defendants does not in any view of it, constitute an estoppel of record upon the plaintiffs in this action, for the plain reason that that proceeding was never determined upon the merits thereof by any final judgment therein. See *Powell v. Morisey,* 98 N. C., 426.

This Court directed the judgment therein appealed from to be reversed, but no entry of reversal was ever made. Indeed, it appears that when the decision of this Court was certified to the Superior Court, the latter court at once allowed the plaintiffs to "withdraw their action or special proceeding, because the same was prematurely begun," and allowed the defendants therein "to withdraw their counterclaim." Thus the proceeding was, in legal effect, dismissed, abandoned, by com-
(591) mon consent of the parties, before the litigation was completed.

There was no settlement of the rights of the parties, nor any judgment concluding the latter in any respect. The plaintiffs withdrew the matter of their proceedings, and the defendants did likewise, with the sanction of the court. It so appears of record. Nothing appears by the latter to estop the parties in this action or elsewhere. To create an estoppel by a former judgment it must appear that the matter, claim, or demand in litigation has been tried and determined in a former action or proceeding, and the identity in effect of the present and former cause of litigation must appear. *Temple v. Williams,* 91 N. C., 82.

The defendants objected to the deposition read in evidence on the trial, on the ground that it "had not been regularly taken in this action, and no proceeding in law or equity has been taken to make" the same competent. These objections are clearly not tenable. It was not necessary that the deposition should be taken in this action. It is sufficient if it was taken in another action or proceeding between the same parties in relation to the same subject-matter, or cause of action, or involves the same material questions, and the adverse party had opportunity to cross-examine the witness. *Bryan v. Malloy,* 90 N. C., 508; 1 Greenleaf Ev., 553; Taylor Ev., sec. 434. Nor was it necessary that any proceeding should be taken in a court of law or equity to render it competent as evi-

dence in this action. It was sufficient to take it from the files to which it properly belonged and introduce it on the trial, properly identifying it with the former action. It could not be changed, modified or amended; it, as it appeared on file, was sufficient or insufficient, competent or incompetent. Why, therefore, should any proceeding be taken in court to render it competent? Any proper objection might have been made to it at the time it was put in evidence. It might have been objected that it was not taken in another action between the parties, or that it was taken in respect to a different matter or cause of action; it might (592) have been objected further that it was in no way material in the former action. The material parts of the record in the former action should have accompanied and been introduced with it to show its pertinency or competency in this action. Indeed, it seems that such record was so introduced.

It does not appear from the record that any such objections as those just suggested were made in the court below. If there were such, and the defendants intended to avail themselves of them here, they should have had the objection noted in the record, and if the court failed to sustain the same they should have assigned error. The exceptions made did not raise any such questions.

The defendants' counsel, on the argument before us, insisted that several of the parties to the former action are not parties to the present one, and that several of the parties to the present one were not parties to the former one. But no such objection appears from the record to have been made in the court below. No error is assigned in such respect. Moreover, there is no pertinent *data* by which we can see who of the present action were or were not of the former action. Nor can we see by the record who of the present action are in privity with parties to the former action.

The judgment, therefore, must be

Affirmed.

Cited: Mabe v. Mabe, 122 N. C., 553; *Freeman v. Brown,* 151 N. C., 114.

(593)

A. M. GUDGER v. A. M. PENLAND.

Slander—Damages—Words Actionable per se—Complaint—Infamous Offense—Judicial Proceeding—Privileged Communications—Special Damages—Prayer for Relief.

1. A charge that one has committed an infamous offense is actionable *per se* without alleging special damages.

2. An offense is infamous that is punishable by imprisonment in the State penitentiary.

3. The plaintiff in an action for slander is not required to negative in his complaint that words actionable *per se* were not spoken in such a manner or under such circumstances as rendered them privileged, and this though it appeared from the complaint that they were spoken in or about a judicial proceeding.

4. The place where the words are spoken and the circumstances of excuse or privilege are matters of defense.

5. If it had appeared affirmatively that the words were spoken in a judicial proceeding, the position of a prosecutor in such proceeding would furnish no absolute or *presumptive* protection against such liability.

6. A formal prayer for relief is not now necessary in a complaint; and in an action for slander separate demands for damages need not be appended to the various allegations setting up the causes of action.

(598) ACTION for slander, heard on demurrer at the February Term, 1890, of BUNCOMBE, before *Philips, J.*

Demurrer overruled. Appeal.

George A. Shuford for plaintiff.
W. J. Peele for defendant.

(599) AVERY, J. The charge that one has committed an infamous offense, if false, is actionable *per se*. *Pegram v. Stoltz,* 76 N. C., 349; *Wilson v. McKee,* 87 N. C., 300; *Sparrow v. Maynard,* 53 N. C., 195; *Eure v. Odom,* 9 N. C., 52. It is not material whether the offense charged falls within the classification of felonies or misdemeanors, if, at the time when the words are spoken, a person convicted on indictment for it would be subject to infamous punishment. *Eure v. Odom, supra.* Imprisonment in the State prison is infamous punishment. *Wilson v. McKee, supra; In the matter of Hughes,* 61 N. C., 62. Perjury is a misdemeanor, and is punishable by imprisonment in the penitentiary or in the county jail, and by fine not exceeding $1,000. The Code, sec. 1092. The contention of the defendant's counsel that the slanderous

language appeared to have been used while a judicial investigation was progressing, and that, under the principle stated in *Nissen v. Cramer,* 104 N. C., 574, the defendant is absolutely exempt from liability, finds no support in the admitted allegations of the complaint. It does not appear affirmatively in the complaint whether the language imputed to the defendant in either of the paragraphs of the complaint, setting forth specific language in which the charge was couched on different occasions, was spoken at the time of the trial of the criminal action, or afterwards. The plaintiff was not required to negative the idea that the words, slanderous *per se,* were uttered under such circumstances that the defendant would be protected from liability on the ground of privilege. The fact, if true, that the words were uttered in the course of a judicial proceeding, and were relevant and pertinent to the matter before the court, must be set up in the answer if the defendant wishes to avail himself of it in his defense, unless it be gratuitously alleged in the complaint.

If it had been alleged that the language was spoken when the defendant was being examined as a witness on the trial of the indictment, still it does not appear that the defendant sustained such relation to the prosecutor as to furnish absolute or presumptive protection against liability. *Nissen v. Cramer, supra; Shelfer v. Gooding,* (600) 47 N. C., 175; *Briggs v. Byrd,* 34 N. C., 380. There is nothing alleged in the complaint that will support the contention of the defendant's counsel that the action cannot be maintained.

We think that it appears with sufficient certainty that defendant charged the plaintiff with having sworn a lie when he was examined as a witness in the Criminal Court of Buncombe County on the trial, at a term mentioned, of an indictment (under section 1062 of The Code) against the persons named for destroying Penland's fence. We take judicial notice of the existence of that court, and of the fact that it had jurisdiction of the offense mentioned. *S. v. Ledford,* 28 N. C., 5; *S. v. Brown,* 79 N. C., 642. It was not necessary that the plaintiff should set forth the language or substance of the testimony delivered by him and referred to by the defendant as constituting the false swearing, unless the defendant, when speaking the slanderous words, went on to specify what the plaintiff did swear or in what particulars his testimony was false. *Smith v. Smith,* 30 N. C., 29.

A formal prayer for relief is not now essential in any complaint, and where a plaintiff specifies, in different paragraphs of the complaint, language used by the defendant at various times before the action was brought, but amounting in each instance, in all of its varied forms, to a charge that the plaintiff swore falsely as a witness on the trial of a certain suit before a court of competent jurisdiction, it is not necessary to

append to each specification a separate demand for damages. *Harris v. Sneeden,* 104 N. C., 369. Though an action could be maintained and damages recovered by proving the utterance of the slanderous words set forth in more than one paragraph of a complaint, the language used in each instance amounting to a charge of perjury in the same judicial proceeding and at the same time, it does not follow that it is essential in this case that a separate demand for damages should be ap-
(601) pended to each of such paragraphs. *Harris v. Sneeden, supra.*

The rule referred to in the demurrer is not susceptible of the construction that counsel seem to have given to it.

For the reasons given, we think that the demurrer was properly overruled.

Affirmed.

Cited: *Gattis v. Kilgo,* 125 N. C., 135; *Upchurch v. Robertson,* 127 N. C., 129.

CICERO FULPS v. HENRY MOCK.

Contract Quantum Meruit—Evidence—Charge—Statute of Limitations —Pleadings—Amendment.

The plaintiff brought his action against the defendant for services rendered him from 1883 to 1889. Defendant pleaded the statute of limitations and a counterclaim. Plaintiff denied the counterclaim, and replied that the contract was that he was to be paid *at the defendant's death,* but had been dismissed from his service: *Held,* (1) that it was not incompetent for plaintiff to testify of the matters set up in his replication under the pleadings as they stood unamended; (2) it was not error for the court to charge that if the contract was as alleged by plaintiff *in his replication,* then, unless the plaintiff was willing to perform his part of it, and was prevented from so doing by the defendant, they would find plaintiff not entitled to recover; (3) that if the contract set out in the replication existed, and the plaintiff was ready to perform his part of it, his recovery was not barred by the statute of limitations; (4) that if there was no contract as to length of service or rate of payment, plaintiff could only recover for three years next preceding the commencement of the suit.

APPEAL from *Merrimon, J.,* at Spring Term, 1891, of ALEXANDER.

R. B. Burke for plaintiff.
Jones & Kerner (by brief) for defendant.

CLARK, J. The defendant seems to have misconceived the scope
(605) of the action. The court below did not "allow plaintiff to

abandon his cause of action set out in the complaint and to recover on a special contract set out in the replication." The plaintiff, by his complaint, was seeking to recover the value of his services from 1881 to 1889. On the trial he abandoned any claim for services from 1881 to 1883. To this defendant did not and could not object. To prove his right to recover the value of his services from 1883 to 1889, without being subject to counterclaim for board, and to bar the application of the statute of limitations, the plaintiff introduced evidence which was also admissible to prove the allegations of his complaint. The evidence was pertinent and appropriate. It was not necessary to plead these matters of evidence in the complaint, and that the plaintiff pleaded them in his replication constituted no change or abandonment of his cause of action, which remained as before, for the recovery of the value of his services. The plaintiff did not seek, on the trial, to recover the compensation alleged to have been stipulated for in the express contract. The express contract was put in evidence merely to show why the plaintiff, by defendant's abandonment of it, could recover on a *quantum meruit,* and why the statute of limitations did not run. The cause of action was so broadly stated, indeed, as to have authorized a recovery by proof either on a *quantum meruit* or express contract. *Lewis v. R. R.,* 95 N. C., 179. If the allegation was defective, the proper mode of correction (when the substantial facts which constitute the cause of action are stated in the complaint, or can be inferred therefrom by reasonable intendment) is not by demurrer, nor by excluding evidence on the trial, but by a motion, before the trial, to make the averments more definite by amendment. *Stokes v. Taylor,* 104 N. C., 394; Pom. Civ. Rem., 549; The Code, sec. 261; *Moore v. Edmiston,* 70 N. C., 510.

No error.

Cited: Roberts v. Woodworking Co., 111 N. C., 433; *Grady v. Wilson,* 115 N. C., 347; *Webb v. Hicks,* 116 N. C., 603; *Webster v. Bailey,* 118 N. C., 194; *Holden v. Warren, ib.,* 327; *Brittain v. Payne, ib.,* 991; *Roberson v. Morgan, ib.,* 994; *Sams v. Price,* 119 N. C., 574; *Beach v. R. R.,* 120 N. C., 507; *Lucas v. R. R.,* 121 N. C., 508; *Parker v. Express Co.,* 132 N. C., 130; *Alley v. Howell,* 141 N. C., 115; *Mitchem v. Pasour,* 173 N. C., 488.

(606)

W. D. BARRINGER v. WILLIAM BURNS.

Contract—Breach—Right of Possession of Personal Property—Instructions—Charges.

1. In an action brought to recover possession of a mare, the plaintiff alleged that he placed her with the defendant, a horse trader, to be trained for trotting races. Defendant was to stable and feed her, and, at plaintiff's direction, put her on the track for trial race; and when she had attained the proper speed, she was to be turned over to the plaintiff, who was to sell her, and, out of the proceeds, pay for her board, lodging and training; that defendant refused to give her a trial race and to turn her over, and, in violation of the contract, he permitted her to be driven for business and pleasure: *Held*, that upon these allegations, if true, plaintiff was entitled to recover.

2. It was not error for the court to charge that, in certain aspects of the case, specifying such aspects, the plaintiff might recover, where there was evidence in support of them, especially as the aspects favorable to defendant were likewise specified.

3. The defendant has no lien upon the mare for the expenses of shoeing her while in his possession, when no charge was made against him therefor.

APPEAL from *Merrimon, J.*, at Spring Term, 1891, of MECKLENBURG.

This action is brought to recover possession of the mare specified in the complaint. The pleadings raised issues of fact. On the trial the court, among other instructions, gave the following to the jury at the request of the plaintiff:

"3. That if the jury believe from the testimony that the contract was that the defendant Burns was, upon request of plaintiff, to exhibit the speed which the mare had attained under his training, and upon request by the plaintiff to that effect, the defendant failed or refused so to do, that would operate as a breach of the contract, and would entitle the plaintiff to a verdict for the mare.

"That if the jury believe from the testimony that the contract
(607) was that the defendant Burns was only to use the mare for training purposes, and that Burns used her, or allowed her to be used, for any other purpose, it would constitute a breach of contract on the part of the defendant, and would entitle the plaintiff to a verdict for the mare, unless the use made of the mare was such as riding to town was necessary for the mare as exercise, and in this event it would not amount to a breach of the contract."

The court further instructed the jury as follows:

"1. If Barringer states the contract correctly, the jury should answer the first issue 'Yes.'

"2. If the contract was that the defendant was to turn the mare over to the plaintiff to be sold and to receive the compensation out of the proceeds, the answer will be 'Yes.'

"3. There is no evidence as to the damage the plaintiff sustained by reason of the defendant's wrongful detention.

"4. If the contract was as stated by Burns, the answer to the first issue should be 'No,' and to the second issue 'None.'

"5. If the defendant was to be paid by the month as testified to by Barringer, i. e., $8 for training and $20 for keeping, and it was not a part of the contract that defendant was to surrender possession of the mare and take his pay out of the proceeds, the answer to the third issue should be the amount accrued up to the date demand was made.

"6. The plaintiff says he saw the mare here thirty times. It does not appear that he made any protest. If this was a provision of the contract, did he not waive it?

"7. If the defendant has not himself paid for the shoeing of the mare, and no charge has been made against him for it, he cannot claim any lien for charges for that."

The testimony on both sides, bearing upon these points, was called to the attention of the jury.

The jury responded to the first issue, "Yes," to second, "None," (608) to third, "None," and to fourth, "Nothing."

The defendant moved for a new trial. Motion denied. Judgment for the plaintiff, from which defendant appealed.

In statement of case on appeal, the defendant assigns the following errors and exceptions:

2. That the court gave the jury the instruction No. 3, of the plaintiff's prayers, set out above.

3. That the court gave the jury the instruction No. 4, of the plaintiff's prayers, set out above.

4. That the court charged the jury that if Barringer stated the contract correctly, the jury should answer the first issue, 'Yes.'

5. That the court charged the jury that if the defendant had not paid for the shoeing of the mare, and the bill for shoeing was not charged to him, he could not claim a lien for that.

McCall & Bailey (by brief) and G. F. Bason for plaintiff.
Jones & Tillett (by brief) for defendant.

MERRIMON, C. J. The parties produced evidence on the trial pertinent to and bearing upon every aspect of the case to which the court directed the attention of the jury. Particularly, there was evidence of the plaintiff tending to prove the breaches of the contract alleged by him to which

the third and fourth special instructions complained of as erroneous, had reference. The plaintiff alleged that he placed his mare with the defendant, a horse-trainer, to be trained for trotting races; that she was to be left in defendant's possession to be trained; that said defendant was to feed her as trained horses should be fed—have her comfortably stabled and well groomed, and then thoroughly trained, and that at the direction of the plaintiff the mare was to be trotted around the race track
(609) for a nominal prize, in the presence of two or three disinterested witnesses, who were to time her with stop-watches, in order that it might be discovered what speed she had attained as a racer, and she was then to be delivered to the plaintiff, and he was to sell her and out of the proceeds of sale to pay the defendant," etc. That the defendant, "although several times requested to display the speed of said mare as aforesaid, invariably refused so to do, in consequence whereof the plaintiff demanded her surrender from the defendant," etc.; and he further alleged, that in violation of the contract alleged, the defendant had "used and permitted another to drive said mare on other occasions than for training, and for purposes of business or mere pleasure, in which several matters the plaintiff avers the defendant broke his contract," etc. By the terms of the contract thus alleged, it was material and important that the defendant who so had the mare in training, should, upon the demand of the plaintiff, exhibit trials of her speed in the presence of witnesses. He refused, upon repeated demands of the plaintiff, to make such trials, as he was bound to do. If he did, he violated a material provision of the contract as alleged, and the plaintiff became at once entitled to have possession of his mare. And as there was evidence tending to prove the contract and a breach thereof, as alleged, the plaintiff was entitled to have the third special instruction which he demanded and the court gave.

The plaintiff alleged that the defendant, by the terms of the contract, had possession of the mare only for the purpose of training her. If he went beyond that, and used her, as alleged, for other purposes, he committed a breach of the contract, and the plaintiff might demand and have possession of her. There was some evidence tending to prove such allegation, and, therefore, the plaintiff was entitled to have the fourth special instruction as to which error is assigned. There is nothing al-
leged by the plaintiff that creates a lien upon the mare in favor
(610) of the defendant, or that gives rise to a counterclaim in his favor.

The instructions just referred to were asked for by the plaintiff, as bearing upon certain aspects of the case favorable to him and deemed important. They did not embrace or apply to every aspect of the case, particularly those favorable to the defendant, but other instructions given did, and all the instructions given must be taken together, certainly

in so far as they have reference to and bearing upon each other. If a party ask for and special instructions are given, that present certain aspects of the case distinctively and in a way misleading to the jury, unless qualified, and no qualification is given in some appropriate connection, this would be ground for a new trial. But this is not such a case. The record shows that the court distinctly gave instructions in aspects of the case favorable to the defendant, calling the attention of the jury to the evidence pertinent and bearing upon them. The instruction so given, taken in connection with others given, and the whole taken together, were not in themselves misleading, nor does it appear that they had such effect. Indeed, the instructions were clear, fair and easily understood. There were allegations and evidence that warranted them, and they were properly given.

It is further objected that the court erroneously told the jury that if the plaintiff, in his testimony on the trial, had stated the contract correctly, they should respond to the first issue in the affirmative. We do not think this instruction was erroneous in any view of it. If the testimony of the plaintiff was true, obviously he was entitled to have possession of his mare, because it went directly to prove the contract as alleged by him, and the alleged breaches thereof. We have seen above that if the contract, as alleged, was the true one, and the defendant violated the same, he had no right to detain the mare.

But it is insisted that it was error to thus make the case turn upon the evidence of the plaintiff himself. It appears that the plaintiff distinctly alleged and testified to one contract, and breaches thereof (611) by the defendant, and the latter quite as distinctively alleged and testified in his own behalf to another and different contract favorable to himself. The plaintiff and defendant were the principal witnesses and testified to the main facts. The other evidence tended more or less, to corroborate them. Seeing this, the court told the jury that if the plaintiff stated the contract correctly they should answer the first issue in his favor. But almost in the same connection, and substantially in the same words, and with equal clearness, it told them that if the defendant stated the contract correctly they should answer the issue favorable to him. These instructions, taken together, as they must be for the present purpose, were terse, plain, impartial, easily comprehended and understood. We cannot see that the defendant suffered any prejudice by either of them. They did not prevent the jury from taking any other view of the evidence, in part or as a whole. The court had called their attention to and pointed out its bearings upon the various aspects of the case. It appears that it "arrayed the testimony on both sides."

As to the fifth assignment of error: There was evidence bearing upon and that fully warranted the seventh instruction complained of, as well

as some evidence to the contrary. The instruction left it fairly to the jury to weigh and pass upon the whole evidence pertinent.

So far as appears, the instructions were pertinent, clear, fair and very impartial. We are not at liberty to grant a new trial upon the ground that the jury, possibly, ought to have rendered a different verdict. The court below, alone, could set the verdict aside because they found it against the weight of evidence, if they did. We do not mean at all to say that they did or did not.

Affirmed.

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(612)

J. W. RANDALL v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Common Carrier—Negligence in Shipment—Prepayment of Freight—Notice—Reasonable Regulations.

1. A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others. It should appear, however, that a plaintiff had notice of such regulation.

2. The plaintiff was injured by the failure of the company receiving the goods for shipment to notify the defendant that the freight had been prepared according to its well-known requirement, and must look to that company for damages.

ACTION tried at February Term, 1891, of MADISON, before *Brown, J.*, upon appeal from a justice of the peace.

It was brought against the defendant railroad company to recover damages for failure to ship certain goods as freight upon which the freight charges had been prepaid to the E. T., V. & G. Railroad, for both companies, but the defendant, at the time of the injury complained of, had not received its part thereof, nor had it been notified of its reception by the other company.

The two companies were under separate and distinct management. The requirements of defendant company, which were known to the plaintiff, were that charges on freight shipped to such depot as was designated for these goods should be prepaid. Under the instruction of the court, there was a judgment against the plaintiff, from which he appealed.

No counsel for plaintiff.
F. H. Busbee for defendant.

CLARK, J. A common carrier can demand prepayment of (613) freight from any one and to any station. The Code, sec. 1963; *Allen v. R. R.*, 100 N. C., 397.

That the defendant made a general regulation that it would require prepayment on all freight to a flag station (at which there was no agent), was not only reasonable, but was a matter entirely within the defendant's powers. A common carrier may require prepayment from any shipper, at its choice, though it may not require it from others. *Allen v. R. R., supra.* It should appear, however, that the plaintiff, or his forwarding agent, the first company, had notice that prepayment was required. This the defendant was not improperly allowed to do, by showing, as it did, that all freight to this station was required to be prepaid, and further, by the plaintiff himself that he knew of such regulation. It was also in evidence that notice of it was given to the E. T., V. & G. Railroad, who were the agents of plaintiff for forwarding the freight beyond its own line.

A witness introduced for defendant testified that the defendant did not accept the freight from the E. T., V. & G. Railroad till 28 February, and that it was shipped the next day. The two companies were not shown to be under the same management but were simply connecting roads. The defendant was not required to receive freight from the E. T., V. & G. Railroad for shipment without prepayment of freight any more than from any one else. It is in evidence, and not contradicted, that the defendant notified such company that it required prepayment, and when it was satisfied in that regard that it immediately received and promptly shipped the freight.

If the E. T., V. & G. Railroad received prepayment of freight for shipment over both lines, and negligently failed to prepay the defendant as required by its regulations, and the plaintiff has suffered damage by the consequent detention, he must look to the company who received his money and with whom he contracted for the shipment. (614) *Manufacturing Co. v. R. R. Co.*, 106 N. C., 207.

The court properly instructed the jury that there was no evidence that the defendant received the freight until 28 February, and to find the issues in favor of the defendant.

Per Curiam. No error.

S. F. PLEMMONS, ADMR., v. SOUTHERN IMPROVEMENT COMPANY.

Summons—Amendment—Corporation—Parties—Descriptio Personæ —Special Appearance—Appeal.

1. In a summons against A. H. B., "President of Southern Improvement Company," these latter words are mere *descriptio personæ* and do not make the company a party to the proceeding.
2. The court could have allowed an amendment making the company a party either with its consent or by service of such amended summons upon the corporation.
3. The special appearance of the company's counsel did not bring it into court for the purposes of the action.
4. No appeal lies from a refusal to dismiss an action, but after such motion and refusal the company might treat all proceedings as a nullity as to it, or to have an exception noted and proceed with the cause.

ACTION tried at November Term, 1889, of MADISON, by *Whitaker, J.* The facts are stated in the opinion.

No counsel for plaintiff.
F. A. Sondley (by brief) and T. F. Davidson for defendants.

(615) CLARK, J. The summons commanded the sheriff to summon "A. H. Bronson, President of the Southern Improvement Company," and it was so served. This is legally a summons and service only upon A. H. Bronson individually. *Young v. Barden,* 90 N. C., 424. The superadded words "President of the Southern Improvement Company," were a mere *descriptio personæ,* as would be the words "Jr.," or "Sr.," or the addition of words identifying a party by the place of his residence, and the like.

The Code, sec. 273, gives the court very great powers of amendment over pleadings, process and proceeding "by adding or striking out the name of a party," etc. It was competent for the court below to amend the summons so as to make the Southern Improvement Company either an additional party defendant, or have substituted it as sole party defendant by striking out the name of "A. H. Bronson, President," etc., but it could not bring the Southern Improvement Company in as a party defendant to the action without its consent (either expressed or by entering a general appearance), except by causing the amended summons to be served upon it. The service of summons issued against "A. H. Bronson, President," etc., was not a service upon the corporation, and it cannot, in this short-hand manner by amendment, be brought into court without service of process. *Young v. Rollins,* 90 N. C., 134.

When additional parties plaintiff are made, or there is a substitution of parties plaintiff, no summons issues because the plaintiff is the moving party and comes into court voluntarily. *Reynolds v. Smathers,* 87 N. C., 24; *Jarrett v. Gibbs,* 107 N. C., 303.

If the additional or substituted party objects, and is a necessary party, he is made a defendant. The Code, sec. 185. No summons was directed to issue against the corporation and the amendment of the summons not having the effect to make it a party without service of process, the company, by counsel appearing specially for the purposes of (616) the motion only, moved to dismiss the proceedings as to the Southern Improvement Company. The court refused the motion and the said company appealed. It is settled that no appeal lies from a refusal to dismiss an action. *Mitchell v. Kilburn,* 74 N. C., 483; *Foster v. Penry,* 77 N. C., 160; *Crawley v. Woodfin,* 78 N. C., 4. The appellant might have properly treated all subsequent proceedings as a nullity till served with process or it may be that leave may still be granted to issue against it upon the amended summons, or it could have had its exception noted and proceed with the cause.

Appeal dismissed.

Cited: Bray v. Creekmore, 109 N. C., 51; *Guilford v. Georgia Co., ib.,* 312; *Clark v. Mfg. Co.,* 110 N. C., 112; *Cameron v. Bennett, ib.,* 278; *Sheldon v. Kivett, ib.,* 411; *Luttrell v. Martin,* 111 N. C., 528; *Lowe v. Accident Asso.,* 115 N. C., 19; *Clark v. Hodge,* 116 N. C., 766; *Whitaker v. Dunn,* 122 N. C., 104; *Bernhardt v. Brown, ib.,* 591; *Proctor v. Ins. Co.,* 124 N. C., 269; *Allen v. R. R.,* 145 N. C., 41; *Williams v. Bailey,* 177 N. C., 40.

WILLIAM J. MEREDITH, BY HIS NEXT FRIEND, v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Railroad—Negligence—Injury to Person—Infants—Idiots.

In an action against a railroad company for injury to person by its train, it appeared that the defendant had put in two side-tracks which extended into the public road, and that the plaintiff, a bright boy about thirteen years old, while passing along the highway, was struck and injured by an engine while seeking to avoid another coming from the opposite direction. At a short distance on either side of the tracks there was a wire fence: *Held,* he was not entitled to recover.

ACTION for damages, tried at February Term, 1890, of MADISON, before *Philips, J.*

The defendant company, in constructing its road from Hot Springs to Paint Rock, had used what had previously been the public highway, and, just below Hot Springs, had put in two side-tracks, in addi-
(617) tion to the main line, extending some distance down the road.

The plaintiff, W. J. Meredith, who sues by his next friend, Nicholas Meredith, his father, was shown by all of the witnesses to be a bright boy about thirteen years old. In going from the house of his father to Hot Springs, he was compelled to pass along the defendant's road where the three tracks were laid down, and at a short distance on either side of said tracks there were lines of wire fence. When on the way from his father's house to Hot Springs, he passed a train apparently heading toward Paint Rock, and not long after, seeing another train coming from Hot Springs, in his front, on the track on which he was walking, he stepped over to the side-track on which the train first seen by him was running, but failed to see it approaching him from his rear till it ran against and injured him. He might has stepped off the track and avoided the injury had he seen the train coming up behind him. He was stricken by the engine and his arm was crushed and afterwards amputated.

When the plaintiff rested his case, the judge instructed the jury that he could not recover. The plaintiff submitted to judgment of nonsuit, and appealed.

No counsel for plaintiff.
F. H. Busbee for defendant.

AVERY, J. Where the engineer in charge of a moving engine sees a human being walking along the track in front of it, if such person is unknown to him and is apparently old enough to understand the necessity for care and watchfulness, under such circumstances the engineer may act upon the assumption that he will step off the track in time to avoid injury. *McAdoo v. R. R.*, 105 N. C., 140; *Parker v. R. R.*, 86 N. C., 221. The witnesses concur in the statement that the boy who was injured was an intelligent youth about thirteen years old. In the absence of knowledge or information to the contrary, the engineer
(618) was justified in supposing that he would look to his own safety even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the rail to a neighboring sidetrack. *Daily v. R. R.*, 106 N. C., 301.

The fact that there was then no other possible route for persons walking from Paint Rock to Hot Springs would not relieve a man, or boy of his age, endowed with reason and the instinct of self-preservation,

from the duty of watchfulness, when he must know and should be always mindful that carelessness will expose him to danger.

Actual or implied license from the railroad company to use the track as a footway would not relieve him from the consequences of failing to exercise ordinary care. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. *McAdoo v. R. R., supra.* Where an engineer knows the person on the track, and has knowledge or information that he is of unsound mind, or so deaf that he cannot hear an approaching train, or where the engineer sees or can, by ordinary care and watchfulness, discover that a human being is apparently lying asleep or helplessly drunk, or an animal or wagon is entangled on the track in his front, even at a public crossing, he cannot relieve the company of liability for injury caused by running over the person or animal, except by showing that he promptly used every available means, short of imperiling the lives of passengers on his own train, to avert the danger. *Deans v. R. R.,* 107 N. C., 686; *Bullock v. R. R.,* 105 N. C., 189; *Carlton v. R. R.,* 104 N. C., 365. The same rule applies where the injury has been done to a child apparently too small to understand the danger, and where the engineer, had he kept a proper lookout, might have averted it without peril to passengers. The boy injured was described by witnesses as bright and "smart," but, if he was *apparently capable of appreciating his peril* or his situa- (619) tion, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him. Considerations of public policy, such as the reasonable demand for the speedy transportation of mails, and the proper regard for the safety of passengers, forbid that trains should be stopped for trivial causes, or that the lives of those on board should be put in jeopardy, even to avert manifest danger to others.

We concur with the judge below in the opinion that the plaintiff was not entitled to recover, because by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would move out of the way of the engine before it should reach him. There is no error.

Affirmed.

Cited: Clark v. R. R., 109 N. C., 451, 453; *High v. R. R.,* 112 N. C., 388; *Syme v. R. R.,* 113 N. C., 565; *Bottoms v. R. R.,* 114 N. C., 714; *Smith v. R. R., ib.,* 767; *Pickett v. R. R.,* 117 N. C., 631; *Purnell v. R. R.,* 122 N. C., 850; *Neal v. R. R.,* 126 N. C., 638, 644, 654; *Smith v. R. R.,* 130 N. C., 346; *Bessent v. R. R.,* 132 N. C., 941; *Lassiter v. R. R.,*

133 N. C., 249; *Pharr v. R. R., ib.,* 610; *Crenshaw v. R. R.,* 144 N. C., 322; *Beach v. R. R.,* 148 N. C., 164; *Baker v. R. R.,* 150 N. C., 566; *Exum v. R. R.,* 154 N. C., 411; *Patterson v. Power Co.,* 160 N. C., 580; *Talley v. R. R.,* 163 N. C., 573, 576; *Abernathy v. R. R.,* 164 N. C., 95, 96, 97; *Ward v. R. R.,* 167 N. C., 151, 152, 155; *Treadwell v. R. R.,* 169 N. C., 699; *Foard v. Power Co.,* 170 N. C., 51; *Davis v. R. R., ib.,* 585, 590.

(620)

THOMAS D. JOHNSON, EXR., v. ROBERT B. JOHNSON ET AL.

Construction of Will—Deed—Distribution—Executors—Devisees—Legatees—Real and Personal Property—Receipts.

1. A testator devised and bequeathed all his property, real and personal, not included in a deed of gift referred to, appointing his son as his executor to make the distribution in equal portions to his children or their lineal representatives, taking receipts, as directed, therefor; and authorized him to sell at public auction all property not easily divided, and distribute the proceeds in the same manner. This action was brought to obtain a construction of the will: *Held,* (1) it was the duty of the executor to distribute the property, real and personal, which, in his judgment, was easily parceled out, and sell the residue in the manner described, to enable him to in like manner distribute the proceeds; (2) that any allotment of real estate shall be by deed, duly proven and recorded, referring to the will, the source of the maker's authority, and setting forth the cash value thereof, as directed in the will.

2. In making the allotment the executor shall take from each devisee or legatee a receipt stating the cash value thereof as of the time of the testator's death, and containing the conditions required by the will. This receipt should be filed with the clerk of the court.

3. A deed incorporated in a will, though not in terms, becomes thereby a part thereof.

4. By the terms of a will, where any distributee had issue which had arrived at the age of twenty-one, such distributee took without the conditions imposed therein, and the receipts taken in that case should so state.

5. This action does not determine the rights of any party claiming under the will.

APPEAL at March Term, 1891, of BUNCOMBE, from *Brown, J.*

It appears that William Johnson died in the county of Buncombe on 20 September, 1890, leaving a last will and testament, which was duly proven, and the plaintiff qualified as executor thereof.

The following is so much of the will as need be reported:

"In the event of my death without other and further distribution of the remainder of my estate, it is my wish and desire that this paper-writing be taken as in effect and purpose my last will and testament, and the basis of the final distribution of my effects; and to that end I hereby appoint my son Thomas D. Johnson my executor, who is hereby fully charged with the duty and authority of carrying out the purposes and intent expressed in it, viz., a distribution of equal portions of my remaining property to each of my children, or their lineal heirs, with the same conditions annexed as expressed in my deed of gift now about to be made, and taking herewith and take receipt therefor of like tenor (621) and manner as those bearing even date with these presents. And in regard to property not easily parceled out and assessed in equal portions, whether the same be lands or stock, real or personal property, it is my direction that the same be sold at public auction to the highest bidder for cash, or on time, duly advertising the time, place, terms, etc.; and after deducting the necessary expenses and his reasonable commission, divide the proceeds equally among my children or their lineal heirs as herein directed.

"But at said sale the said Thomas D. Johnson is not to be debarred from becoming a purchaser on account of his executorship, but is to be on equal footing in regard thereto with the rest of my children. My purpose being not only to secure equality in distribution of my effects among my children according to the terms and limitations and conditions expressed in my said deed of gift, but also to hedge them in with safeguards against the contingency of litigation. It being an expressed condition of this and each bestowment that the recipient in receiving the same recognizes the validity and effect of this paper-writing as my last will and testament, and thereby expressly pledge their acquiescence and assent to the provisions and conditions thereof both now and ever hereafter.

"In testimony whereof I have hereunto set my hand and seal this 18 September, 1885.

"WM. JOHNSON." [Seal.]

The devisees and legatees of this will each contends for a different interpretation of some of its material provisions, and insists upon different views of the powers of the executor to be exercised in the administration of the estate. The latter brings this action against the former, and asks the court to interpret the will, and particularly to advise and direct him as to his duties in the following specified respects:

(622) "1. That the plaintiff, by this action, desires to obtain from the court its advice, direction and opinion in construing said will, and as to his duty thereunder, and especially in the following particulars:

"*First.* Whether, by the terms of said will, he should divide or partition among the devisees and legatees mentioned therein the said real estate, or any part thereof, and if so, should he assign the value of the several parts; and whether said will vests in him a discretion as to which part should be divided by metes and bounds, and which part should be sold.

"*Second.* That if the court shall be of the opinion that any part should be divided among the said devisees and legatees, would it be the duty of the plaintiff, as executor, to make such division and to execute deeds to the devisees for their several allotments, or would they each take as purchasers under said will, simply?

"*Third.* That if the court be of the opinion that the plaintiff should execute deeds as aforesaid, should the deeds so executed contain the conditions and limitations annexed to the property by the provisions of said will?

"*Fourth.* If the court be of the opinion that the plaintiff should execute deeds with said conditions and limitations as aforesaid, how would the plaintiff take title as one of said devisees under the will?

"*Fifth.* That if the said real estate in the opinion of the court should be sold as a whole or in part (provided in plaintiff's judgment the same cannot be divided by metes and bounds without prejudice to the parties in interest), should the plaintiff execute deed in fee simple to the purchasers free from all conditions and limitations contained in said will, and divide the proceeds of said sale, taking from the said legatees and devisees their receipt with such conditions and limitations ex-
(623) pressed therein and of the same tenor and in like manner as was taken from said devisees and legatees by testator in receipt dated 18 September, 1885, as per copy herewith annexed, marked Exhibit 'B.'

"*Sixth.* If, in the opinion of the court, the said real estate or any part thereof should be sold for division under said will, and any of the said legatees and devisees should purchase at said sale, should the plaintiff as executor execute to them deeds in fee simple without the conditions and limitations expressed therein?

"*Seventh.* That the plaintiff is willing and ready to do and perform any and all of the opinions and directions of the court in the premises, and prays that the court will advise and direct him in each and every one of the particulars above stated, and in such other particulars as to the court may seem proper in construing said will."

Upon the facts admitted the court gave judgment, whereof the following is a copy:

"Upon these facts the court is of opinion and adjudges as follows:

"1. That Thomas D. Johnson is vested with the power, and it is his duty, as executor, to divide the real and personal estate devised and bequeathed in said will equally among the said devisees and legatees whenever in his judgment such estate can be easily parceled out and assessed in equal portions. But whenever, in his judgment, any of said real or personal estate cannot be easily parceled out and assessed in equal portions, the said executor is authorized and it is his duty to sell the same in the manner directed in said will.

"2. That it is the duty of said executor to make such division, or cause the same to be made under his supervision, in such manner as will best conduce to perfect equality of division as nearly as possible. That any allotment of such real estate should be in writing under the hand and seal of said Thomas D. Johnson, which refers to the will under which it is made and designates and allots to every devisee his (624) or her part of the real estate actually divided in severalty, and states the cash value fixed upon such real estate as is in it allotted as of the time of the death of the testator, but contains no conditions, limitations or restrictions, and this writing shall be duly proved or acknowledged and registered in said county as deeds are ordinarily proved or acknowledged and registered in said county according to law.

"3. In making such division or allotment, or division and allotment, the executor shall take, signed by every devisee and legatee, six receipts, of like tenor with that mentioned in finding of fact No. 4, for the amount of the value of the real and personal estate so to such devisees and legatees respectively allotted as fixed by said executor in making such division or allotment, or division and allotment, as aforesaid, as by said will directed, which receipts shall contain the conditions and stipulations set forth specifically in said will. At any sale of said real or personal estate, or any part thereof, made by said executor for division as aforesaid, any of said devisees and legatees may become a purchaser, and take such property or estate so purchased, as would any other person, not a devisee or legatee as aforesaid, who should purchase at said sale.

"4. That the plaintiff executor pay the costs of this action, to be taxed by the clerk of this court."

George A. Shuford for the plaintiff.
F. A. Sondley (by brief) for defendants.

MERRIMON, C. J. The will before us to be interpreted is peculiar in its form and the method of the disposition of the testator's large estate. He first devised a scheme of division of his property, both real and personal, among his children, which is embodied in what he styles "my (his)

(625) deed of gift," which was executed at the same time he executed his will, is particularly referred to in and made part of it. By this deed he gave, at the time of its execution, to each of his children, in equal amounts, considerable parts of his personal property upon terms, conditions and limitations expressed therein, and took from them a receipt therefor, joint and several in its form, in which they recite that they respectively received the property upon such terms, conditions and limitations as are recited in the deed. As to further future dispositions of property to his children, to take effect in his lifetime, or after his death, except as to "such legacies, bequests and devises as I (he) may make by a last will and testament under different limitations and conditions," he directs that they shall be made and received by them "upon the express provisions and conditions that the same shall be held by my (his) said children, and each of them, in their own names, respectively; and that all uses, changes and investments of the principal of the same shall be made in their own names respectively," etc. This deed provides and directs, much in detail, that the testator's children shall severally share equally his property, and how they shall receive, have, own and enjoy the same, and it specifies certain terms, conditions and limitations affecting the several shares. In it the testator directs his executor to take receipts for the property so bequeathed and devised "of like tenor and manner" with that taken by himself above-mentioned.

The deed above referred to is clearly made a material and substantial part of the testator's will. He refers to it in the first paragraph thereof as "my (his) deed of gift now about to be made and taking (taken) herewith," etc. Indeed, the will would be incomplete without it. In the first clause of his will he declares that, "In the event of my death without other and further distribution of the remainder of my estate, it is my wish and desire that this paper-writing be taken as in effect and purpose my last will and testament, and the *basis* of the final distribution of my (626) effects; and to that end I hereby appoint my son, Thomas D. Johnson, my executor, who is hereby fully charged with the duty and authority of carrying out the purposes and intent expressed in it, viz., a distribution of equal portions of my remaining property to each of my children, or their lineal heirs, with the same conditions annexed as expressed in my deed of gift, now about to be made and taking herewith, and take receipt therefor of like tenor and manner as those bearing even date with these presents." The deed thus constituting part of the will, must be so interpreted in all pertinent respects, and have due weight and force in fixing the dispositions of the property and determining the power of the executor. *Siler v. Dorsett, ante,* 300.

The testator disposes of his whole property exclusively to his children. He gives to no one of them any particular property, but plainly directs

that the whole, both real and personal, shall be divided equally among them. At the time he executed the will and that part of it called the deed of gift, he gave each of them an equal amount of personal property, and, keeping in view his purpose of just equality, he directs "a distribution of equal portion of my remaining property to each of my (his) children, or their lineal heirs, with the same conditions annexed as expressed in my deed of gift," etc. Indeed, the whole will manifests a deep affection for all his children alike, and a settled purpose that they shall in equal measure share his bounty.

It appears that the testator, at the time of his death, had large and valuable real estate, consisting of city lots, mountain land, undivided fractional mineral interests in large tracts of land, and that an actual division of all of them cannot be made among the devisees without prejudice to all, or some of them. He did not devise particular tracts, or parcels of land to any of his children, nor did he give any one or more of them specific legacies; he devised and bequeathed the whole of his property, both real and personal, as a whole, to be equally divided (627) among them. And a chief purpose he had in view was equality in the division, made in such way as would most certainly promote the interests of all. Hence, he made his dispositions of his property, both real and personal, very general, and the "basis of the final distribution of" the same; and hence, too, he "fully charged (his executor) with the *duty and authority* of carrying out the purpose and intent expressed in" his will, that is, "a distribution of equal portions of my (his) remaining property to each of my (his) children, or their lineal heirs," etc. He did not determine that his property, real and personal, other than money, could and should be actually divided among his children; at all events, he intentionally left that to be determined after his death. He thought parts of it (parts of the land, stocks and other personal property) might be actually divided, and to the advantage of his children. In such case, when it can be done, it is made the duty of the executor to make such division, otherwise he is required to sell the property, real or personal, and turn the same into a cash fund for such division. If it should turn out, for any cause, that such actual division cannot be made, that it would better promote the interests of the devisees and legatees to turn the whole property into a cash fund for division, then, and in that case, it will be the duty of the executor to sell the whole for such purpose. It was, therefore, the testator said in general terms: "And, in regard to the property not easily parceled out and assessed in equal portions, whether the same be lands, or stock, or personal property, it is my direction that the same be sold at public auction," etc.

It is expressly made the duty of the executor to carry "out the purposes and intent expressed in" the will, to distribute the property, both

real and personal embraced by it. It is very obvious that the testator had great confidence in the ability, integrity and good judgment of his son Thomas, and his fitness to be the executor of his will. He
(628) fully charges him with the *"duty* and *authority"* of carrying out the purposes and intent expressed in it, viz.: "A distribution of equal portions of my remaining property to each of my children," etc. He is "fully charged with the *duty* and *authority"* to effectuate such purpose. It is his duty to make the division, and he has full authority to that end, and when, in good faith, he has made it, it will be effectual. Thus, if the land, or parts of it, can be divided, he must make the division, and so also as to the personal property. If such actual division cannot be made, "parceled out and assessed in equal portions," then he should sell the property as directed, turn the same into a cash fund and divide the same. It is his duty, in making such division, to assess the value and allot the property to the devisees and legatees. He may call to his aid the experience and observation of others, if he shall see fit to do so, but the division and allotment must be his own. His judgment and action must prevail. Moreover, he is made the judge of what property cannot, for any cause, be "easily parceled out and assessed in equal portions." As to this, he should exercise a sound, not an arbitrary, discretion.

In case of such actual division of the property, real or personal, or any part of it, the devisee or legatee will take and have title under and by virtue of the will, and hence it will be sufficient for the executor to execute a paper-writing, under his hand and seal, specifying the division made and the allotment of the same in severalty to the particular devisee or legatee, making appropriate reference to the will and his power as executor under the same. Such paper-writing should be duly proven and registered as in case of deeds required to be registered. Moreover, the executor should take from the devisees and legatees, in case of such division, a receipt in substance and form such as that mentioned and referred to in the will.

In case the property, or any part of it, shall be sold, the sale
(629) should be made strictly as directed by the will, and the executor should execute to the purchaser a proper deed conveying the absolute title to the purchaser. The deed should appropriately refer to the will and the power of the executor to sell the property and make title therefor.

In case the devisees, or any of them, shall purchase property at such sale, the executor should execute to him a proper deed for the property so purchased by him, just as if he were not such devisee. He should take a receipt from such devisee for his part of the fund divided when the division shall be made.

It is very apparent that the testator did not intend to put the executor at any disadvantage, but on a footing equal with the other devisees and legatees. No special provision is made for ascertaining and allotting the share of the executor. Hence, in the absence of such provision, in dividing property, whether real or personal, he should set apart a share for himself equal with the shares respectively of the other devisees or legatees, and should execute a paper-writing, under his hand and seal, to the effect that in such division his share had been allotted to him, and the same should be proven and registered. Thus, the evidence of such division and allotment would be established and made perpetual. Furthermore, the executor should execute a "receipt"—a paper-writing—in all respects like the receipts he is required to take from the other devisees and legatees, reciting in the face thereof that he had received his share or some part thereof, of the estate of the testator, and such paper should be filed in the clerk's office with the other papers and records of the estate. These receipts should be carefully preserved, as they may become important in an action or actions to enforce the conditions and limitations therein specified.

It is expressly provided in that part of the will specifying the (630) terms, conditions and limitations of the devises and bequests as follows: "And in case any or either of my said children shall have any issue which shall arrive at the age of twenty-one years, whether in the lifetime or after the death or deaths of each of my said children, then the gifts and advancements herein made to such of my said children respectively, or which may come to them on any future distribution of my estate, shall vest in such of my said children respectively, or in their respective lineal heirs *'per stirpes'* absolutely and released and discharged from all the terms, limitations and provisions herein imposed."

When, therefore, it appears to the executor that one of the devisees and legatees has issue that has so arrived at the age of twenty-one years, the receipt required need not specify such terms, conditions and limitations, but these may be omitted. It should, however, specify particularly that such issue had arrived at that age, thus suggesting the reason for such omission.

This action is brought by the executor simply to obtain the advice and direction of the court as to his duties under the will. We are not called upon, nor would it be proper for the court below, or for us, to express any opinion as to the rights of any party claiming under the will who is a party to the action. The purpose of the action is not to litigate, but to settle and determine the rights of parties.

The advice and direction given by the court below, so far as it extended, was substantially correct, and we approve and affirm the same.

It should, however, have given the additional advice and direction indicated in this opinion, and it will amend and enlarge its entry so as to embrace the same. To that end, let this opinion be certified to the Superior Court.

Remanded.

(631)

J. B. HOUSER ET AL. V. W. J. MCGINNAS.

Principal—Agent—Payment—Mistake—Negligence—Equity—Knowledge of the Facts.

One H, while acting as express agent for M, the regular agent, received, in the course of business, money sent by K and intended for B; and the same was delivered to him, but no receipt was taken and no entry made. Some months after this, B denied receiving the money, and the amount thereof was, upon demand (the transaction not being remembered), paid by H and M to the express company for K, who received it and had it allowed as a credit in his transaction with B. Finding afterwards, as the fact was, the money sent had been duly paid, H brought this action against M and B for the payment of the part he contributed to the express company: *Held,* (1) that he was entitled to recover against B, who was twice paid what was due him, and could not in good conscience hold both amounts; (2) this action might have been maintained against B alone and by either H or M; (3) negligence in the transaction does not bar recovery unless some circumstances had arisen which would make it inequitable; (4) full knowledge of the facts by the plaintiff would not excuse B for holding money he was not entitled to.

ACTION heard upon demurrer of the defendant, P. C. Beam, at the Spring Term, 1891, of GASTON, before *Merrimon, J.*

The complaint was as follows:

"That heretofore, to wit, on 25 November, 1887, the defendant W. J. McGinnas was the agent at Cherryville of the Southern Express Company, a corporation doing business as a common carrier between the towns of Shelby in Cleveland County, N. C., and the town of Cherryville in Gaston County, N. C., and plaintiff was, on said day, acting as clerk or agent of said defendant in the transaction of the business of said express company at Cherryville; he, the said defendant McGinnas, being on said day absent from Cherryville engaged in other business.

"2. That on said 25 November, 1887, plaintiff in the course of (632) his business as such clerk or agent, and while defendant McGinnas was still absent, received a package containing $500 in currency from said express company, the same having been transmitted by the defendant B. K. Humphreys from the said town of Shelby, through said express company, to the defendant P. C. Beam at Cherryville.

"3. That immediately upon the receipt of the package, and without entering the same on the books of the said express company, kept at Cherryville, known as the 'delivery book,' plaintiff carried and delivered said package of $500 to the defendant, P. C. Beam, without taking the receipt of said Beam therefor, intending afterwards to make the proper entry on said book and take the same to Beam and obtain his receipt thereon for said package, as was frequently done at said office, but plaintiff wholly forgot to make said entry or to take such receipt.

"4. That afterwards, to wit, on 22 March, 1888, nearly four months after such receipt and delivery of said package, the defendant McGinnas demanded the payment of the said sum of $500 by the plaintiff, alleging that the said sum had been demanded of him, the said McGinnas, by said express company, upon the ground that said Beam denied its delivery to him by plaintiff, or that he had ever received the same from any source; that the books of the route agent or messenger of said express company showed a receipt for said package signed by plaintiff, and that the said express delivery book showed no entry of said package, nor any receipt of said Beam therefor, and that said Beam denied the delivery of said package to him by plaintiff or any one else for him.

"5. That plaintiff, upon investigation, found the allegations of McGinnas with regard to the book of the express messenger and the delivery book to be true; and further, that Beam denied the receipt of said package, and having, on account of the great lapse of time (633) since the receipt and delivery of said package to said Beam, forgotten the circumstances thereof, in his surprise and confusion supposed he must either have lost or mislaid said package, and by mistake and inadvertence, being misled by the appearance of said books and the denial of Beam, he then and there acknowledged his liability therefor, and agreed to pay to said McGinnas the said sum of $500 for said Humphreys, or to be delivered by said McGinnas to the express company for said Humphreys.

"6. That thereupon plaintiff paid to McGinnas $245—all the money he could raise at the time—which sum was by McGinnas immediately paid to the express company for Humphreys, and the balance of the $500, to wit, $255, was at the same time paid by McGinnas out of his own pocket to said express company, to be by it delivered to Humphreys.

"7. That the said sum of $500, so contributed and paid to said express company as aforesaid, was by it carried and delivered to said Humphreys at Shelby, N. C., who allowed credit therefor to said Beam in the settlement of certain dealings between them, as plaintiff is informed and believes.

"8. That afterwards, plaintiff having discovered with certainty that he did deliver said package of $500 to said Beam, as alleged in the first

paragraph hereof, before the institution of this suit made demands upon the defendants McGinnas and Beam for the repayment of said sum of $245, which was refused.

"9. That neither of said defendants, nor any one for them, have paid to plaintiff the said sum of money, nor any part thereof, but the whole thereof remains due and unpaid.

"10. That by reason of the receipt of said package of $500 on said 25 November, and the credit afterwards given him by said Humphreys, said defendant Beam has had the benefit of said sum of money twice, and his detention thereof is unjust and unlawful, and wrongful toward the plaintiff.

(634) "11. That defendant McGinnas ought properly to have been a party plaintiff to this action, but he refused to make himself a party plaintiff at the institution of this suit, and was, therefore made a party defendant.

"Wherefore, plaintiff demands judgment against the defendants, W. J. McGinnas and P. C. Beam, for the said sum of $245, with interest from 22 March, 1888, until paid, together with the costs of this action, and for such other and further relief as to the court may seem just."

Defendant McGinnas answered, admitting all of the material allegations of the complaint. Humphreys neither answered nor demurred.

Defendant Beam demurred as follows:

"1. That the complaint does not state that the money paid by Houser to McGinnas was ever paid to the defendant Beam, or that he derived any benefit therefrom.

"2. That the complaint states a cause of action against Beam and Humphreys on account of the money sent by him to P. C. Beam, which still subsists. The said cause of action has not been extinguished by the payment of the money by Houser, nor does the complaint state any facts which amount to an assignment of said cause of action to Houser.

"3. That the complaint does not allege that the expressions therein made by Beam were ever made to Houser, or made with intent to influence Houser, or to affect him in any way, nor made with intent to deceive him or any one else.

"4. That there are no facts or circumstances alleged in the complaint which constitute an express contract between Houser and Beam, or from which any contract could be implied, or other liability could arise on the part of Beam to Houser.

"Whereupon, defendant demands judgment that this action be dismissed, that he go without day and recover his costs of the plaintiff, to be taxed by the clerk."

(635) Demurrer sustained, plaintiff appealed.

George F. Bason and Jones & Tillett (by brief) for plaintiff.
No counsel contra.

AVERY, J., after stating the facts: By demurring, the defendant Beam admits that the plaintiff paid over to him the sum of $500 in money, consigned by express, and failed to take his receipt, and that subsequently, under a mistake as to the fact of having previously made said payment, the plaintiff, through the defendant McGinnas, paid to the defendant Humphreys $500, which Humphreys allowed as a credit on a debt due him from Beam, in order to satisfy and pay a second time the claim of Beam as assignee. The money has thus been twice paid to the consignee, with no new consideration, and yet he resists the plaintiff's demand for restitution, on the ground that the action could be maintained by Humphreys only, in whom the right to bring it still subsists, the company failing to show any privity between the plaintiff and Humphreys.

Where money is paid and received in discharge of a debt then believed by the payer to be due, but in fact previously paid in full by or for the debtor, the creditor is not allowed to keep double the sum due him against the demand of the debtor preferred in an action in the nature of assumpsit for the recovery of the second payment made by mistake. *Pool v. Allen,* 29 N. C., 120; *Mitchell v. Walker,* 30 N. C., 243; *Newell v. March, ib.,* 441; Hare on Contracts, p. 104. The defendant seems to admit this principle, but insists that Humphreys paid the debt the last time, and he alone can maintain the action for the restitution of the amount wrongfully paid by him. The plaintiff has (636) brought all of the parties who actually have claimed, or who, according to the contention of either party, can rightfully claim, an interest in the controversy. McGinnas admits the truth of plaintiff's allegations by answer, and Beam by demurrer, while Humphreys confesses by failing to answer.

When the money was placed by McGinnas in the hands of Humphreys, as agent, to pay the claim of the defendant Beam a second time, Humphreys retained the money, but allowed Beam credit on a debt due him from the latter. This was equivalent to paying the debt in money a second time, and the arrangement was made for plaintiff and in consideration of funds furnished by or for him. It was, in effect, a second payment by Houser. *Quod facit per alium, facit per se.* If the facts stated in the complaint be true, we see no reason why the plaintiff might not have maintained his action against Beam alone, treating both McGinnas and Humphreys as his agents. Houser paid $245 in money—all that he could raise—to McGinnas, to be handed over to Humphreys, who was to effect the settlement with the defendant, and

induced McGinnas to pay for his benefit $255, the residue of the $500. The law implies a promise by Beam to repay Houser. *Mason v. Waite,* 17 Mass., 563.

Where an agent, by mistake of fact, pays money for his principal, the latter may recover it back from the party who has received it. Story Agency, sec. 435; Wharton Agents, sec. 413; *Sheffer v. Montgomery,* 65 Penn. St., 329; *Bank v. King,* 98 Am. Dec., 215, and note 221. It is a general rule that where the money of the principal has been wrongfully paid by his agent to a stranger, either the principal or the agent may maintain an action for its recovery. 1 Lawson Rights and Rem., sec. 121. But the principal cannot recover where the agent loans to one of his own creditors who has no notice that it is the principal's money. *Ib.* McGinnas, being entrusted by Houser, as
(637) agent, with a part of the money, and having advanced the residue for the plaintiff, might substitute Humphreys, who would be, in contemplation of law, says Mr. Wharton, "but the extension of the principal himself, introducing no new party into the contract." Wharton's Com. on Agency, secs. 33, 34. As Houser might have made Humphreys directly his agent, or might in terms have authorized McGinnas to constitute him a subagent to settle with Beam, he had the right to ratify the substitution of Humphreys by McGinnas and thus establish a privity between Humphreys and himself, and of this Beam could not complain. But if this were not so, all of the parties being before the court, and the mistake being admitted, it would be unconscionable to allow the defendant to retain double the amount due him.

As it may possibly be insisted that, though the privity between the plaintiff and Humphreys be admitted, still the complaint does not state facts sufficient to constitute a cause of action, it is proper that we should consider this case in another aspect. We think that if the plaintiff, under the circumstances, actually knew he had paid the debt, and could not at the time prove the payment, or if his mistake of the fact was negligently made, and he might, by the exercise of ordinary care, have avoided falling into it, still, as between him and the defendant, who admits that the money was paid to him in full a second time, not as a gratuity, but nominally in discharge of the same debt, the plaintiff is entitled to restitution, when it can be made without loss or sacrifice on the part of the latter. His negligence in failing to find out the facts before paying the money does not prevent his recovery from one who does not deny the allegation that he received and retained double the sum justly due to him. Hare on Con., p. 233; *Bank v. Bank,* 43 N. Y., 445; *Line v. Shinnerburger,* 17 Mo. Appl., 66; *North v. Blow,* 30 N. Y., 374; *Bank v. Morse,* 38 Am. Dec., sec. 284, and notes, p. 290.

It would have been otherwise if the plaintiff, by his negligence (638) in failing to give timely notice of his demand, had prevented the defendant from recovering the sum claimed of a third party, or, generally, where the defendant had sustained damage which the plaintiff by ordinary care might have prevented. *Bank v. McGilvary,* 64 Am. Dec., 92; *United States v. Bank,* 6 Fed., 854. Where the parties cannot be placed *in statu quo,* the loss must fall upon the person who caused it by his negligence, though he may have made the payment under a mistake as to the facts, but without exercising due diligence in ascertaining them. *Boas v. Updegof,* 47 Am. Dec., 404.

If a second payment had been made with a full knowledge of the facts, but not by compulsion of, or mistake as to, the law, the courts would not allow Beam, who acknowledges that he has been twice paid, to go out of a court of conscience, when all of the parties are before the court, without accounting for what is justly due to the plaintiff, when he has advanced out of his own funds a part and owes McGinnas the balance of the amount used by Humphreys in making the second payment. No wrong is imputed to any other party, and, in any view of the facts, the courts could not lend their sanction to fraud by allowing one who, by falsely denying a first payment, secures a second, to retain it simply because the debtor may have been guilty of even gross negligence. A payment is not necessarily voluntary, nor is it to be treated as a gift, because the debtor did not act under compulsion in paying it a second time. *Pool v. Allen, supra.*

We conclude, therefore, that there was error in sustaining the demurrer, and the judgment of the court below is

Reversed.

Cited: Board of Education v. Henderson, 126 N. C., 694.

(639)

MARSHALL & BRUCE v. THE MACON COUNTY SAVINGS BANK.

Evidence—Letters of Incorporation—Proof of the Existence of a Corporation—Measure of Damages—Contract.

1. Copies of letters of incorporation are admissible to show *prima facie* the existence of a corporation, and it cannot avoid its liability for debts because in fact it had but an inchoate existence.

2. When articles of value were prepared by plaintiffs according to the direction of such corporation, and before the order was countermanded, they are entitled to recover the damages sustained on account of defendant's refusal to receive them.

3. The measure of damages is the difference between the contract price and their present value, and, if of no value to any one but the defendant, then the measure is the contract price.

ACTION tried at Spring Term, 1887, of MACON, before *Merrimon, J.*

This action was brought in the court of a justice of the peace to recover from the defendant the price of a "ledger, index, check-books and other stationery," which the plaintiffs allege they prepared at the request of the defendant, and which it afterwards, without cause, refused to accept, and refused to pay for the same; that the articles so prepared were of no value to the plaintiffs or other person than the defendant, etc. The pleading raised issues of fact.

On the trial in the Superior Court the defendant requested the court to instruct the jury:

"1. That the plaintiffs cannot recover of the defendant, for the reason that the goods were never delivered to the defendant.

"2. The defendant is not a corporation, for the reason that at the time the goods were ordered was within a few days after the defendant undertook to be incorporated, and that the notice countermanding the same was before the expiration of thirty days, the time required by law for the publication to be made before the defendant was a corporation in law.

(640) "3. That the defendant was not a corporation in law, and, therefore, could not be sued, although it might be an inchoate corporation.

"4. That, if a corporation, or an inchoate one, in the absence of evidence of the use of the functions conferred by law, it would not be, in law, a corporation.

"5. That as the articles of agreement provide that none of the stockholders are responsible or liable for any debt except the subscription to the capital stock, that the defendant or any other stockholder would not be liable for the goods sued on by the plaintiff, the evidence being that the defendant has no assets or property of any kind whatsoever in its corporate capacity, nor ever had any.

"6. That if the jury believes that one Danford entered into and confederated with the plaintiffs to defraud the defendants, that the plaintiffs could not recover in this action; and as a badge of fraud that there is no evidence that the plaintiffs ever made any inquiries as to the existence of the defendant as a corporation, nor whether the defendant had assets or property, as to the liabilities of the alleged stockholders in said corporation, if in law the defendant was a corporation."

The court refused to give the instruction as asked for, but instructed the jury, after reciting the testimony, that the copy of letters of incorporation put in evidence by the plaintiff was *prima facie* evidence of

the complete organization and incorporation of the defendant company, and that there was no evidence to rebut this *prima facie* case.

That if the defendant ordered the goods from the plaintiffs, as testified by W. R. Johnson, and the plaintiffs, under such order, prepared the goods for the defendant according to the terms of such order, and the order was countermanded after the goods were prepared, and the defendant refused to receive and pay for the same, then the plaintiff would be entitled to recover of the defendant the sum of damages they sustained by reason of defendant refusing to receive and pay for (641) said goods.

The measure of damages would be the difference between the contract price, which is the reasonable worth of the goods, and their present value.

If the goods in their present condition are worthless to the plaintiffs, and are of no value to any one except the defendant, then the plaintiffs' damage would be the contract price for the goods. If the jury should find that said goods are of some value in their present condition, they should subtract their value from the contract price of the same.

That it devolves upon the plaintiffs to make out their case by a preponderance of evidence.

There was a verdict and judgment for the plaintiffs. Defendant appealed.

No counsel for plaintiff.
K. Elias and T. F. Davidson for defendant.

MERRIMON, C. J. The statute (Laws 1887, ch. 412) authorizes the incorporation of "savings banks in the manner already provided for the formation of other corporations," etc. The general statute (The Code, secs. 677, 682) prescribes how corporations, with certain specified exceptions, may be formed, and it is among other things expressly provided that copies of the letters of incorporation, "certified by the clerk of the Superior Court of the county where the same are recorded, shall in all cases be admissible in evidence, and the letters aforesaid shall in all judicial proceedings be deemed *prima facie* evidence of the complete organization and incorporation of the company purporting thereby to have been established." The statute thus makes the letters *prima facie* evidence of the incorporation of the company and its organization; and also a certified copy of the letters as recorded likewise (642) evidence in all cases. *Iron Co. v. Abernathy,* 94 N. C., 545. The court, therefore, properly received in evidence the certified copy of the letters of incorporation, and instructed the jury that the same was *prima facie* evidence of the incorporation and organization of the defendant.

There was evidence that warranted the instructions given the jury, and the defendant could not complain of them. The defendant ordered the goods and they were prepared as directed, and thus in their nature were useful only for its purposes. It could not, after they were so prepared, without any lawful excuse, be allowed to refuse to receive them. And no such excuse was shown. The evidence went to prove that the defendant ordered the goods; that they were manufactured as directed; that they could be useful only to the defendant. There was no evidence of fraud, so far as appears, as suggested by the instructions asked for by the defendant.

Judgment affirmed.

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(643)

W. G. TURNER, ADMR., v. MARTHA SHUFFLER ET AL.

Real Estate Assets—Administrator—Heirs, Collateral—Impeachment—Consent Reference—Subrogation to Rights of Creditors—Statute of Limitations—Pleadings.

1. This Court will not review the findings of fact under a consent reference.
2. The heirs of a decedent, defendants in a proceeding to make assets, will not be allowed, ordinarily, to collaterally attack a former proceeding between them and the same administrator to sell other lands of the decedent to make assets.
3. Where it was found as a fact that the land so sold for assets brought a fair price, and that the sale was in good faith and ratified by the court, this Court will not set it aside because the purchaser afterwards sold it to the administrator who had instituted the proceedings to make assets.
4. When the administrator pays debts of the decedent with moneys other than those belonging to the estate, he will be subrogated to the rights of the creditors and allowed to apply the assets obtained from a sale of real estate for the purpose of paying the debt due him.
5. Claims not barred presented to the administrator in one year after letters granted and admitted by him need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them.
6. An allegation of defendants that "they plead the statute of limitations of ten, seven, six, and three years, as prescribed in The Code, to all of said claims, and aver that they are unable to plead the same more definitely to each and all of said claims," is bad and insufficient without amendment.

ACTION heard on exceptions to a referee's report, at Spring Term, 1891, of BURKE, before *Hoke, J.*

It appears that Christopher Shuffler died intestate in the county of Burke before 9 August, 1877, and that on that day the plaintiff was duly appointed and qualified as administrator of his estate; that his personal estate was of little value; that the debts against his estate aggregated several hundred dollars; that the plaintiff applied for and obtained a license to sell certain real estate of his intestate, called the "mill property," to make assets to pay debts; that this land was sold and the proceeds of the sale were duly applied as assets to the payment of debts; that other debts remain unpaid, and the present is a special proceeding to obtain a license to sell another tract of land of the intestate to make additional assets to pay such unpaid debts.

The defendants, heirs of the intestate, deny the material allegations of the complaint; they allege that the alleged unpaid claims are not just, and that they are barred by the statute of limitations. They further allege that the sale of the land by the plaintiff first above mentioned was void, upon the ground that the plaintiff himself, (644) in effect, bought the same at his own sale.

By consent of parties, it was ordered by the court that all matters in controversy between them be referred to a referee, named, to take testimony, and report to the court the facts and the law arising thereon. The referee took evidence, took and stated an account, reported the same and his findings of fact. To the same the defendants filed divers exceptions, some of which were sustained and others were overruled by the court.

The referee, among other things, found that the claims against the estate of the intestate specified in the account were "presented to the administrator and payment demanded within twelve months from the date of his qualification as administrator, and that he told the creditors that "if they would not sue on their claims he would pay all just claims as soon as he had assets in hand sufficient, and that he would not plead the statute of limitations against debts."

The defendants' exceptions overruled were these:

"3. That referee's finding that Turner went strictly according to law in the sale of the mill property finds no support whatever in the evidence shown him on the trial, and is in direct conflict with a long train of judicial decisions, in this and all the States, that an administrator must not buy directly or indirectly at his own sale.

"4. That the referee erred in omitting to find the plea of the three-year statute of limitations pleaded by the defendants in bar of the plaintiff administrator's right to reimbursement for debts of his intestate paid by him, as he alleged, three years before the commencement of this action, in favor of defendants. And likewise error is alleged in the refusal of the referee to permit defendants to make their former

(645) plea of the seven-year statute of limitations (The Code, sec. 152, subsec. 2) more specific in an amended answer tendered by them and refused by the referee at the hearing of this cause."

In the case settled for this Court the court says: "Third exception overruled and report sustained, and the court finds that the sale was *bona fide* and for fair value to Galloway and bought by Turner from him, and, if otherwise, cannot be impeached here. Fourth exception overruled." The defendants assigned as error the overruling of the exceptions above set forth. There was judgment for the plaintiff, and defendants appealed.

S. J. Ervin for plaintiff.

J. T. Perkins and W. S. Pearson (by brief) for defendants.

MERRIMON, C. J. The order of reference was entered by consent of the parties, and the court below, in all respects pertinent and material here, approved the findings of fact by the referee. It is not objected that there was no evidence to warrant such findings. Indeed, there was some. That it is not the province of this Court to review such findings of fact is well settled by many decisions.

Regularly and properly, the defendants could not attack, collaterally, in this proceeding, the sale of the land made in the former special proceeding mentioned above to make assets to pay debts. That should be done by motion in the cause in a proper case, or by an action brought for the purpose. *Sumner v. Sessoms,* 94 N. C., 371; *Garrison v. Cox,* 99 N. C., 478; *Smith v. Fort,* 105 N. C., 446. But if this were not so, the defendants' third exception could not be sustained, because the court below distinctly found the fact that the sale of the land complained of was made in good faith, and purchased by one who might buy and who paid a fair price for it. The sale was ratified by the court, the purchaser took a proper deed therefor, and afterwards conveyed the (646) title he thus bought to the plaintiff. This being true, the defendants' objection is clearly groundless. It seems that they were dissatisfied with the findings of fact, but, as we have said, we cannot review such findings. We can only correct errors in the application of the law to them, and in this respect no error appears in the record.

It appears that the plaintiff paid several debts of his intestate with moneys other than such as constituted part of the assets of the estate in his hands, for which he was not allowed credit. It further appears, in that connection, that he received certain rents that he supposed to be assets, but the same were not allowed to be such, and the court sustained the exception to the allowance of the same by the referee. This and like things done by the plaintiff show that, in paying debts of his intestate

and charges of administration, he was not officiously paying the same with his own funds simply for the purpose of creating a debt in his own favor whereby he might annoy and prejudice the defendants, but that he did so in good faith. The debt of the estate remaining unpaid is due to the plaintiff on account of moneys advanced and used by him to pay debts of his intestate. The defendants insist that such payments were officious, and also that the same are barred by the pertinent statute of limitations, and they cite and rely in part on *Bevers v. Park,* 88 N. C., 456. We think such payments by the plaintiff were not officious, but were such as were made through inadvertence, in part, as to what constituted assets in his hands, and also such as he might have made for the convenience and benefit of the estate. In such case the administrator is entitled to be subrogated to the rights of the creditors whose debts he so paid with his own funds. In making such payments he was not a mere intermeddler; he simply gave the estate, wherewith he was charged, the temporary benefit of his own funds in the course of his administering the same. *Williams v. Williams,* 17 N. C., 69; *Sanders v. Sanders, ib.,* 262.

It is insisted, however, that he stands in the place of the (647) creditors whose debts he so paid, and their debts were barred by the statute at the time he so paid them. But it does not so appear. It is found as a fact that they were not so barred at the time he paid them. And it further appears that such debts were presented to the administrator and payment thereof demanded within one year after the issuing of letters of administration to the plaintiff, and that he took notice of the same, as contemplated by the statute (The Code, sec. 164), which, among other things, provides that "if the claim upon which such cause of action is based be filed with the personal representative within the time above specified (within one year after the issuing of letters testamentary or of administration), and the same shall be admitted by him, it shall not be necessary to bring action upon such claim to prevent the bar." It seems that the creditors and plaintiff, as to these claims, intended to and did substantially what the clause of the statute just recited allows to be done in such cases. This had the effect to prevent the bar of the statute. If it be said that it does not specifically appear that the claims were not barred at the time they were so presented, still it appears expressly that they were not barred at the time the plaintiff paid them; and hence it must be that they were not, at the time they were so presented. They were paid after that time. It has been decided at the present term that claims not barred at the time they were filed with the administrator, as just indicated, will not be barred by subsequent lapse of time pending the administration. Nor can the heir plead the statute as to them. *Woodlief v. Bragg, ante,* 571.

The defendants in their answer say that they "plead the statutes of limitations of ten, seven, six, and three years, as prescribed in The Code, to all said claims, and aver that they are unable to plead the same more definitely to each and all of said claims." This is clearly bad and insuf-
ficient pleading. The court might, in its discretion, have allowed
(648) appropriate amendments, but it was not bound to do so; nor is the exercise of its discretion reviewable here. It declined to allow an amendment. It seems that it treated the pleading as sufficient as to the statute barring claims after the lapse of three years, but it refused, as it might do, to recognize the insufficient pleading of any other like statute. The answer is wholly insufficient, in so far as it no more than suggests its purpose to allege that the cause of action was barred by the lapse of seven years. It should, in this respect, have alleged definitely that the special proceedings were not begun "within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims." *Love v. Ingram,* 104 N. C., 601. This case is materially different from *Proctor v. Proctor,* 105 N. C., 222. In that case the court did not take notice or dispose of the imperfect pleading at all. In this one it refused to allow an amendment, and treated the insufficient pleading as none at all.

Judgment affirmed.

Cited: Lassiter v. Roper, 114 N. C., 20; *Byrd v. Byrd,* 117 N. C., 526; *Denton v. Tyson,* 118 N. C., 544; *Stonestreet v. Frost,* 123 N. C., 647; *Justice v. Gallert,* 131 N. C., 396; *Murray v. Barden,* 132 N. C., 144; *Pipes v. Mineral Co., ib.,* 613; *Morton v. Lumber Co.,* 144 N. C., 34; *Rackley v. Roberts,* 147 N. C., 205; *Bank v. Warehouse Co.,* 172 N. C., 603.

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

Removal of Cause to the United States Court—Nonresident—Res Judicata.

1. A nonresident defendant whose petition for removal of the cause to the United States Court was denied on the ground of insufficient affidavit cannot be again heard upon further application for removal—it has become *res judicata.*

2. The court might have allowed an amendment, if made in apt time.

MOTION heard before *Boykin, J.*, at January Term, 1891, of (649) DURHAM.

The defendant filed its petition in the action within the time allowed by law, praying that the same be removed to the Circuit Court of the United States in and for the Western District of North Carolina, as allowed by law in appropriate cases. That petition failed to allege, and it did not appear, that one of the plaintiffs was a citizen of this State, that the others were citizens of another State, and the defendant was a citizen of a third and different State at the time the action began, and the application was denied. *Herndon v. Ins. Co.*, 107 N. C., 191 and 194. Thereupon, the defendant excepted and appealed to this Court, and the latter affirmed the judgment of the court below.

Thereafter, and at the last term of the Superior Court, the defendant moved, upon affidavit, "that it be allowed to amend its petition to remove this action to the United States Court, which has been heretofore filed herein," etc., so as to allege such diverse citizenship at the time the action began. The court refused this motion, "not as matter of discretion, but on the ground that it is too late to amend, the defendant having heretofore filed its answer herein." From the order of the court refusing to allow the amendment the defendant appealed to this Court.

F. L. Fuller and J. W. Graham for plaintiff.
J. W. Hinsdale (by brief) and J. S. Manning for defendant.

MERRIMON, C. J. No doubt, the court below might, in its discretion, have allowed such amendment as that prayed for, if a proper motion for the purpose had been made in apt time; but it is questionable whether such motion could have been allowed after the lapse of the time within which application might be made to remove the case to the Circuit Court of the United States. We need not, however, decide how this might be, because the application to so remove the case was denied, the defendant appealed to this Court from the order of denial and the latter Court affirmed the order. Thus the application was ended, be- (650) came *res judicata,* and the court below had no authority to set the order or denial affirmed aside, or at all interfere with it, or allow such amendment as that asked for, and denied upon the ground that the motion came "too late, the defendant having heretofore filed its answer." This denial does not properly rest upon the ground thus assigned, but upon the other ground above indicated. Nor does the fact that the order so appealed from and affirmed by this Court was to be treated as interlocutory or incidental at all alter the case. The application was ended by a regular and orderly adjudication which was, as to it, final. *Jones v.*

Thorne, 80 N. C., 72; *Roulhac v. Brown,* 87 N. C., 1; *Pasour v. Lineberger,* 90 N. C., 159; *Wilson v. Lineberger,* 82 N. C., 412; *Moore v. Grant,* 92 N. C., 316; *Wingo v. Hooper,* 98 N. C., 482; *Dobson v. Simonton,* 100 N. C., 56; *White v. Butcher,* 97 N. C., 7.

If it be granted that the defendant could have made a fresh application to remove the case, it did not do so; and if it had done so, the application could not have been allowed, because it would have been made too late—not within the time such applications might be made.

Order affirmed.

Cited: Tussey v. Owen, 147 N. C., 337; *Powell v. Watkins,* 172 N. C., 247.

(651)

E. K. OSBORNE, RECEIVER, v. JOHN WILKES AND WIFE.

Fraud—Husband and Wife—Evidence—Practice.

1. M, a creditor of W, bought at execution sale a lot belonging to the latter for $7,000. In consideration of $3,000 advanced for the benefit of W's wife by S, her brother, and four notes for $3,000 each, signed by W and his wife, secured by reconveyance in trust, M, in pursuance of a previous agreement with the attorney of S, conveyed the land to W's wife. W and his wife conveyed the equity of redemption to S by deed absolute upon its face to secure the payment of the $3,000 advanced: *Held,* that the transaction was not fraudulent in law, nor did the admitted facts raise a presumption of fraud; but it was proper for the court to leave the jury to determine, upon consideration of all the evidence, whether the purchase was made for the husband in the wife's name in order to evade the payment of his debts, and whether she participated in the fraud, or she or her agent had notice of a fraudulent purpose or combination to defraud the husband's creditors.

2. When M, S, and W and wife subsequently joined in conveying to a purchaser, who paid a price more than sufficient to discharge the whole lien of $15,000 held by M and S, if there was no intent to defraud in the first purchase participated in by her, the profit realized by the sale might be invested in making the first payment for a second lot, for which a reconveyance was taken in the wife's name, but a conveyance was immediately executed by her and her husband to secure the notes given by them for deferred payments.

3. Though the wife cannot bind herself by contract for the purchase-money, and though she may have no separate estate, or may not bind what she has for its payment, still, if the vendor will take the risk of selling to her on a credit, neither the husband nor his creditor will be allowed to question the validity of a bond for title or deed made to her in good faith.

4. Where a married woman, not being a free trader, carries on the business of manufacturing on her own property, she may employ the husband as

her agent to manage the business, and the fact that she employs him raises no presumption of a purpose to defraud his creditors; but it is competent, in trying an issue of fraud, to show his manner of conducting the business.

5. While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including even a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for service rendered to any person with the understanding that it was gratuitous.

6. Where many circumstances were shown tending to prove that conveyances were made to the wife to evade the payment of a certain debt due from the husband, it was competent for him to show in rebuttal that he had voluntarily allowed the judgment in favor of that creditor to be renewed after it was barred by the statute of limitations.

7. Where such creditor testified that he was informed by the debtor, in 1871, that he conducted the business in his wife's name to prevent his creditors from hampering him, the creditor acknowledged that he then had notice of the fraud, and where suit was brought and judgment rendered against the debtor alone in 1874, and under a supplementary proceeding begun soon after, though the receiver had power to bring an action in 1886 against husband and wife to have her declared a trustee, and to recover the land conveyed to her, with rents, and for specific articles of personal property alleged to have been bought with the husband's funds, or on his credit, such action, both for the equitable relief and the recovery of rents and specific personal property was barred in three years after he had notice of the fraud, according to his own testimony, as against the wife, who was a party only to the action brought by the receiver.

8. If the action had not been barred by the provisions of subsections 4 and 9 of section 155 of The Code, it would have been barred under the general section 158, and it was not error to tell the jury that the action was barred in three years, or in ten years.

9. Where execution was issued on another judgment and levied on the husband's interest in a gold mine for which he had paid $13,000, and the wife bought for $5 at the sheriff's sale, but it appeared that the judgment, as well as the debts of some other creditors, had been subsequently discharged in full: *Held*, that mere inadequacy of price was not sufficient to raise a presumption of fraud, but the inadequacy of the price and the subsequent payment of the debt might be considered by the jury as suspicious circumstances tending to establish the fraud.

10. While there is a presumption that a deed from a husband who is embarrassed with debt, conveying land to his wife is fraudulent, yet a deed from the sheriff, or any other person, to her is presumed to be made in good faith, and the burden is on any one alleging the contrary to prove it.

11. Where the judge invited argument in the presence of the jury, when the plaintiff rested, as to whether he had made a *prima facie* case, and when he directed the defendants to proceed in the development of their case, and told the jury then, and subsequently charged them, that they must

not be influenced in favor of defendants by his inviting argument, nor against them by his order to proceed with the introduction of their testimony: *Held*, not to be error.

12. Where the jury came into court on Saturday of the first week of the term and announced that they could not agree as to the facts, it was not error for the judge to say that there were two more weeks of the term, and he would give them plenty of time to consider, and then to direct the sheriff to provide comfortable accommodations for them.

(652) ACTION brought by the receiver appointed in a supplementary proceeding, under the order of the court to have the *feme* defendant declared a trustee as to some property, and to recover specifically other property, which it was alleged had been purchased with the funds of or on the credit of the male defendant, her husband, and tried (653) at September Term, 1889, of MECKLENBURG, before *Clark, J.*

In 1869 The Rock Island Manufacturing Company became indebted to Coates Bros. in the sum of $24,806.78, for which said company gave several notes, with the defendant John Wilkes as surety. Judgment was rendered in the Superior Court of Rowan County in favor of Coates Bros. against said John Wilkes, at April Term, 1874, of said court, and supplementary proceedings were begun on the 7th of the following September. During the same month Wilkes was examined, after which there was a suspension of active proceedings until he was again ordered before the clerk and examined in December, 1883. A (654) number of other witnesses were also examined between that time and 17 September, 1885, when the plaintiff was appointed receiver.

The plaintiff brought this action in the Superior Court of Mecklenburg County. In his complaint he alleges three causes of action:

1. That defendant Jane Wilkes unlawfully and fraudulently withholds the possession of the property described in the second section of the complaint, because the plaintiff is receiver and said property is liable to the Coates Bros. judgment. The plaintiff demands judgment for possession and damages for detention.

2. That the Alexander property was purchased by Jane Wilkes with the money and credit of John Wilkes, by a scheme or plan contrived to defraud the creditors of John Wilkes. The plaintiff demands judgment for a surrender of this property and damages for use and occupation.

3. That the Capps Mine is subject to the lien of said judgment, and the title thereof is in John Wilkes individually, or as partner of Jane Wilkes, and that Jane Wilkes claims said property because her money paid therefor. Plaintiff alleges that she had no claim to it, and demands judgment for the possession and damages.

The defendants positively deny all allegations of fraud, and aver that the property described in the complaint is the property of Jane Wilkes, and not in any way liable to the payment of the debts of John Wilkes. They further allege that the plaintiff's cause of action, if he has any, is barred by the statute of limitations. The first two allegations of fraud were treated as one, by agreement of the parties, and are known as the first cause of action, and that relating to the Capps Mine as the second cause of action.

It was in evidence that a certain lot in the city of Charlotte, known as the "Navy Yard," was sold under execution against the defendant John Wilkes, and bought by R. Y. McAden for the First National Bank of Charlotte, to which Wilkes owed a debt of about $15,000. (655)

The brothers and sisters of the *feme* defendant were residents of the State of New York, where she had a separate estate invested by trustees under marriage settlement. They subscribed or loaned $3,000 to be used for her benefit by her brother Adolphus Smedburg. He, through Mr. J. H. Wilson, an attorney, effected an arrangement, whereby in consideration of the payment to said bank of the $3,000 and the execution by Wilkes and his wife of several notes falling due annually for the remaining $12,000, the said "Navy Yard" property was conveyed to Mrs. Jane R. Wilkes and immediately reconveyed by her and her husband by mortgage deed to secure the payment of the notes as they should fall due. The equity of redemption was conveyed by Wilkes and wife to Smedburg as a security for the $3,000. The "Navy Yard" property was subsequently sold at a profit, and out of proceeds of sale the deeds to the bank and to Smedburg were discharged, leaving a balance in the hands of Mrs. Wilkes, a part of which was subsequently used in making the cash payment for a lot or tract of land in Charlotte, on which are located her dwelling house and the Mecklenburg Foundry, and a portion of the profits were used for the purchase of machinery, etc., used in said foundry. The said lot was sold to her by S. B. Alexander for $9,000. She paid out of her profits $1,000 and she and her husband gave notes for $8,000, the balance of the purchase-money, taking title to herself but immediately joining her husband in a reconveyance to secure payment of notes for purchase-money. She has not paid all of the purchase-money yet. The foundry has been managed by the defendant John Wilkes for her since the year 1871, and she has realized a handsome profit. He draws checks and attends to the management; she allows him a support for himself and family out of the profits of the business.

The plaintiff offered circumstantial testimony tending to show that the purchase was made in the name of the wife, but really for the benefit of her husband, in order that it might be protected (656)

from the husband's creditors. The depositions of one of the plaintiffs, and that of one Frank W. Hall, were read in evidence, both deposing that John Wilkes told them that he conducted the business in his wife's name to save himself from annoyance by his creditors.

John Wilkes, McAden, Alexander and others testified to circumstances tending to show that the purchase and sale of the "Navy Yard," and the subsequent purchase from Alexander, were made in good faith for the *feme* defendant.

It was in evidence for the plaintiffs that, after the defendant John Wilkes had expended many thousands of dollars for an interest in the Capps Gold Mine, including the land and valuable machinery erected thereon, his interest was sold at execution sale to satisfy an execution issued on a judgment in favor of one J. C. Burroughs, and bought by the *feme* defendant for $5. Burroughs also testified that, after the sale, the whole of his judgment was paid.

John Wilkes testified that he had been permitted by his wife to pay off a number of old debts which he owed. He denied making the alleged statement to the plaintiff Coates, or the witness Hall. He testified also that more than $8,000 of his wife's separate funds, held by trustees for her, had been invested in the machinery, etc., at the foundry. He further testified that he had made no arrangement, either with the bank, McAden, or the sheriff, in reference to the sale or purchase of the "Navy Yard" property, and also to the good faith of the parties in the purchase of the Capps Mine.

One of many circumstances offered for plaintiffs was the fact that for nine years the business of Mecklenburg Foundry was advertised in the name of "John Wilkes, proprietor."

The following issues were submitted, without objection:

1. Was there any arrangement, agreement or understanding (657) between the defendants John Wilkes or Jane Wilkes and the First National Bank of Charlotte by which the property conveyed to the bank by the sheriff under the execution sale of 23 May, 1870, was thereupon conveyed to defendant Jane R. Wilkes, for the purpose of preserving the property and business of John Wilkes and hindering, delaying or defrauding his creditors? Ans.: "No."

2. Was the property conveyed to Mrs. Wilkes by the bank for $15,000 paid for out of the proceeds of sale thereof to Matthews in whole or in part, and if in part, how much of said proceeds were so used? Ans.: "In part, $12,000 and interest."

3. Were the lots conveyed to the defendant Jane R. Wilkes by S. B. Alexander, trustee, and the machinery, tools and appliances made for and used in the foundry and shops purchased with the money and credit

of John Wilkes, and was the title to said lots procured to be made to his wife for the purpose of defrauding his creditors of their just debts, and especially Coates Bros.? Ans.: "No."

4. Is the plaintiff in this action entitled to the possession of the property known as the Capps Mine or any interest therein as the property of John Wilkes, defendant? Ans.: "No."

5. Is the plaintiff's first cause of action barred by the statute of limitations? Ans.: "Yes."

6. Is the plaintiff's second cause of action barred by the statute of limitations? Ans.: "No."

The plaintiff requested the court to instruct the jury—

1. That if the property in dispute was purchased from Alexander for the consideration of $9,000, $1,000 in cash, and the balance upon credit, for the payment of which Wilkes and wife executed their notes and mortgage upon the same for the payment of the notes, as set forth in the mortgage, and only $1,000 has since been paid thereon, and there is still due of the purchase-money over *eight thousand dollars*, then the consideration of the contract of purchase did not move from Mrs. (658) Wilkes, she has acquired no sole and separate interest therein as to the unpaid purchase-money, and the property is subject to the claims of the creditors of the husband, encumbered by the amount of the purchase-money yet due. This instruction was refused.

2. The defendants, both in their answer to paragraph six (of answer) having admitted and averred that they invested the surplus after paying off the bank debt in the purchase of the Alexander property, now occupied by them as the Mecklenburg Iron Works, cannot be permitted to prove the contrary, and issue third must be found for the plaintiff. The court refused to give this instruction.

3. That even according to the evidence of Mr. Wilkes on the trial a part of said surplus did go in part payment of the purchase-money of said property. The court gave this instruction.

4. That according to the evidence of Mr. Wilkes he was the agent of Mrs. Wilkes, and gave the operations of the iron works his exclusive attention and labors and large accumulations resulted therefrom, which were applied in enlarging the building, increasing the machinery and plant, supporting the household to the extent of $5,000 per annum and adding to the value of the iron works to the amount of $35,000; such accumulations did not become the separate property of the *feme* defendant, but inured to the benefit of John Wilkes, and the third issue must be found for the plaintiff. The court refused to give this instruction.

5. That if any of the earnings of John Wilkes went to pay for the property conveyed to Mrs. Wilkes by Alexander, they will find for the plaintiff on issue three [to the extent of said earnings]. Given by the court as modified in brackets.

6. That if any residue or balance arising out of the sale by Mrs. Wilkes and the Smedburgs to Matthews went to pay any part of
(659) the purchase-money to Alexander they will find for the plaintiff on issue three. The court refused to give this instruction.

7. That a separate estate in a married woman must be proved by the instrument making it, and that there is no evidence here of any separate estate belonging to Mrs. Wilkes, defendant, sufficient to have a credit upon in the purchase of lands, and no evidence has been adduced showing that any charge upon such estate, if it existed, could attach to the transactions set up in the answer. The court refused to give this instruction.

8. "A badge of fraud is a fact or circumstance calculated to throw suspicion on a transaction and requiring explanation." (This instruction was given.) If, therefore, there are any circumstances connected with the sale of the "Navy Yard" property on 23 May, 1870, calculated to throw suspicion on that transaction and which circumstances have not been satisfactorily explained by the defendants, the jury should answer the first issue "Yes." The court refused to give this instruction.

9. Fraud may be inferred from facts and circumstances tending to establish it, and less proof is required to establish fraud between husband and wife than between strangers. This instruction was given.

10. That stronger proof is required of parties claiming the benefit of transactions between husband and wife than from parties claiming benefit of transactions between strangers. This instruction was given.

11. The presumption is that the wife purchased with funds of the husband. Refused. Transfer of property from the husband to the wife is regarded with suspicion. Given.

12. Conversations of parties charged with fraud are admitted to prove the fraud. If there was any arrangement between the bank on the one hand, and either of the defendants, or any one of them, on the other, that the property should be bid in by the bank and conveyed to
(660) Mrs. Wilkes, the answer to the first issue should be "Yes." Given.

13. If Wilkes has devoted his industry, his knowledge of the business, his skill in its management, his name and credit to the accumulation of property to be held by his wife for the use of himself and family, to the exclusion of his creditors, the jury ought to answer issue third "Yes." [But not if he was merely acting *bona fide* as agent for his wife.] Given as modified, modification shown in brackets.

14. To make the execution sale fraudulent, it is not necessary that the sheriff should be a party to the agreement that the property shall (should) be bid in or held for the benefit of the judgment debtor. *Dobson v. Erwin,* 18 N. C., 569. Given.

15. If there was any arrangement between the bank and either John or Jane Wilkes to bring about the sale under execution so as to divest John Wilkes of the title and vest it in Mrs. Wilkes, and the effect of the transaction was to hinder and delay creditors, the law will regard such transactions fraudulent, though it may have been the intent of the parties to so hinder, delay, etc. Given as a supplement to prayer No. 1 of defendants.

DEFENDANTS' PRAYERS FOR INSTRUCTION.

1. As a general rule (amendment)in order to find that any of the transactions which are alleged to have been fraudulent were fraudulent as to the creditors of the defendant, John Wilkes, the jury must first be satisfied by a preponderance of the evidence that the transactions were not only such as, in their effect, might delay or hinder creditors, but that they were conceived and carried on with the actual intent to hinder, delay and defraud creditors [subject, however, to the proviso, that if it was a combination and arrangement to do that act, etc.]. Given as amended, amendments in brackets.

2. That the jury, in order to find that any of said transactions (661) were fraudulent, must also find that Jane R. Wilkes participated in said intent and purpose [or bought with notice thereof, either in person or through her husband, acting for her]. Given, as amended in brackets.

3. That if the creditors, Coates Bros., discovered the alleged fraud more than three years prior to the commencement of this action, the first cause of action is barred by the statute of limitations. Given.

4. That if more than three years prior to the commencement of this action they had knowledge of facts and circumstances calculated to put a prudent man on inquiry, which if prosecuted would have disclosed the alleged fraud, then the law presumes a discovery of the alleged fraud at said time, and the first cause of action would be barred. Given.

5. That if said discovery was made more than ten years before this action was commenced, the first cause of action is barred. Given.

6. Repeat the fourth prayer as to the ten-year limitation. Given.

7. That if the jury should find that any of the personal property, estate or credit of John Wilkes was invested in the property described in the first cause of action, yet, if after said investment, more than three years elapsed before the commencement of this action, plaintiff is barred. Refused.

8. That if more than ten years elapsed under the facts and circumstances detailed in the seventh prayer, the plaintiff is barred. Refused.

9. That if the jury believe the evidence, the plaintiff's second cause of action is barred by the statute of limitations. Refused.

10. That if more than ten years elapsed after Coates Bros. obtained their judgment, and before this action was commenced, the plaintiff's first cause of action is barred by the statute of limitations. Given.

11. That if more than ten years elapsed after Coates Bros. (662) obtained their judgment, and before this action was commenced, the plaintiff's second cause of action is barred by the statute of limitations. Refused.

The court, in addition to special instructions given, charged the jury, in substance, as follows:

"It is the duty of the jury to weigh the testimony, etc., to remember if the court omits or misrecites any. The court expresses no opinion on the facts, and the jury are not to draw any conclusions against the plaintiff by reason of the stoppage of the case against the defendant, nor against the defendant for requiring it to go on.

"The jury are not to consider that argument of counsel as to the effect of verdict on the present condition of the Mecklenburg Iron Works. The court did not stop counsel in that argument, but now cautions the jury that they are not to consider that, nor the effect of their verdict upon any one, but only to find the truth of the facts submitted to them on the issues.

"On the first issue the plaintiff claims that the sale of the foundry property on 23 May, 1870, was fraudulent, and as grounds for this contention offers evidence that sale was postponed from 7 May to 23 May; no readvertisement of property was made. John Wilkes was insolvent. The bank sold to his wife and took mortgage back.

"The books of the foundry went on without change.

"The admission of John Wilkes to Coates and to Hall that he had put the property in his wife's name, etc., as testified by them. On the other hand, the defendants say the postponement of the sale to 20 May was from inadvertence, and they don't know whether readvertised or not. They admit that Wilkes was insolvent, but deny, on the testimony of McAden and Wilkes himself, that there was any arrangement by which the property was to be sold to Mrs. Wilkes and a mortgage taken back for the purchase-money; that the sale was made in good faith, (663) and not for the purpose of defrauding creditors, and refer to the fact that afterwards the plaintiff's claim became barred by the statute of limitations and Wilkes renewed the debt by written acknowledgment.

"When the purchaser of the husband's property is his wife, the law looks through all disguises, and if the jury find on going to the bottom

of the matter that it was an arrangement, no matter how arranged, they should answer the first issue 'Yes'; otherwise, 'No.' The burden is on the plaintiff to show such arrangement by preponderance, etc.

"The plaintiff claims on the second issue that the property conveyed to Mrs. Wilkes by the bank for $15,000 was paid for entirely out of the proceeds of the sale to Matthews; on the other hand, the defendants say that only $12,000 of the purchase-money and interest was paid out of the proceeds of that sale.

"On this point it is the duty of the jury to sift and weigh the testimony, and say whether in whole or in part, and if in part, how much of said proceeds were so used."

On third issue same charge was submitted substantially as on the first issue, except that the evidence raised a presumption of fraud in the purchase.

On fourth issue: "If the property known as the Capps Mine was bought by Mrs. Wilkes by an arrangement, contrivance, etc., and $13,000 worth of property was bought for $5, the sale would be fraudulent—the jury are to consider it in his wife, etc.—but if the sale was *bona fide,* and if it was not with consent of husband, etc., it is a good sale.

"The law views with suspicion the dealings of husband and wife, and the gross inadequacy of price, if bought with Wilkes' money, or by any contrivance, or if sold with intent to hinder and delay his creditors, and Mrs. Wilkes participated in such intent, or had notice of it, the sale was fraudulent, and you will answer the fourth issue 'Yes'; otherwise, 'No'."

The plaintiff excepted to the court's refusal to instruct the jury as requested by plaintiff, and to his instructing them as requested (664) by defendant, and to the charge as given.

In the trial of the cause all that part of the complaint which spoke of the Mecklenburg Iron Works was, by consent, treated as the plaintiff's first cause of action, and all that part relating to the Capps Mine, as a second cause of action.

After verdict, plaintiff moved for judgment, notwithstanding the verdict, upon the grounds—

1. That the evidence as to the sale of the Capps Mine property under execution to Jane R. Wilkes was sufficient to raise a presumption of fraud, and that there was no evidence in the case to rebut such presumption.

2. That the evidence showed clearly that the defendant, John Wilkes, had at least an interest in all the property in controversy, by reason of his services and skill in operating the foundry and shops, from the earnings of which all the money which had gone to pay for the said property had been derived, and that his creditors were entitled to the benefit thereof upon a proper accounting.

3. That the evidence showed that the Mecklenburg Iron Works, as well as the old "Navy Yard" property, had been bought by Mrs. Wilkes largely on credit, and that, being a married woman and not a free trader at the time of such purchase, there being no evidence that the purchase was made on the faith of her separate estate, or that her separate property was charged therewith, such purchase inured to the benefit of her husband's creditors.

This motion was refused, and the plaintiff excepted.

Plaintiff then moved for a new trial upon the same grounds as set out in the motion for a judgment notwithstanding the verdict, and upon the additional grounds—

1. That the court intimated an opinion that the plaintiff had failed to make out a case when he rested.

2. Because of the court's language to the jury when the jury (665) announced that they could not agree.

3. For failure to give the instructions asked for by the plaintiff, and for improper instructions given at request of counsel for defendant, and for error in the charge.

The motion was refused and the plaintiff excepted.

There was judgment for defendants, from which plaintiff appealed.

B. C. Potts, G. F. Bason and W. P. Bynum for plaintiff.

A. Burwell, P. D. Walker, H. C. Jones and C. W. Tillett for defendants.

AVERY, J. When the plaintiff rested upon the supposition that the testimony offered by him was sufficient to be submitted to the jury as *prima facie* evidence of his right to recover, the judge asked counsel in the presence of jury, in effect, whether they did not think that the defendant might safely demur, and required both parties to give him the benefit of their views upon the question of law thus propounded. *Wittkowsky v. Wasson,* 71 N. C., 451; *S. v. Brown,* 100 N. C., 519. After hearing the argument, the court directed the defendants to proceed, and told the jury then, as they were subsequently cautioned in the charge, to bear in mind the fact that the court had no right to intimate, and had not, in fact, intimated, an opinion in favor of the defendants by requiring argument, or against them by requiring them subsequently to develop their defense. The plaintiff had promptly objected, and excepted, when the inquiry was first addressed to his counsel.

The statute (The Code, sec. 413) prohibits the judge who presides at the trial from expressing an opinion "in giving a charge to the jury, either in a civil or a criminal action," that a fact has or has not (666) been fully proven. Neither the letter nor the spirit of the law

was violated. The jury were cautioned after the argument, and warned subsequently in the instructions given them, that they must draw no inference prejudicial to either of the parties from the request for an argument on the one hand, or the order made at its conclusion on the other. There was no good ground for complaint on the part of either. *S. v. Chastain,* 104 N. C., 904; *McCurry v. McCurry,* 82 N. C., 296.

"This cause was given to the jury about 12 o'clock on Saturday of the first week of the term; about 5 o'clock p. m., of the same day they came into court and stated to his Honor that they were unable to agree. He inquired whether they wished instructions upon any matter of law, and stated that he would be glad to give them special instructions upon any point of law about which they were in doubt, but if they were differing as to matters of fact in the case he could not help them. They responded that they were differing as to matters of fact, but thought it was utterly impossible for them to agree. The court remarked that there were two weeks more of the court, and as it was important to the parties that the jury should agree, he could give them plenty of time to consider the case. Upon further discussion and consideration of the case, he thought they would be able to agree upon a just and proper verdict, and notified the sheriff to provide them with comfortable quarters, and to keep them together in charge of an officer. They were accordingly kept at a hotel in charge of an officer until Tuesday evening following, when they rendered the verdict recorded. No exception was taken to the remark of the court until after the verdict."

The law anticipates a verdict in every case after the jury have had a reasonable time for consideration. *S. v. Ephriam,* 19 N. C., 171. The judge had the power to discharge the jury in accordance with their request, or in the exercise of a sound discretion to detain them till the end of the term. It is not error to tell them what the law pro- (667) vided in reference to their detention, and direct that they should be taken to comfortable quarters for further consideration and discussion of the issues in reference to which they had not agreed. *Hannon v. Grizzard,* 89 N. C., 115.

The jury, selected by the county commissioners on account of their high character, are supposed to have sufficient intelligence to understand the extent of the judge's power, and to have such conceptions of their own duty that they will not be driven to return a hasty and unjust verdict for fear of being kept in comfortable quarters, but separated from their families, for a few days or for two wekes, if they could not sooner concur as to their findings. If the typical jurors chosen under our law are so wanting in intelligence and virtue that they can be swerved from the line of rectitude by such considerations, then we should so reform our system as to insure the selection of men who are guided by principle, and thus bring our practice and theory into harmony.

The remark of the judge did not constitute sufficient ground for exception, if objection had been made in apt time. If the tendency of telling the jury the extent of the authority vested in the court was to induce them to agree, neither party could say in advance that it was calculated to foreshow or indicate the particular conclusion which it would be proper for them to reach. It is unreasonable to entertain this objection, made for the first time after verdict, if, from the nature of the case, it would have been available as a ground of exception at an earlier stage of the proceeding.

It is settled law in North Carolina that our statutes (chapter 47 of The Code) impose no limit upon the "wife's power to acquire property by contracting with her husband or any other person, but only operate to restrain her from, or protect her in, disposing of property already acquired by her." *Battle v. Mayo,* 102 N. C., 439; *Stephenson v. Felton,* 106 N. C., 121; *George v. High,* 85 N. C., 99; *Dula v. Young,* 70
(668) N. C., 450; *Kirkman v. Bank,* 77 N. C., 394. The law restricts her *jus disponendi*—not her *jus acquirendi.*

Though a married woman may not be able to bind herself by a contract for the payment of the purchase-money, yet, if the vendor chooses to take the risk of collecting the debt from her, neither her husband nor his creditor will be allowed to question the validity of a bond for title or deed executed to her in good faith, or to claim profits accruing from a resale of any interest in land which she may have acquired under such agreement or conveyance. No complaint was ever made by McAden or the bank, and the purchase-money was ultimately paid and the lien upon it created by the mortgage discharged.

Where the wife has no separate estate, or where she does not bind such separate estate, as she has, to secure the payment of the purchase-money for other property bought by her on a credit, the contract, nevertheless, inures to her benefit, and she holds the property, when paid for, in her own right. 2 Bishop Married Women, sec. 80; *Burns v. McGregor,* 90 N. C., 222; *Knapp v. Smith,* 27 N. Y., 277. If, therefore, after R. Y. McAden had bought at execution sale the land of her husband, known as the "Navy Yard" property, the *feme* defendant contracted, through Smedburg, Wilson, or even through her husband, acting in good faith as her agent, for the purchase of the property in her own right, and Smedburg advanced $3,000 of the purchase-money, taking a conveyance absolute upon its face of her equity of redemption from her husband and herself to secure its repayment, while McAden, for the bank, conveyed the property to her absolutely, taking at the same time a mortgage from her and her husband to secure the residue of the purchase-money ($12,000), due in four equal annual installments, these transactions vested in her the equitable title to the land, subject, first, to the payment of the notes

for the purchase-money, with interest, and then to the amount (669) advanced by Smedburg. While her agreement to pay the purchase-money could not be enforced directly, she could, by joining her husband, make a valid conveyance of her own land, whether by an absolute deed or a mortgage. *Newhart v. Peters,* 80 N. C., 168. In this way she pledged the land as security for the payment of the residue of the purchase-money, though she did not bind herself personally.

Where land is conveyed to a married woman by a person other than her husband, every presumption is in favor of the validity of such a conveyance, as is the rule in reference to other deeds. 2 Bishop, *supra,* sec. 138. The burden of proving the deeds of both McAden and Alexander to Mrs. Jane Wilkes to be fraudulent was upon the plaintiffs. She was not required to show affirmatively that she purchased with her own money or upon her own credit. A different rule might have applied if the land had been conveyed by her husband instead of by the purchaser at execution sale. While her buying on a credit from McAden does not *per se* affect the validity of the conveyance to her, the counsel for the plaintiff had the right, which they doubtless exercised, to insist before the jury that her purchase on a credit, when her separate funds held under her marriage contract could not be invested outside of the State of New York unless in pursuance of a judicial decree of the courts of that State, was a suspicious circumstance, which with others tended to show that the husband used the wife's name with her assent to buy the property for his own benefit, and prevent his creditors from again selling it to satisfy his debts. All of the circumstances enumerated in the carefully prepared brief of plaintiff's counsel are, at most, but badges of fraud to be considered by the jury as tending to establish the purpose of the parties in the execution of the deed. The evidence as a whole was not even sufficient to raise the presumption in fact, much less in law, that the first conveyance (of 14 October, 1870) to Mrs. Wilkes (670) was fraudulent. *Brown v. Mitchell,* 102 N. C., 347; *Woodruff v. Bowles,* 104 N. C., 197; *Harding v. Long,* 103 N. C., 1; *Berry v. Hall,* 105 N. C., 154. There is no presumption arising from the testimony that she used the funds of her husband in making the purchase. The judge in his charge enumerated carefully the circumstances relied on by the plaintiff as badges of fraud, and also recapitulated the testimony offered by the defendants in explanation. There was no errer in giving or refusing instruction in relation to the first issue involving the character of the deed conveying the "Navy Yard" property to Mrs. Wilkes. The general principles already stated, if applied to the testimony bearing upon that issue, will dispose of all exceptions arising out of any view of it.

If the *feme* defendant, through her agent acting in good faith, had legal capacity to purchase, even on a credit, the "Navy Yard" property, it would follow that the fund realized as a profit from a subsequent sale of it would constitute a part of her separate estate, and she could use that fund, or $1,000 of it, in making a cash payment for the property on which the dwelling-house and foundry are now located, and the deed of Alexander to her would be presumptively valid as would be the mortgage deed executed by her and her husband, by which they reconveyed the land to Alexander to secure the payment of the residue of the purchase-money ($8,000). The same reason and the same authorities that were offered to sustain the presumptive validity of the transaction with McAden applied to the latter trade with Alexander. The consideration of $1,000 paid down did move from Mrs. Wilkes, as it constituted a part of her legitimate profit from the former sale, if her deed for the "Navy Yard" property was valid.

Neither of the deeds was fraudulent as to the *feme* defendant unless she participated in the fraud, or she or her agent had notice of a fraudulent purpose or combination to hinder, delay or defraud the
(671) creditors of her husband before she purchased. *Battle v. Mayo* and *Woodruff v. Bowles, supra.*

Without discussing them in detail, we have disposed of the exceptions to the refusal of the court to give the instructions asked, numbered, respectively, 1, 3, 6, 7, 8, 11, 15 and those relating to instructions requested by the defendants upon the same subject numbered 1 and 2. The objection urged in the plaintiff's brief, that the verdict was against the weight of the evidence, is one that is addressed entirely to the discretion of the *nisi prius* judge when made below. His refusal to grant a new trial on that ground is not reviewable, and such motions will not be entertained when made for the first time in the appellate court. *Whitehurst v. Pettipher,* 105 N. C., 40. An appeal lies only from the refusal to set aside the verdict on the ground that there was no evidence, or not in law sufficient evidence to support it.

Inadequacy of price is not of itself in any case sufficient ground for setting aside a conveyance as fraudulent, but is a suspicious circumstance to be considered in connection with other testimony tending to show fraud in procuring its execution. *Berry v. Hall, supra; Potter v. Everett,* 42 N. C., 152; Bump. on Fraud. Con., p. 36; Kerr on F. & M., 189. Mrs. Wilkes had the same right to buy her husband's land with her funds when sold at execution sale, or from a purchaser at such sale, that any other person had. If additional testimony were offered tending to show a fraudulent combination to prevent a fair competition of bidders on the part of her husband and others, in which she participated, or of which she had notice before buying, then the jury would be justi-

fied in considering the inadequacy of the price paid for the Capps Mine in connection with other badges of fraud, and with the fact that she was the wife of the debtor. Where the husband contracts to sell to the wife or convey property to her in payment of an alleged debt, or for an alleged money consideration paid by her, the burden is upon her to show the *bona fides* of the transaction. *Brown v. Mitchell,* (672) *supra.* But where she claims under a sheriff's deed and an execution sale, there is no such presumption as would arise from a direct sale and conveyance by him to her. The subsequent payment of the whole debt due the plaintiff in execution by some one, and the fact that the husband was the defendant in execution, were the circumstances relied on in connection with the inadequacy of price, to establish the alleged fraud. If these, standing alone, were sufficient to be submitted, as the judge did, to the jury to show a fraudulent combination, it will not be insisted that they are strong enough to raise such a presumption of fraud as would, without explanation, justify the court in instructing the jury to respond "Yes" to the fourth issue. We are aware that there is some apparent conflict of authorities in those cases where the property has been sold at judicial sale, as to the weight of certain evidence tending to establish fraud, but it is now settled that, since separate Courts of Equity were abolished, the judge has no right to instruct the jury as to the weight of evidence when it is not sufficient to raise a presumption of the truth of the allegation of fraud. *Berry v. Hall, supra; Ferrall v. Broadway,* 95 N. C., 551.

Under our present Code, a married woman may purchase property and carry on business on her separate account, and through her husband as agent. The fact that she employs him and supports him does not raise a presumption of fraud, though it is competent in trying the issue to show his manner of conducting the business. *Brown v. Mitchell, supra;* Abbott Tr. Ev., 171 and 172; *Rankin v. West,* 25 Mich., 195; *Kluender v. Linch,* 4 Keyes (N. Y.), 363. Her title to the property is not impaired, nor do his creditors acquire any interest in the profits because he gives his services without other compensation than an indefinite allowance applied by her permission to the payment of his expenses. *Abbey v. Deyo,* 44 N. Y., 345; *Knapp v. Smith, supra; Gage v. Douchey,* 34 N. Y., 293; *Burkley v. Wells,* 35 N. Y., 518. In *Manning v.* (673) *Manning,* 79 N. C., 293, the right of the wife to hold the husband, as her agent, to account for the rents and profits of her lands, though received by him without objection was distinctly recognized.

While creditors may subject one's choses in action, including even a claim for compensation due him for his services, under an express or implied contract, in a supplementary proceeding, they have no lien upon his skill or attainments, nor can they compel him to exact compensation

for managing his wife's property, or collect from her as on a *quantum meruit* what his services were reasonably worth. 2 Bishop, *supra,* secs. 453, 454, 299, 300. She may remunerate him by furnishing him a support. He may, if he choose, serve her without compensation. 2 Bishop, *supra,* sec. 439; *Corning v. Flower,* 24 Iowa, 584. Indeed, a creditor cannot collect from any person compensation for services rendered by his debtor with the understanding that it was gratuitous. 2 Bishop, *supra.*

We think, therefore, that there was no error in the refusal of the court to give the plaintiff's instruction numbered 4, nor in the amendments made to those numbered respectively 5 and 13. The plaintiff certainly has no just ground to complain of the charge given upon that point, and the defendants, in view of the verdict rendered, have no reason for objecting.

In the trial of issues like those submitted in our case, where so many competent circumstances are adduced as badges of fraud, it necessarily opens the door quite as wide for the introduction of evidence in rebuttal. When so much testimony had been offered for the purpose of showing an intent on the part of Wilkes and his wife to evade the payment of the debt to Coates Bros., it was competent to show in rebuttal that, with full knowledge that the judgment was barred by the statute of limitations, he had voluntarily allowed them to renew it.

(674) The *feme* defendant was not a party to the suit brought in the Superior Court of Rowan County by Coates Bros., on 20 March, 1874, and in which judgment was recovered and proceedings supplementary to execution were instituted. The affidavit, which was the basis of the supplementary proceedings, was dated 7 September, 1874. In obedience to an order dated 24 September, 1874, the defendant John Wilkes appeared before J. M. Horah, clerk of said court, during the same month and was examined. No further action was taken till 21 April, 1883, when another order was issued upon a similar affidavit, in obedience to which John Wilkes was again summoned before said clerk and examined, first on 8 May, 1883. John Wilkes again appeared, on notice, 17 December, 1883, when he and F. W. Hall and others were examined before said Horah, clerk. The deposition of George M. Coates, Jr., was taken before a commissioner of affidavits on 3 January, 1884, to be read in said proceeding. From an order of *Graves, J.,* refusing a motion to appoint a receiver upon the testimony of the witnesses examined, and to compel the defendant, John Wilkes, to produce the books of the Mecklenburg Iron Works, kept by or under the direction of John Wilkes for his wife, Mrs. Jane Wilkes, the plaintiffs appealed, and the judgment below was reversed. *Coates v. Wilkes,* 92 N. C., 376. From an order made by *Montgomery, J.,* at August Term, 1885, and subsequently amended, appointing the plaintiff Osborne receiver, and em-

powering him to bring suit, etc., and restraining Mrs. Wilkes, who was not a party, from disposing of or transferring certain property, the defendant, John Wilkes, appealed. *Coates v. Wilkes,* 94 N. C., 174. This Court declared that it was error to order that she be restrained from transferring property claimed by her, when she was not a party and had not been ordered to appear for examination, or otherwise notified of the decree, though, in other respects, the judgment of the lower court was affirmed.

Accordingly, the plaintiff, as receiver, caused the summons in (675) this action to be issued against the defendant John Wilkes and his wife on 20 August, 1886.

The exceptions to the charge given by the court at the request of the defendant, raised the question whether what was called the first cause of action, brought for the recovery of the Mecklenburg foundry property, had been barred by the lapse of time since the right of action accrued. The plaintiff in his complaint demanded judgment that the deed conveying the Mecklenburg foundry property to the defendant, Jane Wilkes, be declared void, and that she be declared a trustee of said property for the benefit of the creditors of John Wilkes, and that she be required "to surrender the said lot, buildings, machinery and all things thereunto belonging or used in said foundry and shops to the plaintiff as receiver," etc., and that she and John Wilkes be "decreed to account with the plaintiff for use and occupation, rents," etc. The case was one solely cognizable in a Court of Equity, and therefore, without regard to the amendment of 1889, the plaintiff's right to have the defendant, Jane Wilkes, declared a trustee for Coates Bros., was barred three years after the discovery of the fraud by Coates Bros., or three years after, by the exercise of reasonable diligence, they might have discovered it. The Code, sec. 155, subsec. 9; *Day v. Day,* 84 N. C., 408; *Lanning v. Comrs.,* 106 N. C., 511; *Hulburt v. Douglass,* 94 N. C., 122; *Jaffray v. Bear,* 103 N. C., 165. This action is brought with the special view of declaring Mrs. Wilkes, who was not a party to the former action or proceeding, a trustee, and therefore, to her plea of the statute of limitations, it is not sufficient to reply that this action (as in *Hughes v. Whitaker,* 84 N. C., 640) was brought in aid of the former suit. The right of action accrued as to her when the fraud was, or might, by due diligence, have been discovered. If the testimony of George N. Coates, Jr., a member of the firm of Coates Bros., be taken as true, John Wilkes told him, in the year 1871, that he conducted the business in his wife's (676) name "because his creditors would hamper him" if he conducted it otherwise. If Coates Bros. had notice that Wilkes used his wife's name in 1871 to avoid embarrassment on account of his debts, being *then* creditors, a cause of action accrued at that time in their favor. After

their right to equitable relief was barred by the lapse of time, a receiver appointed at their instance could not recover when the statute was pleaded by Mrs. Wilkes.

In so far as the action was prosecuted for the purpose of recovering from the *feme* defendant the possession of specific articles of personal property, or of compelling her to account for the use of the personal property or the rent of real property, it was clearly barred after the three years from the time when the right of action accrued. The Code, sec. 155, subsec. 4.

If the first cause of action had not been barred in three years under the subsection of section 155 of The Code as to Mrs. Wilkes, she might clearly have availed herself of the general provision (The Code, sec. 158), and, therefore, it was not error to tell the jury that the first cause of action was barred within ten years after the right to bring it accrued. The cases of *Dobson v. Erwin,* 18 N. C., 569; *Bridges v. Moye,* 45 N. C., 170, and others cited, were decided long before either of the three statutes upon which the rulings of his Honor below rested were enacted as a part of the Code of Civil Procedure in 1868. Before that time there was no limit, short of twenty years, to the right to follow the funds of a debtor fraudulently invested in the name of another, except where the statute in relation to the abandonment of an equity (Rev. Code, ch. 65, sec. 19; Laws 1826, ch. 28, sec. 2) applied.

With full and fair instruction, the jury, as it was their province to do, passed upon the good faith of the parties interested in the transactions in reference to the sale of the "Navy Yard" property and the (677) lot on which the Mecklenburg Foundry is located, as well as in the purchase of the Capps Mine. There was testimony tending to throw a cloud of suspicion over the treaties that culminated in the conveyance of each of the three tracts of land to the *feme* defendant; but this may always be expected where the wife purchased property, making little if any outlay of money, and, after placing her husband as agent in charge of it, realizes a large profit or receives an extraordinary income. There was no testimony offered by the plaintiff that raised a presumption of fraud, in either purchase, so as to shift the burden of proof to the defendants.

We have not adverted to the large number of cases cited, and for the most part decided by the Supreme Court of Pennsylvania, in which a different view is taken as to the right of married women to acquire property by purchase during coverture, and in reference to the weight of evidence bearing upon issues of fraud. We must be governed by our own Constitution and laws and by the construction given to them by this Court. The adoption of our Constitution, embodying especially

Article X, sec. 6, and the enactment immediately thereafter of chapter 47 of The Code (Laws 1868-69, ch. 122), marked a new era in our law affecting the rights of married women.

Having thus disposed of all the assignments of error that were insisted on here, we conclude that there was

No error.

DAVIS, J., did not concur.

Cited: Blake v. Blackley, 109 N. C., 264; *Orrender v. Chaffin, ib.,* 425; *Markham v. Whitehurst, ib.,* 309; *Walker v. Long, ib.,* 514; *Peeler v. Peeler, ib.,* 631; *Williams v. Johnson,* 112 N. C., 433; *Toole v. Toole, ib.,* 157; *Lloyd v. Lloyd,* 113 N. C., 190; *Bank v. Gilmer,* 116 N. C., 700; *Sydnor v. Boyd,* 119 N. C., 485; *Trust Co. v. Forbes,* 120 N. C., 361; *Davis v. Keen,* 142 N. C., 504; *Calvert v. Alvey,* 152 N. C., 613; *Eddleman v. Lentz,* 158 N. C., 73; *S. v. Burton,* 172 N. C., 944; *Guano Co. v. Colwell,* 177 N. C., 221; *S. v. Hall,* 181 N. C., 530.

(678)

CLEVELAND COTTON MILLS v. COMMISSIONERS OF CLEVELAND COUNTY.

Majority, When Act of, Valid—County and County Commissioners.

1. If an act is to be done by an incorporated body, the law, resolution, or ordinance authorizing it to be done is valid if passed by a majority of those present at a legal meeting; and when the act creating a corporation is silent on the subject, a majority of the officers or persons authorized to act constitute the legal body, and a majority of the members of the legally constituted body can exercise the powers delegated to the municipality.

2. The powers delegated to a county can, as a general rule, be exercised by the board of county commissioners or in pursuance of a resolution adopted by them; but where the action of the commissioners, as in the matters specified in subsections 1, 8, 9, 10, 11, 17, and 20 of section 117 of The Code, is subject to the "concurrence of a majority of the justices of the peace" or "the assent of a majority of the justices of the peace therein," the action of the board must be approved at a meeting of the justices convened according to law, a majority of the whole number in the county being present, by a majority of such majority constituting the organized body.

3. The words, "majority of the members-elect," or "majority of the qualified voters," are used in constitutions and laws to take the exercise of a particular power out of the general rule and make the assent of a majority of the whole number necessary.

4. Where the approval of the justices is required, it must be given in a properly constituted meeting by them as an organized body. It is not sufficient to secure the assent of even a majority of the whole number, manifested only by their signatures to a paper-writing.

5. The commissioners are not required in any case to vote or participate in the meeting of the justices.

6. The county commissioners must in all cases exercise their own judgment first, just as though their action would be final, but they cannot give effect to such action, where the statute makes the approval of the justices necessary, till the justices ratify it.

7. The agreement by the commissioners to pay each year a sum of money equal to the aggregate amount of plaintiff's tax for that year till the whole cost of the bridge should be discharged was not an unlawful appropriation of the tax devoted by law to other purposes, but simply the means of ascertaining the amount of each annual installment.

(679) ACTION tried at Fall Term, 1890, of CLEVELAND, before *Brown, J.*

The plaintiffs contracted in writing with the defendants to construct for the latter a bridge across First Broad River, in the county of Cleveland, and the latter stipulated and promised to pay the former for the same the actual cost of the bridge; the price was not otherwise specified. A majority of the justices of the peace of that county, not in session with the defendants at the time, signed a paper-writing, in which they "do by our (their) signatures ratify and confirm and concur in the above contract, made on 21 May, 1888, between the County Commissioners of Cleveland County and Cleveland Cotton Mills," etc. In the contract it is stipulated that "the payments [are] to be made in annual installments in amounts equal to the tax on its (the plaintiff's) property in this county each year, until full payment shall be made."

Afterwards, at a regular joint meeting in June, 1890, of the commissioners and justices of the peace, a quorum of the latter being present, the plaintiffs asked in writing that the justices of the peace "ratify and concur in the contract" mentioned above. A motion in this joint meeting was made to that effect, which was adopted, twenty-three justices of the peace voting for and thirteen against it. The defendants did not vote.

The plaintiffs complied fully on their part with the contract, and the defendants accepted the bridge, which cost $2,730.95. A new road was established leading across this bridge, and it and the bridge have been constantly used by the public, and there is no other way of
(680) crossing the river in the northern part of the county when the water is high.

The board of commissioners for 1888, after the completion and acceptance of the bridge, "made the first payment on said bridge, amounting

to $185.21, an amount equal to the tax on plaintiff's property in this county for that year." Between the time of this first payment and the time when, under the contract, the second payment to be made came due, a new board of county commissioners came into office, and, upon demand, they refused, and still refuse, to pay the second installment of the contract price due the plaintiffs, but, nevertheless, they exercise control over the new road which leads to and across the said bridge, and it and the road have been constantly used by the public as a highway, and the supervisors control the road.

This action is brought to recover the sum of money alleged to be due to the plaintiffs upon and by virtue of the said contract. The defendants contend that the contract sued upon is void and of no effect, because it was not made "with the concurrence of a majority of the justices of the peace" of the county, as required by the statute (The Code, sec. 707, par. 10); and, further, that it is void because it undertakes to provide in advance that a part of the regular revenues of the county coming from the plaintiffs shall be devoted to a specified purpose, etc.

The court gave judgment for the plaintiffs for the amount due, and the defendants, having excepted, appealed to this Court.

W. J. Montgomery and J. F. Schenck for plaintiffs.
J. B. Batchelor and John Devereux, Jr., for defendants.

AVERY, J. The courts of this country have generally adopted the common-law principle, that if an act is to be done by an indefinite body, the law, resolution, or ordinance authorizing it to be done is valid if passed by a majority of those present *at a legal meeting.* (681) 1 Dillon, sec. 277 (215). Where the law creating a municipal corporation is silent on the subject, the majority of the officers or persons authorized to act constitute the legal body, and a majority of the members of the legally organized body can exercise the powers delegated to the municipality. 1 Dillon, sec. 278 (216); *Hieskell v. Baltimore,* 65 Md., 125; *Bomest v. Paterson,* 48 N. J. L., 395. The same rules apply to other bodies, whether the two houses of the Legislature or other organized bodies of officers or persons to whom the Legislature has given authority.

The powers delegated to a county can, as a general rule, be exercised only by the board of county commissioners or in pursuance of a resolution adopted by them. The Code, sec. 703. The commissioners, organized and acting as a board, are the embodiment of municipal authority. In their names the county must sue and be sued. The only limitations upon their exercise of the corporate functions of the municipality is to be found in subsections 1, 8, 9, 10, 11, 17, and 20 of section 707 of The

Code. Subsection 10 provides that where the cost of building or repairing a bridge shall exceed $500, the commissioners can order the construction or repair only *"with the concurrence of a majority of the justices of the peace,"* as subsection 1 imposes the restriction that taxes shall not be levied by the board except *"with the concurrence of a majority of the justices of the peace sitting with them."*

Before the Constitution of 1868 was adopted, the justices of the peace in the several counties exercised the powers delegated to the counties by the Legislature. The justices of the peace were the judges of the Courts of Pleas and Quarter Sessions. For convenience, the various statutes specified the particular number that must sit to discharge certain judicial duties or exercise police powers of different kinds. Rev. Code, ch. 31, sec. 1. "A majority, or twelve," were required to meet (682) on the second and third days of the term of the County Court first held after the election, to take the sheriff's bond. Rev. Code, ch. 105, sec. 10. The justices of the peace, *"a majority being present,"* were required, at their first court held after the first of January of every year, to levy a tax for county purposes. Rev. Code, ch. 28, sec. 1. The justices being then the representatives of the county as a corporation, and recognized by the law as a body clothed with judicial authority and charged with administrative duties, it followed that powers delegated to them were to be exercised by a majority constituting a quorum according to the common-law rule, unless some statute prescribed that a smaller number would be sufficient or more than a majority would be required to discharge a specified official duty. After the constitutional amendments had been ratified and had taken effect (on 1 January, 1877), the Legislature, having entire control of county government, provided (The Code, sec. 716) that the justices should meet biennially on the first Monday in June, and, a majority being present, "should proceed to elect not more than five nor less than three county commissioners." The commissioners can call the justices of the peace together not oftener than once in three months. The Code, sec. 717. The justices are required, by section 719 of The Code, to fill vacancies occurring in the board of commissioners of a county. It is clear that, by implication of law, a majority of the majority of the whole number necessary to constitute a quorum may fill a vacancy in the board of commissioners and elect all of the commissioners in the biennial meeting ("a majority being present") by the express terms of the law in the same way.

In addition to the four instances already mentioned, in which the justices of the peace of several counties are required to participate in their government, we find that it is provided in subsections 11 and 20 of section 707 that the commissioners shall be clothed with (683) authority to meet the necessary expenses of the several counties,

or to sell or lease real estate belonging to the county, only with the "assent of a majority of the justices of the peace therein." We think it clear that the purpose of the General Assembly, according to the ordinary meaning of the language employed by it, was to require the concurrence of a majority of the whole number constituting a quorum, to be expressed in the usual way by a majority of those present, where the justices should ratify or express their approval of an order for the levying of taxes for county purposes, or provide for constructing bridges, involving an expenditure of more than $500, just as a majority (under chapter 28, section 1, Revised Code) levied the tax before 1868.

Under the system of county government established by the Constitution of 1868 the several justices of the peace were made each a judicial officer, with a limited jurisdiction, and those residing in each township were created a body politic for certain purposes. But there were no powers exercised by all the justices of a county as a body, and consequently no provision of law recognizing them as an organization. After the amendments had been ratified, the Legislature of 1876-77 provided (The Code, sec. 717) that they might organize at their meeting, to be held not oftener than four times a year, with the register of deeds as *ex officio* clerk, and, in the absence of a specific requirement, empowered a majority constituting a quorum to transact business. It seems probable that the General Assembly did not propose, originally, to recognize the justices in their organized capacity, except for the seven purposes mentioned, and, therefore, in intrusting them with the supervisory power to ratify or annul the action of the commissioners in five out of seven, it was deemed best to declare what number should be requisite for each purpose, though the number prescribed might amount to an affirmance of the common-law rule. It must be remembered that, unless a contrary intent is apparent from the words (684) of the statute, in each case a majority of the organized body is to constitute a quorum and express their will in the usual way. We must also note the fact that the powers to levy the taxes to build costly bridges and to erect houses of correction are exercised by the commissioners, subject to "the concurrence of a majority of the justices of the peace," while the authority to borrow money to meet the necessary county expenses, and to sell or lease the real estate of the county, is made to depend upon the "assent of a majority of the justices of the peace *therein.*" The language used in these subsections is much more restricted than that employed in the Constitution, Art. VII, sec. 7. That section provides 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 officers of the same, except for the necessary expenses thereof, *unless by a vote of the majority of*

the qualified voters therein." The language of the Constitution is very widely different from that used in any of the statutes defining the powers of justices of the peace to which we have referred. The constitutional inhibition is intended to prevent the creation of any such debts as those specified, not without the assent or concurrence of a majority (which may be expressed by an organization comprising a majority), but *unless by a vote* (actually cast) of a majority of the qualified voters therein (in the county) in favor of creating it. We think that the words, "by a vote of a majority of the qualified voters therein," as an entirety, cannot be interpreted as equivalent to "with the concurrence," or "with the assent of a majority," which can be manifested just as each house of the General Assembly is in the habit of giving the assent of the body to a law by a majority of a quorum. Cooley's Const. Lim., marg. p. 141.

(685) Where the word "majority" is used in the statute to define a quorum, as in the subsections cited, the concurrence of the majority is ascertained by the universal rule governing deliberative bodies.

Judge Cooley says: "A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended." The Constitution of Michigan provided that no act of incorporation should be passed by the Legislature unless with the assent of at least two-thirds of each house. The Supreme Court of that State held that, by the phrase mentioned, two-thirds of the legislative body, comprising a majority of the members elected and qualified, was meant. *Southworth v. R. R.*, 2 Mich., 287.

The custom has been, where the framers of constitutions have meant a majority of the whole number, to indicate the intent to take the provision of the organic law out of the general rule of construction by using the words "a majority" (or two-thirds, as the case may be) of the members elected. Sedgwick Lim., 573. The Constitution of North Carolina, Art. XIII, sec. 3, provides that no part of that instrument shall be altered "unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly." This clause received a legislative construction from the House of Representatives when an amendment was passed by the votes of 60 out of 100 present, and out of an aggregate membership of 120. House Journal 1887, pp. 530 and 707. When a case involving the construction of a similar clause in the Constitution of Missouri (*Harshmore v. Bates*, 92 U. S., 569) first came before the Supreme Court of the United States for

interpretation, upon an analysis of the language ("unless two- (686) thirds of the qualified voters of such city or town, at a regular or special election to be held therein, shall assent thereto"), it was held to require the affirmative vote of two-thirds of all the registered voters, and not to mean two-thirds of those voting. In *Cass v. Johnston,* 95 U. S., 360, the Court overruled that decision, but *Mr. Chief Justice Waite,* delivering the opinion of the Court, rested the ruling entirely upon the idea that the courts of the United States must be governed by, and conform to, the construction given by the Supreme Court of Missouri to a similar statute enacted in pursuance of the same clause in the Constitution of that State. *Justice Bradley,* in an able dissenting opinion, insisted that the clause in question had received no such judicial interpretation from the Court of Missouri, and that it was, in fact, analogous to another section of the Constitution of that State, which provided that no bill should be passed "unless by the consent of a majority of all the *members elected* to each branch of the General Assembly." In the absence of such a provision in our own Constitution, the majority of a quorum, under the general rule, is deemed sufficient, and without the addition of the word "elected." Article XIII, sec. 2, was interpreted, as we have seen, to require the affirmative vote of three-fifths of the whole (being for the particular purpose a quorum) that actually voted. In *Duke v. Brown,* 96 N. C., 130, *Chief Justice Smith* adverts to the conflicting rulings in construing even such strong language as that used in the Constitution of Missouri, and determining whether a requirement that a municipal debt could only be incurred by a vote of a majority of the voters should be interpreted to mean a majority of the qualified voters or a majority of those voting. The ruling of the Court is made to depend, in part at least, "upon the difference in the terms used" in Article VII, section 7, of our Constitution from those employed in statutes and clauses of constitutions that have received judicial construction in other courts. This Court had previously reached the conclusion, in a case decided at the same term (*Southerland v. Goldsboro,* 96 N. C., 49), that registered (687) voters only were qualified voters, and that no county, town or other municipal corporation could contract any debt, pledge its faith or loan its credit, except for necessary expenses, unless a majority of the registered votes of the municipality was actually cast in favor of creating the debt. *Riggsbee v. Durham,* 98 N. C., 81. If the language used in section 707 (10) of The Code had been "with the concurrence by their votes of a majority of the justices of the peace of the county who have been duly appointed and have qualified," it would have been analogous to that upon which the other cases turned, and would have necessitated the actual casting of an affirmative vote by a majority of

all the justices in the county who have qualified. This distinction is clearly drawn in the authorities cited and in many others that might be added, and is fully sustained by "the reason of the thing." It may lend some additional weight to this view of the subject to add that a careful review of the statutes providing a system of county government under the Constitution adopted in 1835, as collated in the Revised Code, and a comparison of them with chapter 17 of The Code will suggest the idea to any intelligent mind that the Legislature of 1876-77 (in the exercise of the power given by the constitutional amendment to provide for the government of counties) was attempting to engraft some features of the old system upon the new by giving to the justices of the peace, a majority being present and constituting a quorum, just as under the old regime, the power to supervise the levying of taxes, the creation of bonded debts, the sale of real estate belonging to the county, and the creation of large indebtedness, even, for the necessary expense of the county. The purpose evidently was, in all these cases, to return to ancient landmarks, and if the language were doubtful this apparent intent might come to our aid in interpreting it. But, following the construction given to the same and similar phrases in our courts, we find that the legislative intent in enacting section 707 (10) is
(688) manifest from the terms of the statute. We adhere, too, to the ruling in *Southerland v. Goldsboro, Duke v. Brown,* and *Riggsbee v. Durham, supra,* all of which are distinguished from that at bar, in that the language employed in Article VII, section 7, of the Constitution is clearly susceptible of no other interpretation than that it is essential to the validity of the indebtedness that an actual majority of all of the registered voters within the corporate limits should cast their votes in favor of creating it. Wherever the words used are construed to require the affirmative support of a majority of all who are qualified to act, of course, their assent must be manifested, not by remaining at home, but by actual participation in the effort to carry the measure. The distinction between this case and those cases mentioned depends, therefore, solely upon the construction of the language employed. It was not the purpose of this Court, in *Duke v. Brown, supra,* to lay down a general rule subversive of the well-established principle that a majority of a body, in the absence of some words clearly showing that a majority of all persons qualified to act as members of it was intended, is always interpreted to mean a majority of a quorum, and that a majority of the whole number authorized to participate is, in law, a quorum, in the absence of a special statutory requirement to the contrary. We think that where the phrase used is "qualified voters," it should be construed just as the courts have interpreted "members-elect."

We attach no importance to the paper signed by an actual majority of the whole number of justices of the peace of the county. The action

contemplated by the law was that of the justices of the peace in a lawfully constituted meeting as a body, as in cases where the validity of an agreement made by the governing officials of any other corporation is drawn in question. *Duke v. Markham,* 105 N. C., 131. It was not intended that the two bodies (the board of county commissioners and the justices of the county) should become merged and act jointly as one assemblage. In all of the cases mentioned where the jus- (689) tices of the peace are clothed with the supervisory power over the acts of the commissioners, it seems to be contemplated by law that the board should first exercise its judgment just as if its action would be final, but should not give effect to such action till the justices of the peace, either at a regular meeting or at one called by the commissioners according to law, should ratify and approve the order held in abeyance to await their consideration of its merits. The law (The Code, sec. 717) names the register of deeds as the secretary of these assemblages, but leaves the organization, beyond that, an open question. It would seem to be proper that, as an independent supervisory body, they should appoint their own chairman and await a report from the board of commissioners as to the preliminary action upon the matters that are subject to their approval. It is not necessary, taking the view of the subject which we have expressed, that we should discuss or decide the question whether, according to the admitted facts, the justices of the peace or the board of commissioners, or both, ratified or sanctioned the original contract by subsequent acts in such a way as to amount to a waiver of irregularities. We hold that the contract was approved by the justices of the peace sitting as an organized body in the manner required by the statute, and, therefore, the contract needed no further recognition to impart validity to it. The contract between the plaintiff and the board of commissioners involved no agreement to appropriate the tax collected to other purposes than those prescribed by law. Upon the principle, *id certum est quod certum reddi potest,* the cost of the bridge to be paid by the county was to be ascertained by keeping and rendering a careful account of the expenditure made in constructing it, while the size of the installments was to be determined by reference to the amount of tax levied on the property of the plaintiff in the county. If the (690) county should pay a sum of money to the plaintiff, and the identical fund should be used the same day to satisfy the claim of the tax collector, it would not amount to a misappropriation of the tax. There is no error. The judgment of the court below is affirmed.

MERRIMON, C. J., concurring in the judgment: The plain, express words of the statute (The Code, sec. 707, par. 10), and as well its obvious purpose, exclude and forbid the interpretation that the con-

currence of a majority of a simple quorum, or of a majority of one of the whole number of the justices of the peace of the county, shall be sufficient to make valid a contract of the board of commissioners of the county for the construction or repair of a bridge or bridges that cost exceeding $500. The words employed are, "with the concurrence of a majority of the justices of the peace." These words are significant and important. They cannot be treated as mere surplusage and meaningless, as they must be if a majority of a majority of one of the whole number is sufficient, because, if such words had not been employed, such majority would have been required and sufficient. In the absence of such words, and in the absence of all limiting words, a majority of a quorum or a majority of a simple majority would be necessary when such concurrence might be required. Such is the rule in all deliberative bodies and judicial tribunals. Then, what useful, effective purpose does the words cited of the statute serve?

That these words imply, and were intended to imply, the concurrence of a majority of the whole number of justices of the peace of the county further appears in this: The same statute (The Code, sec. 716) prescribes that the justices of the peace "shall assemble at the courthouse of their respective counties, *and a majority being present* (at the (691) time designated), shall proceed to the election of not less than three nor more than five persons, to be chosen from the body of the county, who shall be styled the board of commissioners for the county," etc. Here, in an important respect, it is plainly contemplated that a majority of a bare majority may elect. Why were the words, "a majority of the justices of the peace concurring," or like pertinent words, omitted in this connection, and employed in other important connections in the same statute? It is further provided, in paragraph 14, that "the action of the board in creating or altering townships shall not be operative until approved *by the justices of the peace* at a regular meeting." Why were these words, "a majority of the justices of the peace concurring," etc., omitted in this connection?

The Legislature was clearly advertent to distinctions and differences made as to the voice of the justices of the peace. It cannot reasonably be said that it incautiously and carelessly made such difference with no practical purpose in view.

The same statute (The Code, sec. 717) further prescribes that "for the proper discharge of their duties the justices of the peace shall meet annually with the board of commissioners on the first Monday in June, unless they shall be oftener convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months."

It is further prescribed (section 707, par. 1) that at such annual meeting "the board of commissioners is authorized, with the *concurrence of a majority of the justices of the peace* sitting with them, to levy, in like manner with the State taxes, the necessary taxes for county purposes," etc. It is further provided, in paragraph 9 of the same section, that "with the concurrence of a majority of the justices of the peace," the commissioners may "erect and repair the necessary county buildings, and to raise by taxation the moneys therefor," etc. It is further prescribed, in paragraph 11 of the same section, that the (692) commissioners shall have power "to borrow money for the necessary expenses of the county, with the *assent* of a majority of the justices of the peace therein, and not otherwise, to provide for its payment." In paragraph 17 it is provided that, "with the concurrence of a majority of the justices of the peace," the "commissioners may make provision for the erection in each county of a house of correction." It will be, hence, observed that the "concurrence of a majority of the justices of the peace" is expressly required only whenever taxes are to be levied, debts are to be contracted, and obligations incurred in and by the counties. In respect to other matters, whenever they are to coöperate with the commissioners it is only requisite that a majority of a bare majority shall concur. Thus it appears that the Legislature had a settled purpose to make distinctions and differences as indicated, the object being to secure the larger voice and more reliable judgment of the county authorities in the very important matters of levying taxes and creating county obligations to pay money. It was not intended that the county commissioners and a simple majority of a bare majority of the justices of the peace should exercise such authority. Such legislation was cautious and wise, and deemed a proper restraint upon the wild and reckless spirit of the times manifested in the creation of public debts. It is very apparent that the Legislature had in view, and followed up, the spirit and purpose of the Constitution as expressed in Article VII, section 7, which provides 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 officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." The statutory provisions above referred to requiring the concurrence or assent of a majority of the justices of the peace, simply, in effect, extended this (693) wholesale provision of the Constitution to the levying of taxes and the creation of debts for the "necessary expenses" of counties. This purpose is obvious, and hence the words of the statute, "the concurrence of a majority of the justices of the peace," should receive the same interpretation as the substantially similar words, "by a vote of the majority

of the qualified voters therein," of the constitutional provision just cited. The language of the two phraseologies, are in effect, the same, except as to the difference in their application. In the one, the language material here is, "the majority of the qualified voters"; in the other, it is the "majority of the justices of the peace." Can the reasonable mind see substantial difference? The clause of the Constitution just cited has been interpreted by this Court in numerous cases, and it is firmly settled that the "majority of the qualified voters" required by it is a majority of all the qualified voters of the county, city, town or other municipal corporation. *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown, ib.,* 127; *McDowell v. Construction Co., ib.,* 514; *Wood v. Oxford,* 97 N. C., 227; *Riggsbee v. Durham,* 98 N. C., 81, and 99 N. C., 341, and there are other cases to the same effect.

As the words of the Constitution under consideration, and the like words of the statute to be interpreted, are substantially the same, and are used for and intended to serve and subserve the same purpose, is it not reasonable, just and necessary that they must and shall receive the like interpretation? It is very difficult to see how any other conclusion can be reached. Hence the words to be interpreted of the statute, "with the concurrence of a majority of the justices of the peace," imply a majority of all the justices of the county.

I, nevertheless, concur in the judgment of affirmance, because it was clearly within the power of the county commissioners to contract (694) for the construction of the bridge mentioned, if it should cost no more than $500, and they might contract for the same for a greater sum than that mentioned, "with the concurrence of a majority of the justices of the peace" of the county. The several statutory provisions pertinent [The Code, secs. 707 (10), 2014, 2035; Acts 1887, ch. 370] fairly interpreted, imply that the county commissioners ordinarily contract on the part of the county for the construction and repair of bridges, and if the construction or repair shall cost exceeding $500, they must do so subject to the concurrence of a majority of the justices of the peace. It is not essential that such contract shall be made at a joint meeting of the county commissioners and the justices of the peace, the party with whom they contract being present—it will be sufficient if such commissioners contract inchoately with such party at one time, the contract to be afterwards concurred in by the justices of the peace at a joint meeting of themselves and the commissioners. Until such concurrence, the contract would not be complete and binding—it would remain *in fieri,* open for the concurrence or nonconcurrence of the justices of the peace. It would be very cumbersome and inconvenient for the contracting parties in such case to assemble together at a time and place prescribed by law, and agree upon the terms and details of the contract.

It is not contemplated that they shall, but it is intended that the county commissioners and the party contracted with may make the contract, subject to the simple concurrence of the justices of the peace. This is reasonable and practicable, and the statute so contemplates. If the party contracting to construct or repair the bridge should venture to construct or repair the same before such concurrence, he would do so at the hazard of his rights that might arise under the contract. Hence, the contract in question between the defendants and the plaintiffs was not void at the time the justices of the peace concurred in the same (if they did); it was until that time simply inchoate, and they might concur, (695) or refuse to concur, with the defendants, and concurring with them rendered it complete and effectual. Hence, also, the argument for the defendants, that the contract was absolutely void and therefore could not be concurred in, is without force.

I am further of opinion that the justices of the peace did concur in the contract in question. After the bridge was constructed, and after it was accepted by the defendants, they paid the first installment of the price agreed to be paid for it. Regularly, under and in pursuance of the statute [The Code, sec. 707 (1)], a majority of the justices of the peace sitting with the defendants must have concurred in levying taxes to pay such installment paid, and thus they informally, but in effect, concurred in the contract for the construction of the bridge. In the absence of allegation and evidence to the contrary it must be taken that they did. A regular formal concurrence would be better and more satisfactory, but a concurrence in such joint meeting, appearing by presumption and reasonable implication, is sufficient if nothing to the contrary appears.

It is not to be presumed that the justices of the peace at their regular joint meeting with the defendants on the first Monday in June, 1888, for the purpose of levying taxes for county purposes, including bridges, were ignorant of the bridge in question, and the county debt created on account of it, to pay part of which they presumedly made provision. On the contrary, the presumption is that they knew of it and concurred in the contract under which it arose, and hence concurred in the tax levy to pay part of it, and that, afterwards, the defendants, in the orderly course of their duties, paid that part, otherwise they would not have made such payment. Such presumption arose from the record of the procedure and pertinent action of the justices of the peace in the joint meeting of themselves and the defendants. It had and has permanency and continues until, in some proper way, the contrary shall be made to appear. The debt could not be properly and lawfully (696) provided for or paid without such concurrence. The presumption further is, that such concurrence was by a majority of the justices of

the peace, because the statute [The Code, sec. 707 (1)] requires that such majority shall concur in the tax levy.

CLARK, J. I concur with the *Chief Justice* that a vote of a majority of all the justices of the county is requisite, and that the vote of a majority of a quorum is not sufficient.

Per Curiam. Affirmed.

Cited: Bridge Co. v. Comrs., 111 N. C., 318; *Stanford v. Ellington,* 117 N. C., 163; *Bank v. Warlick,* 125 N. C., 594; *Wilmington v. Bryan,* 141 N. C., 683; *Comrs. v. Trust Co.,* 143 N. C., 115; *Rogers v. Powell,* 174 N. C., 392.

E. G. KING ET AL. V. FREDERICK RHEW.

Trusts—Husband and Wife—Statute of Limitations.

1. Where land was conveyed to a trustee and his heirs for the sole and separate use of a *feme covert,* and the husband conveyed the same by a deed in which the wife's name did not appear except in the attestation clause, and no reference was made to the trustee or the equitable estate: *Held,* that although she signed the same, it was not her deed, but that of the husband alone.
2. The limitation being to the trustee and his heirs to hold for the sole and separate enjoyment of the wife for life, and at her death to be equally divided between any children she might leave her surviving born of the marriage: *Held,* that it was necessary that the trustee should hold the fee until the vesting of the contingent interests, and the fee being in him, it was *further held,* that his estate being barred the *cestuis que trustent* were also barred.

Discussion of trust, contingent limitations and dissension by SHEPHERD, J.

ACTION tried before *Graves, J.,* at April Term, 1890, of NEW HANOVER.

The parties waived a jury trial, and agreed upon the following facts, upon which the court rendered judgment for defendant, as set out in the record:

The following facts are admitted:

That title is out of the State, and plaintiffs claim under the (697) deed made by Bryant Williams on 25 April, 1863, to R. B. Wood, trustee. Plaintiff next introduced a deed, signed by Isaac W. King and wife Charlotte, to Ann Eliza Orrell, made 4 August, 1869, and mesne conveyances from Orrell to defendant Rhew, the deed to Rhew being made to him by one Chadwick and wife on 16 September, 1880. It is also admitted that Charlotte King died 20 September, 1889, and

that the plaintiffs are the only children surviving said Charlotte, born of her intermarriage with Isaac W. King, and that the rental value of the property is $2 per month.

It is admitted that the consideration of the deed to Eliza Orrell, signed by King and wife, was a tract of land conveyed to Charlotte King by deed signed by Orrell and wife, on 4 August, 1869, which land was sold and conveyed by said King and wife to one Petteway in September, 1871. This evidence is objected to by defendant, and its competency or incompetency is to be submitted to the court and passed upon.

It is also admitted that the defendant Rhew has been in the actual and open possession of the said land since the date of deed to him, claiming adversely under said deed, and such possession was adverse to the plaintiffs, unless, in law, it was not adverse.

Upon the foregoing facts, his Honor gave judgment for the defendant, from which judgment the plaintiffs appealed.

D. L. Russell (by brief) for plaintiffs.
Junius Davis for defendant.

SHEPHERD, J. The land in question was conveyed on 25 April, 1863, to one "Robert Wood, Jr., and his heirs and assigns," in trust "for the sole and separate use, occupation and enjoyment of Charlotte King during her natural life, and at her death to be equally di- (698) vided between any children she may leave her surviving, born of her intermarriage with her present husband, share and share alike, and to be in no wise liable to be sold or taken for the debts of her said husband." Charlotte King died in 1889, and the plaintiffs are the only children born of her intermarriage with Isaac W. King, her said husband.

The said King, in 1869, conveyed the land, for a valuable consideration, to one Ann Eliza Orrell, and the defendant claims by mesne conveyance from her. Charlotte King executed the deed with her husband, but her name does not appear in it anywhere except in the attestation clause, nor does the deed refer in any way to the trust estate of Wood.

It is admitted that the defendant "has been in the actual and open possession of the said land since the date (16 September, 1880) of the deed to him (by one Chadwick) claiming adversely under said deed, and (that) such possession was adverse to the plaintiffs, unless, in law, it was not adverse."

The first question to be considered is, whether the deed executed by King and wife (the trustee being no party thereto) conveyed any interest of the wife in the said land, so that the trustee would have been prevented in equity from asserting his legal title during the nine years occupancy of the defendant.

In *Bank v. Rice,* 4 How. U. S., 241, it was said that, "in order to convey by grant, the party possessing the right must be grantor and use apt and proper words to convey to the grantee, and merely signing, sealing and acknowledging an instrument in which another person is grantor is not sufficient. The deed in question conveyed the marital interests of the husband in these lands, and nothing more."

"In the following cases the same rule is upheld as to deeds exactly similar to the one in question, where the party signed, sealed and acknowledged it, and was only named in the attestation clause;
(699) *Luffkin v. Curtis,* 13 Mass., 223; *Leavitt v. Lamprey,* 13 Pick., 382; *Greenough v. Turner,* 11 Gray, 332; *Stevens v. Owens,* 25 Maine, 94; *Cox v. Wells,* 7 Blackford (Indiana), 410; *Hall v. Savage,* 4 Mason, 273; *Bruce v. Wood,* 1 Metcalf, 542; *Peirce v. Chase,* 108 Mass., 258; *Purcell v. Goshorn,* 17 Ohio, 105; *Chapman v. Crooks,* 41 Mich., 597; *Wilder v. Van Voorhis,* 15 Gray, 148; *Harper v. Gilbert,* 5 Cush., 418; *Hubbard v. Knous,* 3 Gray, 565." See also 1 Bishop Married Women, sec. 594, note; Malone Real Property, 528-703.

In *Gray v. Mathis,* 52 N. C., 502, several of the foregoing cases are cited and their doctrine clearly recognized and approved. These authorities abundantly show that Mrs. King was not a party to the deed signed by her, and that it was inefficacious to pass her estate in the said land.

Neither did her husband have any interest *jure mariti* which he could have conveyed, as the property was vested in the trustee for the "sole and separate use" of his wife. *Heathman v. Hall,* 38 N. C., 420; 2 Lewin Trusts, 753, 756; 2 Perry Trusts, 648. Even had there been no trust, he could not, under the Act of 1848 (Rev. Code, ch. 56) have conveyed his interest, unless the wife had joined in the conveyance, and this we have seen she failed to do. The deed, then, can only be regarded as that of the husband, and as he had no interest which he could have conveyed, the trustee could have maintained an action at any time against the defendant for the possession of the property. The defendant being thus exposed to an action on the part of the trustee (*Swann v. Myers,* 75 N. C., 585) and having been in the continuous possession for over seven years under his deed from Chadwick (which was color of title) and it being admitted that his possession was actually adverse, it must necessarily follow that the trustee's estate is barred. It is suggested, however, though not seriously pressed, that the possession of the defendant was permissive only; but there is no evidence of this, and we have
(700) but the naked deed of the husband and the admitted adverse possession of the defendant. Indeed, there is nothing in the case to show that Ann Eliza Orrell ever had possession of the land, nor does it appear that the defendant ever had any notice of the deed to Wood, the trustee; nor does he claim under it, nor is it part of his title. The

only evidence as to the possession is the admitted fact that Rhew has had possession since 1880, claiming adversely to all persons, and even had he actual or constructive notice of the trust, the estate which he acquired by disseizin would not be subject to it, as it is well settled that "a disseizor is not an assign of the trustee, either in the *per* or *post,* for he does not claim through or under the trustee, but holds by a wrongful title of his own, and adversely to the trust." 1 Lewin Trusts, 250; 1 Perry Trusts, 241, 346; *Benzein v. Lenoir,* 16 N. C., 225. This seems to be conceded by counsel. It is not insisted that the trustee would have been prevented from suing because of any equitable estoppel against Mrs. King; but we will remark, that although it had appeared that her husband had represented that the conveyance was in proper form, and she had simply remained silent while he received the purchase-money, she would not have been estopped. *Clayton v. Rose,* 87 N. C., 110. Neither would the consideration (other lands conveyed to her) have had this effect, whatever equitable remedy, if any, Mrs. Orrell might have had as to the land conveyed by her while it remained in the hands of Mrs. King. *Scott v. Battle,* 85 N. C., 184; *Clayton v. Rose, supra.*

The estate of the trustee being barred, it is well settled that the *cestuis que trustent* are barred also. This principle is admirably stated by *Smith, C. J.,* in *Clayton v. Cagle,* 97 N. C., 301: "The annexation of trusts to the legal estate cannot arrest the operation of the rule, which, under the circumstances ripens an imperfect into a perfect title, since during all this period the defendant was exposed to the action of the true owner"—that is, the trustee—"and his negligence in bringing it tolls his entry and bars his action. The interest of the *cestui* (701) *que trust* is, as against strangers to the deed, under the protection of the trustee, and shares the fate that befalls the legal estate by his inaction and indifference." See also *Herndon v. Pratt,* 59 N. C., 327; *Wellborn v. Finley,* 52 N. C., 233; *Clayton v. Rose* and *Swann v. Myers, supra.*

It is very earnestly insisted, however, that for the purpose of the trust it was unnecessary that the trustee should have taken any greater than a life estate, and therefore, the remaindermen should not be barred. The principle has very generally been applied in cases of devise, where it is held that there is more room for construction to ascertain and carry into effect the intention of the testator, and accordingly the estate of the trustee has in some cases been enlarged, or restricted, to conform to the purposes of the trust. The rule, however, does not seem to be recognized in this State as applicable to limitations by *deed. Evans v. King,* 56 N. C., 387. But conceding to the fullest extent, for the purposes of the discussion, that in such cases the estate of the trustee will be "abridged or cut down" to a life estate where the statute of uses would

generally execute the ulterior limitations, or, as expressed by the counsel, where the legal estate is unnecessary to subserve the purposes of the trust, we are, nevertheless, unable to see how it can avail the plaintiffs in this action. The land was purchased from a stranger for a valuable consideration, and the plain intention of the parties was that the entire legal and beneficial interest should pass out of the grantor. Although the plaintiffs may not have been in existence at the time of the execution of the conveyance, the limitation could have been made by a deed (operating under our statute of 1715 as a common law conveyance) directly to the wife for life, the inheritance during the contingency being either, as the old writers say, in abeyance or *in nubibus* (Coke Lit., 342)

or, according to *Mr. Fearne* (Cont. Rem., 361) remaining in the
(702) grantor until the ascertainment of the persons who are entitled to take.

Under such a conveyance, however, the wife's estate would have been subjected to the marital rights of the husband, and the contingent limitations over could have been defeated by the destruction of the life estate. For the purpose, therefore, of securing her in the sole and separate enjoyment of her life estate, and presumedly to more effectually preserve the particular estate until the vesting of the remainders, the entire fee was conveyed to Wood and his heirs in trust for the purposes declared. Nothing remained in the grantor, and there being a valuable consideration there could never have been a resulting trust in his favor. *Brown v. James,* 1 Atkins, 158; Perry on Trusts, 158. In whom, then, was it necessary for the fee to vest? It could not be in the wife, because she took but a life estate; and it could not go to the children, even if in existence at the execution of the deed (and this does not appear) for it is well settled that if the use is contingent, the use is not *in esse* until the happening of the contingency upon which its vesting depends, and the statute will not execute it until then. *Chudleigh's case,* 1 Rep. 126; Sanders' Uses, 110; 1 Sugden Powers, 41; 4 Kent Com., 241; 1 Cruise's Digest, 354. It will be observed that the limitation over is not to the children of Mrs. King, "provided" they survive her (in which case they would have taken a vested remainder, subject to have been divested afterwards by their death before that of their mother) but it is to "any children she may leave surviving her." During her life there could be no one to fill the description, and it is, therefore quite clear that the uses were contingent. The fee, then, having passed out of the grantor, the wife taking but a life estate, and the children having but a contingent use, which could not be executed by the statute, it must follow that until the death of Mrs. King it was necessary that it should have abided in the trustee and his heirs, and

this is precisely where it was placed by the express terms of the
(703) conveyance.

In support of this conclusion, in reference to the facts of this particular case, we reproduce the language of *Ruffin, C. J.*, in *Battle v. Petway*, 27 N. C., 576. He says: "If the trust is not for a particular person only, but is limited over for other persons for whose protection the trustee's legal estate is necessary or highly useful, it is plain that the duty of the trustee to those entitled in future requires him to retain an estate, and, therefore, the court would not decree him to convey it." In our case it was not only useful, but, as we have seen, it was absolutely necessary that the fee should have abided in the trustee until the happening of the contingencies mentioned. The legal *fee*, then, being in the trustee, and having been barred by his inaction, as well as that of the equitable life tenant, there remained no estate to feed the remainders when they vested in the plaintiffs upon the death of their mother, and they are, therefore, not entitled to recover. *Herndon v. Pratt, supra*, and the other cases cited. The case of Herndon is strongly in point for the defendant. There, in the words of the defendant's counsel, the purposes of the trust were simply and purely to preserve the estate for the benefit of the contingent limitation to Mary Herndon and the others during the life of Robert and Julia, and, according to the contention of the counsel for plaintiff, it was only necessary that the trustees should take an estate for the lives of those two, and that the statute could only run against that life estate. But the court held that the plaintiffs were barred, and they treated the question as too clear to admit of a doubt. If there had been anything in the point now raised by the counsel for plaintiffs, it certainly would not have escaped the attention of the eminent counsel who argued the case, or of the very able lawyer and distinguished jurist who delivered the opinion. Whatever opinion may be entertained by other courts, it is yet too well settled in this State to admit of argument that where the trustee is barred the *cestuis que trustent* in remainder, as well as those for life, are barred (704) also. *Herndon v. Pratt*, and *Swann v. Myers, supra.*

Under the view we have taken of the law as settled by this Court, and its application to the present case, it is hardly necessary to review the authorities cited by the plaintiffs from other States. We will remark, however, that *Ellis v. Fisher*, 65 Am. Dec., 52, related to a trust created by devise, and the same is true of the quotation from *Coulton v. Robinson*, 57 Am. Dec., 168, cited by counsel. In *Nichol v. Walworth*, 4 Denio, 385, the estate of the trustee was but for life, and the decision is explained by *Danforth, J.*, in *Bennett v. Garlock*, 79 N. Y., 302. In this latter case the doctrine as contended for by the plaintiffs was recognized as to deeds, but its application was denied because, as in the present case, it was necessary for the purposes of the trust that the trustee should take the fee. The passage cited from Perry on Trusts,

858, to the effect that the statutory bar ought not to run against the *cestuis que trustent* in remainder, is not sustained in the single case (*Parker v. Hall,* 2 Head., 641) cited in its support. The case only decides that the *cestuis que trustent* are not barred where the trustee estops himself from suing by selling the property, and thus "uniting with the purchaser in a breach of the trust." "The wrong," says the Court, "is to the *cestuis que trustent* and not to the trustee," and "he could not sue or represent them." It has never been insisted that the bar is effective against the *cestui que trust,* except in cases where the trustee could have sued, as in this case, and failed to do so.

For the reasons given, we are of the opinion that his Honor committed no error in holding that the plaintiffs were barred and could not recover.

Affirmed.

Cited: Culp v. Lee, 109 N. C., 679; *Estis v. Jackson,* 111 N. C., 150; *Erwin v. Brooks, ib.,* 360; *Overman v. Tate,* 114 N. C., 574; *Cross v. Craven,* 120 N. C., 333; *Deans v. Gay,* 132 N. C., 230; *Kirkman v. Holland,* 139 N. C., 188; *Smith v. Proctor, ib.,* 325; *Cameron v. Hicks,* 141 N. C., 32; *Cherry v. Power Co.,* 142 N. C., 410; *Webb v. Borden,* 145 N. C., 197, 201; *Sutton v. Jenkins,* 147 N. C., 17; *Featherston v. Merrimon,* 148 N. C., 207; *Carson v. Ins. Co.,* 161 N. C., 446; *Hardware Co. v. Lewis,* 173 N. C., 298.

(705)

WILLIAM GILCHRIST v. D. W. MIDDLETON.

Ejectment, Evidence in—Laches—Color of Title—Tenant by the Curtesy—Entries and Grants—Executors and Administrators.

1. Where the plaintiff offered a junior grant, issued upon a senior entry, for the purpose of showing title out of the State, and also testimony tending to show seven years continuous adverse possession under colorable title on the part of those through whom he claimed, and the defendant offered a grant of older date than that introduced by the plaintiff, issued upon a junior entry, but also offered mesne conveyances to connect himself with both the older and younger grants: *Held,* (1) that the plaintiff was not precluded from using either grant to show that the State did not controvert his title, in connection with proof of possession under colorable title by himself or those through whom he claimed; (2) that, no equities being set up in the pleadings, the older title is deemed paramount, and one who connects himself with it is considered the true owner; (3) that where two of five heirs at law, to whom the legal title had passed by conveyances and descent from the senior grantee, were *sui juris* during the seven years

when the land was occupied by B., under whom the plaintiff claims, such heirs at law, and those claiming under them, could not avoid the consequences of their *laches* in failing to sue the trespasser, by showing that during the period of such occupancy their rights to sue under the junior grant had not accrued; (4) that the junior grantee, and those claiming under him, took but a bare right to bring an action to establish their equity, and until the legal title should be conveyed to them under a decree of court the junior title was available only as color; (5) whether the husband of one to whom the junior title had passed, by purchase or descent, held as tenant by the curtesy such an interest as was, before 1 March, 1849, liable to sale under execution, *quære.*

2. Where a grant was issued in 1847, the grant was not void upon its face, as was declared in the former appeal in this case; but the enterer had a right to call for a grant even forty-six years afterwards, provided the purchase-money was paid to the State before 31 December of the second year after the entry was made.

3. The effect of the act of 1842 (chapter 35) was to revive an entry lapsed for want of payment of the purchase-money as of the date of the act, and, therefore, an entry made in 1801 would, when revived, be junior to one made in 1841.

4. A resolution passed by the General Assembly in 1847, and reciting that the purchase-money for the land entered in 1801 had been paid in 1804, would not divest any right acquired under the grant of 1842 issued upon the entry of 1841.

5. After the lapse of so many years, and without actual notice that the purchase-money for the older entry had been paid, another might innocently enter and take out a grant for the land for his own benefit.

6. The personal representative has no control over the land of a decedent till he obtains license to sell in order to make assets, but a sale by the heirs or devisee within two years after the grant of letters of administration is declared, as against the creditor or personal representative, void.

7. The provision was not intended to save the heir or devisee from the consequence of his own *laches*, or to deprive one who has been more diligent of a right acquired under section 141 of The Code.

PETITION of defendant to rehear. (706)

Burwell & Walker (by brief) for petitioner.

Frank McNeil and John D. Shaw (by brief) and George V. Strong contra.

AVERY, J. This was a petition to rehear the case argued at the February Term, 1890 (107 N. C., 663). The application to rehear was allowed only as to the holding of the court that the grant to McFarland in 1847, under an entry made in 1801, was void upon its face, and as

to such exceptions as were not considered by the court by reason of the ruling that the grant mentioned could be collaterally attacked on that ground.

The plaintiff offered a grant to Duncan McFarland, dated 13 January, 1847, issued on an entry dated 4 July, 1801. The defendant offered a grant to Duncan McLaurin, dated 31 March, 1842, issued by virtue of an entry made in 1841. It is admitted that both of these
(707) grants cover and include the land in controversy in this action.

Looking only to the older grant to McLaurin as the source of title, and leaving the junior grant out of view, it is admitted by both parties that whatever interest was acquired by the original grantee through several mesne conveyances to one John L. Fairly and descended upon his death to five children, three of whom were laboring under disability, such that the statute did not run against them during the time when J. B. Buchanan held the possession of the land in controversy, and two of whom were under no disability during that period. The plaintiff relied solely, after showing title out of the State by the McLaurin grant, upon this possession of Buchanan under a deed for the premises from one McKoy to him, dated 23 September, 1863. This alleged occupancy by Buchanan extended over the period from the date of his deed in 1863 till the year 1879, when the interest of John L. Fairly was sold by his administrator and bought by one McLaurin. McLaurin conveyed it immediately to the defendant, Middleton, who claims that Fairly could show a claim of title connecting him with both grants, being the deeds and evidence offered by the defendant.

The legal, and presumably the equitable, estate in the land passed by the older grant to McLaurin. His title could not, under the former practice, have been successfully attacked or impeached in a court of law by McFarland. The claimant under a junior grant, but senior entry, if he would avoid the older patent, was compelled to resort to a Court of Equity and allege and prove that the prior grant was obtained by the grantee therein named with knowledge of the first entry. *Plemmons v. Fore,* 37 N. C., 312; *Harris v. Ewing,* 21 N. C., 369; *Stanly v. Biddle,* 57 N. C., 383.

(708) Where controversies have originated in such conflicting claims, it has sometimes happened that the grantee under the senior grant issued on the junior entry brought an action of ejectment against the grantee in possession, claiming under the junior grant and senior entry, and the latter, being unable to set up his equity as a defense in a court of law, filed a bill in the Court of Equity, asking that the former be declared a trustee ordered to convey the legal estate, and that, pending the investigation of his claim for such relief, the plaintiff, in the action of ejectment, should be enjoined from further proceedings. In other

instances the junior grantee was evicted, and subsequently filed his bill. If in such suit the plaintiff succeeded in proving that the defendant had either actual or constructive notice of the older entry when he took out his grant, and that the older entry covered the same land embraced in it, then the court would declare the defendant a trustee for the plaintiff and compel him to convey the legal title. But the burden was upon the claimant under the junior grant, then, as it is now, to establish this fraud in a direct proceeding, in which it must be distinctly alleged. *Currie v. Gibson,* 57 N. C., 25; *Munroe v. McCormick,* 41 N. C., 85; *Allen v. Gilreath, ib.,* 252. As there is no evidence to show that McLaurin was ever declared a trustee and required to convey the legal title, the grant to McFarland could, in the most favorable view, be made available only as colorable title where continuous adverse possession was shown in those claiming under it for the statutory period. If it be conceded that the junior grant was valid upon its face, the only actual poseession of which there appears to have been any evidence was that of Buchanan, the benefit of which inured to the plaintiff, if to any one, the title having been traced from Buchanan by mesne conveyances to the plaintiff, as is admitted. Buchanan occupied under the deed from McKoy to him, which covered the land in dispute, and which the judge properly told the jury was colorable title.

It was not error, in any aspect of the testimony, to instruct (709) the jury that if they should find that Buchanan held continuous adverse possession of the *locus in quo* for seven years, exclusive of the period when the statute of limitations was suspended (from 20 May, 1861, to 1 January, 1870), the plaintiff was entitled to recover.

The older grant is, in a strictly legal as distinguished from an equitable proceeding, paramount as evidence of title, and if it did convey the title out of the State, it is admitted by the plaintiff that such estate as passed by it was transmitted by mesne conveyances to John L. Fairly, and, on his death, descended to his five children. The plaintiff claims that he is entitled to recover two undivided fifths, and concedes the defendant's right to three undivided fifths which descended to the three children of Fairly, who were under disability, passed by the administrator's deed to McLaurin, and was conveyed by McLaurin to the defendant.

Only such interest as was acquired by the junior grantee, McFarland, descended to his heirs at law, and was transmitted by the mesne conveyances offered, if all of them had been admitted to be valid, to the defendant. If McFarland's grant was available only as color of title in a court of law, as against the old title, and gave him only a right of action in equity, those holding under him could acquire nothing more through a chain of conveyances and descents.

Let us suppose, for the sake of argument, that John G. Pearson became the husband of McFarland's daughter, to whom whatever title McFarland held under that grant descended before 1 March, 1849, and that John G. Pearson's interest as tenant by the curtesy was regularly levied upon and sold by Buchanan, sheriff of Richmond County, and conveyed to McCall, to whom the defendant traced his title. The defendant would thereby have shown a better title than that of plaintiff derived through the deed from McKoy to Buchanan, and the possession of the latter under it. The plaintiff had not attempted to connect
(710) himself by mesne conveyances with either of the grants. He offered the younger grant to show title out of the State simply, and when the defendant introduced the senior grant he was not precluded from saying that he did not dispute the fact that the title passed by the last mentioned grant, but, if it did, still the possession upon which he relied would vest the title in him as to two undivided fifths of the land. The Code, sec. 141. But while it appears that the wife of Pearson died before April, 1852, leaving a son, who died in February, 1872, the date of the marriage is not given in the statement of the case. We infer that he was married after 1 March, 1849, and if so, the sheriff's deed was void, and there would have been no error in the instruction in reference to it if the title had actually been in his wife. *Avent v. Arrington,* 105 N. C., 393; Rev. Code, ch. 56, sec. 1.

It is manifest that in any aspect of the evidence the right of the plaintiff to recover two undivided fifths of the land in dispute depended upon the question whether he had shown continuous adverse possession under color of title on the part of Buchanan, through whom he claimed. The deed from McKoy to Buchanan was color of title, and the fact that the right of the heirs of Fairly, and those claiming under them, to bring an action, relying on the McFarland grant to establish title, did not accrue till Pearson died, in 1883, would not interfere with the right which the two heirs, who were *sui juris,* had on 1 January, 1870, and for seven years thereafter, to evict Buchanan under the *prima facie* title shown by the defendant in this action by means of a series of mesne conveyances connecting him with the older grant to McLaurin. Having shown that the two heirs of Fairly had a right to recover under that title, the defendant cannot avoid the consequences of their *laches* by saying that they could not then establish their right in equity to have the junior grant declared superior to the senior grant because of a
(711) fraud, which is neither alleged nor proven, practiced by McLaurin upon McFarland. If the plaintiff had exhibited a chain of title connecting himself with the McLaurin grant, such as the defendant has offered, instead of relying on proof of possession under color of title, the defendant would not in that event have been permitted, after

setting up a strictly legal defense by denying the plaintiff's title, and that his possession was tortious, to nonsuit the plaintiff because the two heirs of Fairly could not, during Buchanan's occupancy, have instituted a suit in the nature of a bill in equity, and have tested their ability to discover and adduce such proof of fraud on the part of McLaurin as would have converted him into a trustee for McFarland.

But the defendant traces his claim under both grants through Ferdinand McLeod. The testimony offered by the defendant shows that Duncan McCall, the purchaser of Pearson's interest as life tenant under the junior grant, conveyed it to Ferdinand McLeod on 24 September, 1857, and that on the same day Duncan McLaurin, the grantee named in the senior grant, also conveyed all of his interest held under it to said McLeod, who subsequently, on 16 April, 1858, conveyed all of the title and interest acquired by the merger of the two interests to John L. Fairly. The defendant also exhibited a series of mesne conveyances, showing a chain of title connecting him with a deed from John G. Pearson to Addison Stevens, executed on 17 April, 1875, after he had inherited from his son, Tryon Pearson, whatever estate had descended to his mother under the McFarland grant. If we admit that an action might have been brought by Tryon Pearson, and, after his death, by his father and heir at law, John G. Pearson, between 1 January, 1870, and 17 April, 1875, and by Stevens between the last named date and 7 January, 1878, in which the burden would have been on them to show that McLaurin practiced a fraud on McFarland in obtaining the grant, still the title was vested absolutely under the senior grant in Fairly's heirs, and in this action any person controverting the (712) rights of claimants by virtue of Buchanan's possession must submit to the consequences of the *laches* of the two who were, during that period, *sui generis*.

If Buchanan occupied the land in dispute, cultivating a portion of it every year for seven years after 1 January, 1870, as the testimony tended to show, under the McKoy deed, which embraced it within its boundaries, then, for the purpose of showing title out of the State, the plaintiff who claimed under Buchanan might offer himself or rely on, when introduced by the defendant, any or all grants from the State which included the *locus in quo*, for the purpose of showing title out of the State and diminishing the statutory period requisite for the maturity of his title from twenty-one to seven years. The plaintiff did not attempt to connect himself with either of the grants, nor was there any testimony tending to connect him by a chain of mesne conveyances with any source of title in common with the defendant, and thereby throw around him the trammels of any rule of evidence that would

interfere with his right to avail himself of the oldest grant exhibited to prove that the State had no interest in the controversy. It being conceded that both grants cover the area upon which the trespass was shown, the defendant might elect to rely on the older and better title exhibited for the purpose mentioned, and when he coupled with it proof of color of title and continuous possession for seven years, he was entitled to recover, even though the defendant exhibited a chain of title connecting him with both grants, unless it had appeared that no right of action accrued to the defendant, or those through whom he claimed title, under the senior grant to McLaurin against Buchanan during his occupancy of the premises, but did accrue afterwards.

As Pearson derived all of the right or title that he had through the younger grant, if we admit that McCall got by the sheriff's deed whatever interest Pearson could claim as tenant by the curtesy, still (713) he acquired, as against those claiming under the senior grant, at best, but a bare right, which would not avail him or them as evidence of title in this action.

It is not material whether the sheriff's deed was utterly void or passed only a right. As it did not in any aspect of the evidence tend to establish title in the defendant to the land in controversy, the defendant has no just ground of complaint, even if his Honor erred (which we do not admit) in telling the jury that the deed from Buchanan, sheriff, to McCall conveyed no title because of irregularities in the judgment or execution, or because Pearson had but a bare right, not subject to sale under execution, or an estate by the curtesy, which the law prohibited the sheriff from selling.

It is unnecessary to review the authorities cited, or pass upon the point urged by the able counsel for the plaintiff on the argument, to wit, that John G. Pearson, as the husband of one claiming through the junior grant, a mere right in equity to compel the grantee under the older grant to convey, had no estate which is subject to sale under execution under section 450 of The Code. It is immaterial, too, for the purpose of disposing of this appeal, whether the sheriff was prohibited from selling such estate as Pearson claimed as tenant by the curtesy because he was married after 1 March, 1849, as the sale passed only such interest as he acquired through his wife, who, if living, would have had the same right of action for the fee.

Where a person, after having perfected the title by possession under a colorable deed, moves off the premises, he is not deemed to have abandoned his right by voluntarily leaving. The estate thus vested remains in him until it is aliened by him or those in privity with him, lawfully sold under judicial decree or process, or another divests it by adverse

possession subsequent to his departure. Wash. R. P., p. 499; (714) Wood Lim., sec. 254; *Avent v. Arrington,* 105 N. C., 393; *Manufacturing Co. v. Brooks,* 106 N. C., 113.

If Buchanan acquired title, therefore, it passed to the plaintiff through the mesne conveyances offered, notwithstanding the fact that Buchanan left after his title was matured, and the defendant entered and took possession.

It is admitted that without actual possession on the part of defendant, or of those under whom he claims, the plaintiff's title to two undivided fifths would mature, and did mature, as against the perfect chain of title offered by the defendant to connect himself with the senior grant to McLaurin, unless for some reason the running of the statute of limitations was suspended as to all of the heirs of Fairly, as well as the defendant, from 1 January, 1870, till the action was brought, in 1882. If the possession of Buchanan would have been sufficient against McLaurin, or those claiming under him and holding the legal and, presumably, the equitable title, to divest their estate and vest it in him, it would seem absurd to hold that the statute did not run in favor of Buchanan and for the ultimate benefit of the plaintiffs, because another grant has been exhibited which in this action could be used only as color of title, and which, at best, might furnish the basis of a claim to the equitable estate, possibly not susceptible of being established.

If such were the law, the recovery of plaintiff in ejectment might be prevented by exhibiting a worse title when a better would not subserve the purpose. The position of the defendant involves the still more startling proposition that, though he acquired the estate that passed by the older grant to McLaurin by deed from W. H. McLaurin, dated 18 March, 1879, and the interest of Tryon Pearson that descended under the younger grant was conveyed to him by McCall and wife on 31 March, 1879, he will be permitted to prevail in an action raising only the issues of title and possession, and drive the plaintiff to a nonsuit because McFarland and others, through whom he connects himself with the junior grant, may have had the right in equity to demand a conveyance of the legal title from McLaurin and those (715) claiming under the older grant to him.

It is manifest that the plaintiff's right to recover two undivided fifths of the land depended solely upon the question whether Buchanan cultivated any portion of the land in controversy for seven consecutive years between 1 January, 1870, and the date of the summons in this action, unless the defendant's right of action had accrued by reason of the death of John L. Fairly and the liability of his lands to be subjected for assets by his administrator.

It is familiar learning that the personal representative has no control over, or connection with, the land belonging to the decedent, unless and until he, under the statute (The Code, sec. 1436) applies for and obtains license to sell it in order to pay the debts and charges of administration. It was evidently the purpose of the framers of the statutes providing for settlements by executors and administrators that they should be required to render their final accounts within two years after qualification, if possible. The Code, sec. 1488. For the benefit of the creditors only, and in harmony with that idea, all conveyances of real property of a decedent by a devisee or heir at law, made within two years after the grant of letters to the personal representative, are declared "void as to creditors, executors, administrators, and collectors of such decedent," but such conveyances, when made more than two years from the grant of letters to *bona fide* purchasers for value and without notice, are *"valid even as against creditors."* The Code, sec. 1442.

The evidence proposed was not only to allow the administrator to sell when necessary to satisfy the demands of creditors, but to restrain heirs and devisees, for a reasonable time, from disposing of the real property, and thereby depriving the creditors, who are represented by the executor or administrator, from making it available as assets. It will not (716) be so construed as to save the heir from the consequences of his own *laches,* or deprive one who has shown more diligence of the rights acquired by him under the express provision of another statute. The Code, sec. 141.

Thus far we have conducted this discussion upon the idea that both grants were valid upon their faces, but that, both being exhibited, the title would be deemed to have passed by that first issued, until, by a direct proceeding, the older grant should be declared fraudulent as against the younger. But it is insisted that the court erred in holding that the grant to McFarland was void upon its face. It is true that the court did not advert to the fact that the statute, then in force, in the year 1847, permitted one who entered land to take out his grant, provided he should pay the purchase-money to the State before the "thirty-first day of December, which should happen in the second year thereafter," but did not declare a grant void because it was issued or the survey was made after that time had elapsed. Rev. Stat., ch. 42, sec. 10; *Krous v. Long,* 41 N. C., 259; *Stanly v. Biddle,* 57 N. C., 383. The result would be, that while it is correct, as a principle, to hold that a grant which upon its face appears to have been issued in contravention of law, is void, the particular grant to McFarland was not on its face invalid.

Neither of the grants has come up with the record as an exhibit. Under the terms of Laws 1796, ch. 455, sec. 13 (2 Potter's Rev., p. 807),

a grant was not valid if taken out more than two years after the entry was made. This section was repealed by Laws 1804, ch. 651 (2 Potter's Rev., p. 1010). At the same session of the General Assembly another act was passed which is substantially the same as The Code, sec. 2766; Laws 1804, ch. 759 (2 Potter's Rev., 1149).

So that, where a grant was issued in 1847 upon an entry made in 1801, it was not upon its face void. If the purchase-money was paid to the State before 15 (now 31) December of the second year after the entry was made, the grant was valid under the statute then in (717) force. *Krous v. Long, supra.*

McLaurin's entry was made in 1841, and his grant was taken out in 1842. The first question suggested by the dates of the entries and grants is, whether the various acts extending the time for taking out patents affect the legal status of the claimants under them. Though Laws 1842, ch. 35, did not contain the saving clause in reference to junior entries, couched in the same terms as the other acts in relation to that subject, it was construed by the Court to mean the same thing. *Buchanan v. Fitzgerald,* 41 N. C., 121. In the case of *Bryson v. Dobson,* 38 N. C., 138 (decided in 1843), the Court having previously declared that "against another subsisting entry, one that has lapsed is revived as of the date of the statute by which it is revived." The only effect of the act of 1842, then, would be to make the rights of the parties the same as if the entry of McFarland had been made in 1842, on the day when the act was passed, thus making his entry (as well as his grant) junior, in contemplation of law, to that of McLaurin.

But the defendant insists, in his petition to rehear, that this Court must take notice of a resolution passed by the General Assembly on 7 January, 1847 (Laws 1846-47, p. 381), while the plaintiff maintains that it is a private law and the courts cannot take notice of it unless it has been offered in evidence. Waiving all objection to its introduction and identity as authority for issuing the McFarland grant, we would encounter insuperable difficulty in declaring it a superior title to the grant issued before the passage of the resolution. The legislative recital that the purchase-money was paid by McFarland in 1804 would not fix Duncan McFarland with notice. Indeed, he could not have been affected by such notice if it had been proven in an action for possession to which he was a party. Even if the resolution can be noticed by us, and we should go further and accept as true the statement that it (718) is referred to in the grant as the legislative authority for issuing the grant, it will not be contended that, in the absence of a judicial declaration of fraud on McLaurin's part, the Legislature had the power to divest out of McLaurin such title as had already vested in him under his grant in 1842 and transfer it to McFarland. *Stanmire v. Taylor,* 48 N. C., 207; *Stanmire v. Welch, ib.,* 214.

In *Buchanan v. Fitzgerald, supra, Chief Justice Ruffin,* delivering the opinion, said, in reference to the validity of a senior grant, taken out after the purchase-money had been paid by a junior grantee, who had an older entry, "certainly without notice of it (the payment), the defendant might innocently and justly enter the land and lay out his money for it after a lapse of upwards of five years from the date of the entry and nearly three from that of the alleged payment of the money into the treasury, and, therefore, is entitled in consequence to hold it to his own use." In that case the defendants had brought an action of ejectment against the plaintiffs, who were heirs at law of the claimant under the junior grant and senior entry, and had evicted them, and after being ejected the plaintiffs had filed a bill asking to have the defendant declared a trustee, but had failed because there was "nothing in the case to affect the defendant with notice of" the payment of the purchase-money. In our case, about forty-three years intervened between the payment of the purchase-money and the issuing of the grant, instead of five. A more marked distinction, however, arises out of the fact that, while no suit had ever been brought against Duncan McLaurin to fix him with notice of the entry and payment of the purchase-money and declare him a trustee, the defendant, under a general denial, in an ordinary action for title and possession, asks the Court to declare that one of the grantees, through whom he claims, defrauded the other
(719) through whom he claims also, and should be declared a trustee as to the land in controversy for his benefit. This relief is asked without a scintilla of evidence to fix McLaurin with actual or constructive notice of the entry or payment of the purchase-money by McFarland, before his grant was issued, and for the purpose of transferring the legal title at this late date, in an action wherein no equity is alleged on the part of the junior grantee, McFarland, and those claiming under him, and then showing the statute of limitations did not run in favor of Buchanan as against that title, because Pearson's life estate had not terminated when he occupied the premises.

Only such exceptions of the defendant as the court did not consider on the former hearing, because of the holding that the McFarland grant was void upon its face, are open for discussion upon the rehearing.

All of these fall within the principles we have announced, and are disposed of, whether specifically mentioned or not, since we have sustained the court below in leaving only the question of possession to the jury, on the ground that if it were admitted that the defendant could trace his title to both the grants offered, the plaintiff, in view of the other admitted facts, was entitled to recover two undivided fifths of the land if Buchanan cultivated the land for seven years when the statute was running as to the two heirs of Fairly, who were not under legal disability.

For the reasons stated, we hold that if it were error to tell the jury that the sheriff's deed for Pearson's interest was void, that error was harmless, and no other material error was shown.

Petition dismissed.

Cited: Kinsey v. Munday, 112 N. C., 827, 830; *Carson v. Carson,* 122 N. C., 647; *Ritchie v. Fowler,* 132 N. C., 790; *Berry v. Lumber Co.,* 141 N. C., 393; *Dew v. Pyke,* 145 N. C., 305; *Barker v. Denton,* 150 N. C., 726; *Anderson v. Meadows,* 159 N. C., 409.

(720)

W. H. THOMAS, BY HIS GUARDIAN, v. E. R. HUNSUCKER ET AL.

Ejectment—Title in Third Persons—Possession—Tenant—Case on Appeal — Sheriff's Deeds Void — Insanity — Judgment — Execution — Irregularities.

1. A defendant in an action of ejectment need not connect himself with an outstanding title in third persons, except in cases where both parties claim from the same source; and not even is exception made in this case where the plaintiff has been divested of such title.

2. When a defendant in ejectment has entered possession as plaintiff's tenant, he may resist recovery by showing that plaintiff has been divested of the title, and still more has he this privilege where no such relation exists.

3. When the case states that the defendant offered no testimony identifying the land, but does not purport to set out the testimony in full, and the ruling of the court seems to assume its existence, this Court cannot say that it does not exist.

4. A deed of a sheriff is not void because the defendant in execution was insane at the time of the judgment and sale thereunder—it is only voidable.

5. The purchaser at a sale under execution gets a good title, though the judgment upon which the execution was issued is subsequently set aside for irregularity therein; and the same principle applies to irregularity in the execution. Such irregularities cannot be questioned in an action against such purchaser unless the plaintiff is purchaser under his own judgment.

ACTION removed from CHEROKEE and tried at Fall Term, 1888, of CLAY, before *Boykin, J.,* for the recovery of a tract of land.

The plaintiff claimed title through one A. H. Killian, and offered in support of it a warrant of survey to Killian from the State; a plat and

certificate of survey made in pursuance of an order of court in 1843; a deed from Killian to one Felix Axley, dated 14 June, 1845, and parol evidence to identify it, which was objected to by the defendant; a grant,

(721) of date 4 November, 1845, from the State to Killian, which was admitted to embrace the land referred to in the warrant of survey and certificate. The defendant excepted to its admission, for that it was void for want of authority to issue it. A deed from Felix Axley to plaintiff, to which defendant also objected because of a defect in the probate.

It was admitted that the land of which defendants were in possession was that conveyed in the grant. There was evidence of possession, cultivation and improvement thereof by the plaintiff through his tenants. There was conflicting evidence to show the identity of the land described in the grant and the deed to Axley.

The defendant claimed title under A. H. Killian, and introduced a grant to him from the State, and a deed from him to E. R. Hunsucker, defendant, conveying his interest in the same, dated 10 March, 1894; a deed from C. C. Vest, sheriff, to William Johnston, dated 4 August, 1869. The judgment docket showed the entry of a judgment against W. H. Thomas in favor of one William Johnston for a considerable amount, but the judgment roll and the execution under which the sheriff (Vest) sold could not be found.

There was evidence tending to show that W. H. Thomas was insane at the time of the sale and conveyance by the sheriff. The defendant offered no evidence to identify the land described in this conveyance. There was conflicting evidence upon the question whether there was more than one tract known as the Killian donation land.

There was no other evidence tending to connect the defendant with any title the said William Johnston may have acquired under the sheriff's deed.

When the argument began, the court informed defendant's counsel that they would not be permitted to argue the effect of the existence of such outstanding title to defeat the plaintiff's claim, as the plaintiff and defendant claimed under the same grantee of the State, A. H. Killian.

The defendant excepted.

(722) The defendant's counsel requested the court to charge as follows:

1. That the trust deed from Killian to Axley is void for the want of a sufficient description to pass the land attempted to be conveyed thereby, and that the possession under it would not be adverse to the true title.

2. That no entry or grant having been shown for any lands on Hanging Dog or Grape Creek, the title has not been shown to be out of the State.

3. That the deed made by Felix Axley to W. H. Thomas by the authority of the trust deed to him does not in law have force to convey to said Thomas any land not authorized in said trust deed.

4. That the judgment, execution, and the deed of Vest, sheriff, etc., to Johnston, conveys the title of said Johnston to the land in suit.

The first prayer for instruction was refused, as there was no evidence tending to identify the land conveyed in said deed.

The second was refused for a similar reason.

The third was given.

The fourth was refused on the ground that the defendant could not show title out of the plaintiff without connecting himself with it, both claiming under the same grantee. The defendant excepted.

There was a verdict and judgment for the plaintiff. Motion for a new trial was refused, and defendant E. R. Hunsucker appealed.

J. B. Batchelor, John Devereux, Jr., and E. C. Smith for plaintiff.
J. W. Cooper and T. F. Davidson for defendant.

SHEPHERD, J. We think there was error in refusing to give the fourth instruction, on the ground that the defendant could not show title out of the plaintiff without connecting himself with such outstanding title. This is a correct principle of law, but is applicable only (723) where the defendant seeks to attack a title under which both himself and the plaintiff claim. *Love v. Gates,* 20 N. C., 498; *Gilliam v. Bird,* 30 N. C., 280; *Christenbury v. King,* 85 N. C., 230; *Ryan v. Martin,* 91 N. C., 464.

It is true that in our case both parties claim under Killian, but the defendant, under the instruction asked, does not propose to impeach Killian's title, but contends that, although the plaintiff may have derived title from him, it has been divested by sale under execution, and, therefore, he is not entitled to recover.

In ejectment the plaintiff must recover upon the strength of his own title, and it is always competent for the defendant to show title out of him, where this can be done without encountering the rule of practice commonly called estoppel. *Clegg v. Fields,* 52 N. C., 37. Even had the defendant entered as the tenant of the plaintiff, he could have shown that the title of the latter had been divested by a sale under execution, and thus have resisted a recovery. *Lancashire v. Mason,* 75 N. C., 455. *A fortiori,* can this be done where no such relation exists.

It is urged, however, that the error is harmless, because there appears to have been no testimony identifying the land in question with that described in the sheriff's deed. The case states that the *defendant* offered no such testimony, but as it does not purport to set out the

evidence in full, and as the ruling of his Honor seems to *assume* the existence of such testimony (possibly disclosed by the plaintiff's witnesses), we do not feel warranted in saying that the error was not prejudicial to the defendant; and especially is this so when the point does not seem to have been made upon the trial below. It is further contended that the plaintiff's deed is void because of the insanity of the plaintiff when the judgment was rendered and at the time (724) of the sale under execution.

The authorities seem to be in entire accord in holding that such a judgment is voidable only. 1 Black Judgments, 205; Freeman Judgments, 142; Freeman Executions, 22. See also *Wood v. Watson,* 107 N. C., 52.

It is also well settled that "whatever irregularity there may be in a judgment, if it be an act of a court of competent jurisdiction, unreversed and in force when a sale is made by execution under it, the purchaser at such sale is safe, even though the judgment be subsequently reversed or set aside. The same principle applies to an error in the execution, the regularity of which cannot be questioned in an action against a purchaser at a sheriff's sale." See cases in Battle's Digest, 559; 6th Digest, 264, and 7th Digest, 279.

It is true that where the plaintiff in the judgment is the purchaser, the sale may be set aside on the ground of irregularity, but unless this is done the title passes and cannot be attacked collaterally. *Benners v. Rhinehart,* 107 N. C., 705.

For these reasons, we think, there should be a new trial.

Error.

Cited: Chamblee v. Broughton, 120 N. C., 176; *Craddock v. Brinkley,* 177 N. C., 127.

JOHN R. TAYLOR ET AL. v. G. T. SIKES.

Husband and Wife—Choses in Action—Banks—Deposits.

1. At common law a husband may, as between himself and his wife, treat the wife's choses in action as his property or constitute himself, in respect to them, a trustee for her benefit.

2. If he can do this, he may also unite with her in their disposition, and, where this has been actually done, the proceeds cannot be recovered back by either of them.

ACTION tried at the November Term, 1890, of GRANVILLE, be- (725) fore *MacRae, J.*

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

This action was for the recovery of money had and received (as alleged) by the defendant to the use of the plaintiffs.

The following are the facts found:

The defendant is the administrator upon the estate of Mrs. Catherine White, who, at the time of her death, resided with the defendant and his wife, the daughter of deceased, in the county of Granville in this State. Deceased had lived in Baltimore prior to 1888, and had then moved to Philadelphia, where she resided until within a month before her death, when she moved to North Carolina and went to live with defendant. While living in Baltimore the three daughters of the deceased lived with her. One of them was the plaintiff, Elizabeth, since then married to the plaintiff, John R. Taylor. Elizabeth attended to the business of her mother when in Baltimore—not to the exclusion of her sisters, but helped them in assisting their mother. She was of age and married before leaving Baltimore. After the death of Mrs. Catherine White, the defendant G. Sikes, who administered upon her estate, found upon her person a pass-book of account of deposits with the Eutaw Savings Bank of Baltimore, showing a balance due to the depositor 1 February, 1889, of $1,365.75.

The account in said book was opened as follows:

No. 51,418.

Catherine White and Elizabeth M. White and the survivor of them, subject to the order of either.

The account book was opened by, and pass-book to the same was issued to Catherine White, and none of the money was paid out by the bank to any one, besides Catherine White in her lifetime, and G. T. Sikes after her death. (726)

The defendant, as administrator of Mrs. Catherine White, presented the pass-book and letters of administration at the bank and demanded payment of the balance. This was declined unless he would produce an order from Elizabeth M. White, who was now married to the plaintiff John R. Taylor, and he was furnished at the bank an order to be signed by the said Elizabeth, which he carried to said Elizabeth, and in the presence of her husband made known to them both the facts above stated, and showed them the order and requested her to sign it. Her husband remarked: "I had no idea the old lady had more than $300 or $400 in all," and handed the order back to his wife, and she was in the act of signing it when he said: "Lizzie, hold on a minute. As the matter now stands, you are about to sign away what is your own, but

when you sign the order, it becomes part of the estate." She replied: "Not so; I lay no claim to the money; I know it is not mine; I know how my mother put it in bank, and it was not intended for me." She thereupon signed the order without further objection on the part of her husband, and gave it to defendant, who drew the money and brought it to North Carolina and holds the same as administrator of his intestate.

The following is a copy of the order signed by the *feme* plaintiff, both maiden and married name, and referred to above:

PHILADELPHIA, 30 January, 1889.

Eutaw Savings Bank of Baltimore:

Pay to the order of Ginnada T. Sikes, administrator of Catherine White, $1,332.50, with interest, and charge Book No. 51,418.

ELIZABETH M. WHITE,
ELIZABETH M. TAYLOR

Papers filed.

(727) Two objections and exceptions were taken by plaintiffs to questions and answers in the deposition of defendant.

The defendant was examined as a witness in his own behalf, and, in the course of his testimony, stated that Mrs. Catherine White had six children at the time of her death. Her three daughters, Anna, Maggie and Elizabeth M., lived with her in Baltimore. They were all grown. Elizabeth was the youngest. Before they left Baltimore she was of age; not when they went there. Witness knows Elizabeth lived with her and attended to her business in Baltimore—not absolutely and individually to the exclusion of the other girls. She helped them when they were there.

All of the foregoing was objected to by plaintiffs. Objection overruled, and defendant excepted.

Defendant further testified that he carried the pass-book; also authenticated letters of administration. The letters were not authenticated at first, and the bank officer told witness it would be necessary to have them authenticated, and witness came back to North Carolina and had them authenticated. When witness presented the pass-book and authenticated letters, they told him the letters were all right, but it would be necessary for witness to have an order from Elizabeth White, and gave him a blank filled up ready for her signature, and asked him if she was married. Witness told them yes, and they said to have her sign her maiden name and her married name.

All the foregoing was objected to by plaintiffs. Objection overruled, and defendant excepted.

Witness took the order and carried it to Elizabeth Taylor, who had been Elizabeth White (in Philadelphia), and was now married.

Plaintiffs objected to any conversation between the witness and Mrs. Taylor, because, she being married, the property passed to her husband. Objection overruled, and plaintiffs excepted.

The witness then related the circumstances under which the (728) *feme* plaintiff signed the order and gave it to him in the presence of her husband, and the conversation which took place, all of which is detailed in the facts found.

Plaintiffs again objected and excepted.

Upon the testimony as set out in the findings of fact, the presiding judge being of the opinion that, by the admissions of the *feme* plaintiff in the presence of and not contradicted by her husband and coplaintiff, the money on deposit in the bank in Baltimore belonged to the estate of the defendant's intestate, and an order for the same was given by said *feme* plaintiff to defendant, as administrator of the intestate, for the same and that the plaintiffs were not entitled to recover. No claim was made against the defendant as administrator for her share of said fund by the *feme* plaintiff in this action.

Judgment was rendered in favor of the defendant, and against the plaintiff for costs, from which judgment the plaintiffs appealed.

L. C. Edwards and J. B. Batchelor for plaintiff.
M. V. Lanier and R. H. Battle for defendant.

SHEPHERD, J. Conceding that this case is governed by the laws of Maryland, and assuming, as we must do, in the absence of proof to the contrary, that the common law prevails in that State, we are, nevertheless, unable to see how the plaintiff can recover.

The finding of the judge is a little obscure as to whether the *feme* plaintiff had any interest in the money on deposit in the bank. His Honor might very well have found, upon her declaration made in the presence of the husband, together with the other circumstances in evidence, that she did not own any part of the said fund, and we are inclined to think that the case upon appeal is susceptible of the construction that such was his conclusion as a matter of fact.

Putting this aside, however, and granting the husband's right (729) to the money *jure mariti,* it is well settled, that instead of exercising his right to the fund, he could have treated it as the wife's, and constituted himself a trustee in respect to it for her benefit. See *Beam v. Bridgers, ante,* 276, and the cases there cited.

If he could have done this he could surely have united with her in its disposition, and this he substantially did by permitting her to relinquish her apparent right to it.

The agreement has been *executed,* and we can see nothing in the case which entitles either of the plaintiffs to recover back the money which they have voluntarily paid to the defendant.

The exceptions as to the admissibility of testimony were not pressed in this Court, and we need not consider them.

Affirmed.

Cited: Walton v. Bristol, 125 N. C., 424, 425.

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(730)

JACOB WOOL v. WM. L. SAUNDERS, SECRETARY OF STATE.

Entries and Grants—Surveys—Warrants—Vacant Lands—Secretary of State—Code—Power of Court to Compel Issuance of Warrant—Conditions—Corporate Towns—Evidence—Navigable Water.

1. The Secretary of State, upon application to him for a grant of vacant lands belonging to the State, has no right to receive and act upon testimony outside of the paper filed by the claimant.

2. Where the claimant has complied with the law, and it appears from the warrant and survey that the entry taker and surveyor have discharged their duties, the secretary must issue the grant, and has no discretion in the matter.

3. The trial of questions arising thereon is left to the courts.

4. A grant irregularly issued is voidable; if issued for land not subject to entry, it is void.

5. The secretary may refuse to issue a grant when, upon the face of the warrant and survey, it clearly appears that the land is not subject to entry, or is subject to entry only upon conditions which are not shown to exist; and no court can compel him to issue such grant.

6. It appeared in a copy of the entry that the land entered "was covered by water in front of Jacob Wool's wood-yard wharf in the town of Edenton, running out from the foot of said wharf south between lines parallel and distant one from the other sixty-four and one-half feet so *far as the channel,* a distance of one hundred and forty-five feet, containing .... acre": *Held,* (1) that this description shows that the land is covered by navigable water, and in front of an incorporated town; (2) such land is not the subject of entry except under the provisions prescribed in The Code, section 2751, one of which is that the town corporation shall regulate the line on deep water to which entries may be made; (3) until the town authorities act the land is not subject to entry.

7. When it sufficiently appeared from the face of the papers presented by the claimant that the town authorities have designated the line on deep water to which the entry could be made, and that the boundaries indicated are in conformity therewith, the Secretary of State could issue the warrant.

APPEAL from *Boykin, J.*, at chambers.

The undersigned, parties to a question in difference, which might be the subject of a civil action, agree upon the following statement of facts upon which the controversy depends, and submit the same to the judge of the Superior Court of WAKE which would have jurisdiction if an action had been brought:

1. The plaintiff is a citizen of North Carolina, residing in Chowan County, and the defendant is the Secretary of State of North Carolina.

2. That on 17 April, 1890, the plaintiff filed in the office of the defendant, in the city of Raleigh, certain entries of land and certificates, plats, etc., copies of which are hereto attached, and upon them demanded of the defendant that he issue to plaintiff grants for the lands described in said entries, according to law.

3. That the defendant, on or about 3 April, received from M. F. (731) and H. A. Bond, Jr., a certain communication, a copy whereof is hereto attached, and also copies of certain extracts from the proceedings of the board of councilmen of the town of Edenton, copies of which are hereto attached, and thereupon his note to plaintiff, a copy of which letter is hereto attached.

4. That the defendant refused, and still refuses, to issue to the plaintiff grants for the lands described in said entries.

Upon the foregoing statement of facts, the following question is submitted to the court:

Is it the duty of the defendant to issue the grants demanded by the plaintiff?

If the court shall be of opinion that it is the duty of the defendant to issue the grants demanded by the plaintiff, then judgment is to be entered in favor of the plaintiff, requiring the defendant to issue the said grants, and for the costs of the action.

If the court shall be of opinion that it is not the duty of the defendant to issue the said grants, then judgment is to be entered in favor of the defendant, and against the plaintiff for costs.

To the Entry Taker of Chowan County:

The undersigned, Jacob Wool, a resident of Chowan County and a citizen of the State of North Carolina, makes an entry of the following described and unappropriated lands to such marks and lines on deep water and at the channel as may have been heretofore indicated by the board of councilmen of the town of Edenton: In front of said Wool's,

John M. Jones's lot, bounded on the north by Blount Street, on the east by lot No. 187, south by the creek and arm of Edenton Bay, and on the west by lot of D. W. Roper, containing . . . . acre, more or less,
(732) to wit, the lands covered by water in front of the lands of said Wool above described, running south out from the said front of said Wool's lot to deep water at the channel in lines parallel and confined to straight lines, including only the said water-front, and the lands covered by water within the said lines to deep water at the channel.

This entry is made for the purpose of erecting a wharf, and other purposes incident thereto.

Witness his the said Jacob Wool's hand and seal, this 7 April, 1890.

his
JACOB X. WOOL. [Seal.]
mark

Witness: WM. J. LEARY, JR.

REPORT OF SURVEYOR.

I, Patrick Matthews, a surveyor, appointed special surveyor on 7 April, 1890, by the board of commissioners of Chowan County, to survey the lands covered by the entry of Jacob Wool, No. 38, entered on 7 April, 1890, do hereby certify that in obedience to the warrant of survey, did, on the 10th day of April, 1890, after duly administering to the chain-carriers the following oath, to wit: "That we, and each of us, do solemnly swear that we will measure justly and truly the lands which are about to be measured and deliver a true account of the same to the surveyor, the said Patrick Matthews, and otherwise to perform our duties as said chain-carriers according to law: so help us God," proceed to make the said survey of said lands and water-front covered by the entry No. 38 of said Jacob Wool, and did, according to law, survey the said land and water-front so entered, two plats of which, showing the beginning, angles, etc., etc., are hereto attached, bounded and described as follows, to wit,
the land covered by water in front of Jacob Wool's lot on Blount
(733) Street, in the town of Edenton, county of Chowan, and State of North Carolina, bounded on the north by the said Blount Street, east by the ice-house lot of H. A. Bond, south by creek, and on the west by the Page or D. W. Roper lot; beginning at "A" on the plat on the Roper line, thence with high-water mark to "B" in the line of the ice-house lot, thence south 17 1-2 west 325 feet to point "C" in the plat, thence with the line of deep water to point "D" in the plat, thence north 17 1-2 east 240 feet to the beginning, containing 74 yards.

In witness of which I, Patrick Matthews, special surveyor, have hereunto set my hand and seal, this 14 April, 1890.

PAT. MATTHEWS, [Seal.]
Special Surveyor.

To the Entry Taker of Chowan County:

The undersigned, Jacob Wool, a resident of Chowan County and a citizen of North Carolina, makes an entry of the following described vacant and unappropriated land, to wit:

The land covered by water in front of Jacob Wool's woodyard wharf in the town of Edenton, running out from the foot of said wharf south between lines parallel and distant one from the other sixty-four and one-half feet, so far as the channel, a distance of one hundred and forty-five feet, containing . . . . acre.

This entry is made for the purpose of erecting a wharf, and other purposes incident thereto.

Witness his hand and seal, this 7 April, 1890.

his
JACOB X. WOOL. [Seal.]
mark

Witness: WM. J. LEARY, JR.

REPORT OF SURVEYOR. (734)

I, Patrick Matthews, a surveyor, appointed on 7 April, 1890, by the board of commissioners of Chowan County to survey the lands covered by the entry of Jacob Wool, No. 39, entered on 7 April, 1890, after duly administering to the chain-carriers the following oath, to wit: "That we, and each of us, do solemnly swear that we will measure justly and truly the lands which are about to be surveyed, and deliver a true account of the same to the surveyor, said Patrick Matthews, and otherwise to perform our duties as said chain-carriers according to law: so help us, God," proceeded to make the survey of said land and water-front covered by the entry (No. 39) of said Jacob Wool, and did, according to law, survey the said land and water-front so entered, two plats of which, showing the beginning, angles, etc., are hereto attached, bounded and described as follows, to wit: The land covered by water in front of Jacob Wool's wood-yard lot, in the town of Edenton, county of Chowan, and State of North Carolina, adjoining the lot of E. M. W. Moon, M. H. Dixon and others, beginning at point "A" on the plat; thence S. 74 1-2 E. 64 feet, 3 inches, to point "B" on the plat; thence S. 8 W. 145 feet to "C"; thence N. 74 1-2 W. 64 feet, 3 inches; thence N. 8 E. 145 feet to the beginning, containing 74 poles.

In witness whereof, I, Patrick Matthews, special surveyor as aforesaid, have hereunto set my hand and seal, this 14 April, 1890.

PAT. MATTHEWS, [Seal.]
Special Surveyor.

JUDGMENT.

This controversy, submitted without action, coming on to be tried this 24 October, 1890, upon the statement of facts agreed, after consideration of the same, it is ordered and adjudged that the defend-
(735) ant William L. Saunders, Secretary of State, cause to be duly issued to the plaintiff the grants for the real estate described in the pleadings, according to law, and that a writ of *mandamus* issue accordingly.

It is further adjudged that the plaintiff recover of the defendant the costs of this action, to be taxed by the clerk.

C. M. Busbee for plaintiff.
Theo. F. Davidson, Attorney-General, for defendant.

SHEPHERD, J. Two questions must be determined before we enter upon the consideration of the facts of this particular case.

1. Whether the Secretary of State has a right to receive and act upon testimony outside of the papers filed by a claimant for the purpose of obtaining a grant for vacant and unappropriated land belonging to the State?

We are of the opinion that the question must be answered in the negative. The law has carefully prescribed how vacant lands may be entered and in what cases the Secretary of State may issue grants. Chapter 17, vol. 2 of The Code. The entry takers and surveyors of the several counties are sworn officers charged with important duties in respect to the subject, and if it appears from the warrant and survey that they have discharged these duties, and if the claimant has in all other respects complied with the law, the Secretary has no discretion and must issue the grant. To permit or require the Secretary to go behind the *prima facie* right of the claimant and determine whether the land is subject to entry, would necessarily involve an inquiry into the legal or equitable rights of other parties claiming under prior entries or grants, or by adverse possession, and thus a new tribunal, unknown to the Constitution and laws, would be erected for the investigation of titles to real estate, the practical workings of which would be productive of
(736) inestimable conflict, uncertainty and confusion.

The trial of such questions is wisely left to the courts after the grant is issued, the grant being voidable if irregularly issued, and void if the land is not subject to entry. *Strother v. Cathey,* 5 N. C., 102; *Harshaw v. Taylor,* 48 N. C., 514; *S. v. Bevers,* 86 N. C., 591; *Brem v. Houck,* 101 N. C., 627.

2. The second question is, whether the Secretary of State may refuse to issue a grant when upon the face of the claimant's papers (that is, the warrant and survey) it clearly appears that the land is not subject to entry, or subject to entry only upon certain conditions which are not shown to exist.

The power of the Secretary as to issuing grants is a limited one, and extends only to those lands which by statute are subject to entry. When, therefore, he issues a grant of lands which are not subject to entry, the grant is void in a court of law because he has exceeded the authority delegated to him, and his act has no more validity than that of any private citizen. *Strother v. Cathey, supra.*

This being so, it would seem exceedingly plain that no court ought to compel him to perform such an unauthorized act where the want of authority appears upon the face of the claimant's papers.

3. The application of these principles to the case before us is free from difficulty.

Excluding from our view, for the foregoing reasons, the communication of Mr. Bond and its accompanying exhibits, and looking only at the papers of the claimant, we find, upon an examination of entry No. 39, that the land described is covered by navigable water and in front of an incorporated town. Such land is not the subject of entry except under the conditions prescribed in The Code, sec. 2751 (subsection 1), one of which is that "the town corporation shall regulate the line on deep water *to which entries may be made.*" It seems to be con- (737) ceded (and we think very properly) that until the town authorities have acted, the land is not the subject of entry. The language of the statute clearly implies this, and there are obvious reasons why it should be so. If, as suggested, the town authorities refuse to act, the courts may compel them to discharge their duty in this respect, and in no event can our construction result in one party's getting an undue priority over the other by any possible collusion with the town authorities, since only one person (the owner of the adjacent land) has a right to make such an entry.

It affirmatively appearing, then, that the land is covered by water in front of an incorporated town, and such land not being subject to entry until the town authorities have acted, and this not being shown, we are of the opinion that the Secretary of State had a right to decline issuing a grant for the same.

As to entry No. 38, we think it sufficiently appears from the face of the papers presented by the claimant that the town authorities had designated the line on deep water to which the entry could be made, and that the boundaries indicated are in conformity therewith. We conclude, therefore, that as to this entry a grant should be issued by the Secretary.

It has been suggested that, although upon the face of the papers the claimant has a right to have a grant issued, and although the Secretary cannot consider the communication of Mr. Bond and its exhibits, still, the court being possessed of this information, we should not require the defendant to do a vain thing. To this it may be answered that the court cannot act upon such information, as it may be incorrect or susceptible of explanation, and the claimant ought not to be precluded in this "short-hand" way of asserting his alleged rights in "a due and orderly course of procedure."

The judgment must be modified to conform to this opinion.

(738) AVERY, J., dissenting: I do not concur in the opinion of the Court. I do not think that the Secretary of State *"had a right to decline issuing"* either of the grants applied for by the plaintiff. On the contrary, he is a mere ministerial officer, acting under the positive mandate of the law that he *"shall* make our grants *for all surveys returned to his office, which grants shall be authenticated by the Governor, countersigned by the Secretary, and recorded in his office."* The Code, sec. 2779. The same section provides further, that "no grant shall issue upon any survey *unless the same be signed by the surveyor of the county."* The requirement that he shall make out and deliver the patent upon every warrant and survey authenticated by the Governor is mandatory. The implication arising out of this command of the law (subject to but a single limitation) is, that the certificate of the surveyor (and nothing short of that) is to be considered by the Secretary as simple evidence, not only of the number of acres embraced within the boundaries, but of the proper and lawful location of the land. A surveyor is required to give bond conditioned for the faithful discharge of his duties, and when he his been inducted into office the law presumes that he has a knowledge of the art of surveying. Lawson Pres. Ev., p. 57; *Ashe v. Lonham,* 5 Ind., 434. Our statute recognizes this principle by thus requiring the Secretary to issue grants in all cases where the survey bears upon its face his certificate that he made it in accordance with the law.

I concur with the majority of the Court in the opinion that the Secretary of State cannot assume judicial functions and hear evidence *dehors* the warrant and survey as to the conflicting contentions of claimants. But it seems to me to be equally without warrant of law to constitute the Secretary of State a judicial officer, clothed with the power to pronounce an entry void upon its face for failure to comply with the law. I find the peremptory requirement that the grant shall issue to the claimant when he presents certain papers, but the most minute search and critical examination of chapter 17, and of our statutes gen-
(739) erally, does not lead to the discovery of any clause or section under

which, explicitly or by implication of the law, the judicial power to pass upon the sufficiency of an entry is given to any officer or tribunal other than courts erected for the purpose of passing upon such issues of law as well as the facts. The Constitution (Art. IV, sec. 2) declares that "the judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, and such other courts, inferior to the Supreme Court, as may be established by law."

If we concede the soundness of the abstract proposition that when the Secretary refuses to issue a grant upon an entry void upon its face the court will not use the writ of *mandamus* to do a vain thing by requiring him to issue it, I seriously doubt whether, since the enactment by the Provincial Legislature of 1777 of the first laws authorizing the conveyance of public lands by patent in the name of the State, a single entry or warrant has ever been forwarded to the Secretary which, upon its face, appeared to cover land not subject to entry. The judicial annals of the State for over one hundred years show no instance where the Secretary of State has refused to issue for any such reason, and no entry upon its face appearing to cover land that could not by law be conveyed by grant. The ruling of the Court in this case is an innovation certainly upon the established practice, and, in my opinion, is such a departure from an important principle as will lead to confusion and give rise to unnecessary litigation. A vague entry was declared not to be void against the State, nor against a subsequent purchaser with notice, because the location is made certain by the survey, and because it was and is deemed public policy to have our vacant lands appropriated by our people and made a source of income to the owners as well as the State. *Harris v. Ewing,* 21 N. C., 374; *Bryson v. Dobson,* 38 N. C., 138.

Where persons have chosen to enter and obtain grants for land (740) not subject by law to entry the Secretary has been accustomed to act without question upon the certificate of the surveyor, leaving the courts to determine what interest passed by the conveyance as against the State or against other persons claiming under the State through other patents. The persistent efforts of owners of large bodies of land to establish some tribunal empowered to pass upon the validity of entries, have proven unavailing because of the popular opposition to imposing any restrictions that might postpone the making out of grants. The Code commissioners reported a provision, which was enacted as a part of section 2765 of The Code, for allowing interested parties to show cause why a warrant of survey should not issue, but, at the very next session of the General Assembly, an amendment was passed striking out that provision and inserting in lieu the words *"the entry taker shall issue and deliver to the surveyor or enterer a proper warrant of survey, in which shall be copied such entry with its true number and date."* The same

unequivocal language is applied to the issue of the warrant by the entry taker as that used in reference to the issue of the grant. If the Secretary of State has "the right" to refuse to issue the patent because, according to his own view of the law, the entry as incorporated in the warrant appears *prima facie* to cover land they cannot pass by grant, what is to prevent the entry taker from constituting himself a court with jurisdiction of the single question whether the entry is not upon its face void because it covers land that, under a proper construction of some statute, is not subject to grant? We will search in vain for any legal warrant for vesting one of these officers with a discretionary right to disobey a positive mandate of the law because he is a high official of the executive department of the State, while the lower official is denied the right to disregard a similar requirement for the same reason. If we arbitrarily establish the right of both to disregard the peremptory require-
(741) ment of the law, then we will erect two petty tribunals, not heretofore known to our law, for construing all statutes authorizing the entry and granting of lands.

It seems to me manifest that the Secretary of State is a ministerial officer, bound to obey the law and issue grants upon all surveys signed by the surveyor of the county (or deputy when he is authorized by the law to act for him), and that he has no right to pass upon the question whether the entry is void upon its face. If we concede, however, that, whatever may be the extent of his power, the courts are not required to compel him to issue a void grant, I maintain that there is nothing upon the face of the entry numbered 39, that would *justify this Court in pronouncing it void.* The statute (sec. 2765 of The Code) as amended, provides, that "the claimant of land shall produce to the entry taker a *writing signed by such claimant, setting forth where the land is situated,* the nearest watercourses, mountains and remarkable places, and such watercourses and remarkable places as may be therein, the natural boundaries and lines of any other person, if any, which divide it from other lands, and every such writing shall be on one quarter sheet of paper at least, and endorsed by the entry taker with the name of the claimant, the number of acres claimed, the date of the entry, and a copy thereof shall be entered in a book well bound and ruled with a large margin in spaces of equal distance; each space to contain one entry and every entry to be made in the order of time in which it shall be received and numbered in the margin." This is all of the statutory provision as to the form of entries, and its requirements are declared to be largely directory, it being deemed sufficient if the survey contain a specific description though the entry may be a "floating one"; not upon its face definitely located. *Harris v. Ewing, supra; Currie v. Gibson,* 57 N. C., 25; *Munroe v. McCormack,* 41 N. C., 85. The effect of the ruling in this case

is to superadd a proviso, not only that it shall appear affirma- (742) tively when land covered by water is entered in front of an incorporated town that the authorities have marked out the line of navigable water, as the statute prescribes, but that this new requirement shall be considered mandatory, so that without previous compliance on the part of the corporation the entry shall be declared void, and even a specific survey shall not be sufficient to make it effective as the basis of a grant from the State.

The material portion of the entry declared void in this case is the following description:

"The land covered in part by water of Jacob Wool's woodyard wharf in the town of Edenton, running out from the foot of said wharf south between lines parallel and distant one from the other sixty-four and one-half feet, *so far as the channel,* a distance of one hundred and forty-five feet, containing ..... acres."

The entry which is declared by the Court to be upon its face valid is in the following form:

"Jacob Wool, a resident of Chowan County and a citizen of the State of North Carolina, makes an entry of the following described and unappropriated lands to such marks *and lines on deep water and at the channel as may have been heretofore indicated by the board of councilmen* of the town of Edenton, in front Jacob Wool's John M. Jones lot, bounded on the north by Blount street, on the east by lot No. 187, south by creek and arm of Edenton Bay, and on the west by lot of D. W. Roper, containing ..... acres, more or less, to wit, lands covered by water in front of the land of the said Wool above described, running south from the front of said Wool to deep water at the channel, in lines parallel and confined to straight lines, including only the said water-front and the land covered by water within the said lines to deep water on the channel. This entry is made for the purpose of erecting a wharf, and other purposes incident thereto."

The Code, sec. 2751, provides generally that all unappropriated (743) lands belonging to the State shall be subject to entry, but except land covered by navigable water, with swamp lands and lands covered by the waters of lakes. The exception to the first exception is that littoral and riparian owners may, for the purpose of erecting wharves, enter the land in which they before had a qualified property by the common law as far as the deep water (which, of course, means the margin of the navigable water). *Bond v. Wool,* 107 N. C., 139. When such entries are made in front of a town, the corporate authorities are required to "regulate the line on deep water to which entries may be made."

It will be conceded that if Jacob Wool's woodyard was located on Edenton Bay, beyond the limits of an incorporated town, he would have

the right to a grant for the land covered by the water in his front as far as the channel or margin of the navigable water, and an entry calling for the channel or for navigable water would be valid, the surveyor being of necessity at liberty to locate the line of the channel. There is nothing in entry No. 39, except the expression, "in front of Jacob Wool's wood-yard in the town of Edenton," to indicate that the land lies in front of an incorporated town. As the Secretary cannot look beyond the particular entry in passing upon its validity (according to the view taken by the Court), I respectfully insist that neither the Secretary of State nor this Court has the right to draw the inference from the fact that Edenton is called a town in the entry that it is an incorporated town, when the act incorporating it is not in evidence. *Durham v. R. R., ante,* 399. The law recognizes the fact that a town or city may exist with known limits and streets admitted to be highways, but without corporate existence. *Merriwether v. Garrett,* 10 Meyer's Fed. Dec., Corp., sec. 2224. The opinion of the Court rests upon the idea that not only is the marking of the line by the authorities of the town or city a condition precedent to the acquisition of the right by the riparian
(744) proprietor to convert his qualified ownership into an absolute property, but that even where such line has been marked, and, in the absence of any prescribed statutory form except the general one, declared by this Court to be merely directory, the entry must be pronounced void because it does not affirmatively appear that the corporation has taken action. I do not think that either proposition is supported by reason or authority; but, were we to concede that any grant issued to the applicant would be void unless the corporation had previously fixed its outer limit, even in this extreme view of the case I contend that the presumption of law would be that the officials named had discharged the duty required of them and in the proper manner, this being one of the many cases in which "acts of executive officers of the government (e. g., sheriffs, registers, treasurers, surveyors) are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such act on the ground of irregularity." 2 Wharton Ev., secs. 1318, 1297; Best on Ev., sec. 300; *United States v. Ross,* 92 U. S., 284. Entry No. 39 extended as far as the "channel," that word being used to designate the nearest portion of the bay where vessels could pass. The term "deep water" is used in the statute to denote precisely the same thing. I think that the presumption of law is that the lines mentioned in entry No. 39 extended only to the channel or deep-water mark, *as that had been indicated by the officers authorized to mark such lines.*

But I further maintain that it is not *essential to the validity of a grant* to a riparian proprietor of his own water-front that the corporation should *fix the line of the channel before the entry is made.* It has been

decided by this Court, and settled by the leading courts of the country, that littoral and riparian owners have, as an incident to their ownership of adjacent land, a qualified property in that covered by water on their front extending to navigable water (or to the channel or deep water). *Bond v. Wool,* 107 N. C., 150. "It does not seem that (745) the General Assembly intended, if it had the power to do so, to wrest (by The Code, sec. 2751) from the riparian proprietors any rights that they already held, but simply to allow them at a fair price to acquire an absolute, instead of a qualified, property." *Ib.,* 154. This Court has held that the plaintiff had the right to erect a wharf at the channel on the margin of navigable water in his own front, and that he is not bound to await the action of a corporation in whose limits his land lies before building it, though he erects it subject to the risk of losing it if located outside of the high-water mark subsequently made by the corporate authorities. When a person had erected a wharf before the passage of the Act of 1854 (The Code, sec. 2751) the Legislature, in that statute, recognized his qualified property and right to erect it "under the restrictions and the terms" prescribed in that act, viz., provided it should fall inside the deep-water line in front of any town, when established in the manner indicated by the laws. The Code, sec. 2751. Even the entry (No. 38) declared to be valid in this case, calls for "such marks and *lines on deep water, and at the channel, as may have been heretofore indicated,*" etc., not that have been designated, and it is not positively asserted, either in the entry or survey, that such line has been established, though the high-water mark and the line of deep water are called for. But the law recognizes the existence of a line of deep navigable water to which the qualified property of the riparian owner extended before the Act of 1854 was passed, and if it should affirmatively appear that the line has been marked, it must be essential to state it more explicitly than it is stated either in entry No. 38 or in the survey of it. If we are permitted to infer from the language used in No. 38 that the line has been actually marked, and is the deep-water line called for in the survey, I can see no sufficient reason why the channel called for in No. 39 should not be presumed to have been indicated by the proper officials of the town.

The opinion of the Court rests upon the ground that it ap- (746) pears affirmatively, from the language of entry No. 39, that the land entered is covered by navigable water, and that "such land is not the subject of entry, except under conditions prescribed in The Code, sec. 2751 (1), one of which is "that the town corporation shall regulate the line on deep water to which entries may be made." When the Colony of North Carolina joined the other colonies in declaring its independence, all vacant lands were held to rest *ipso facto* in the sovereign State

instead of in the British king, or the single lord proprietor, who claimed a portion of it under a grant from the Crown. The Act of 1777 first gave to the citizen the right of making entries upon certain conditions. One of these conditions was that the lands entered must not cover any portion of the territory set apart to the Cherokee Indians. Yet, when grants were made for land along the line of the Cherokee Nation, it was never thought necessary to set forth in an entry that it was located east of said line. Where entries were made and grants were issued after the line was established, by treaty, still further to the west, it was held by this Court repeatedly, that an entry and grant located on the Indian boundary line and covering land partly within and partly outside of the prohibited territory were only void as to the portion within the Cherokee boundaries. *Brown v. Brown,* 106 N. C., 451. I do not see the obvious reason why when a riparian proprietor, in attempting to acquire the absolute property in land covered by water in his front coextensive with his qualified property, mistakes the line of the channel as subsequently marked out by the proper officers, he should not be treated in the same way as one who, by mistake, has located his entry and grant so as to extend beyond the Meigs and Freeman line, or beyond the boundary of the county in which the entry was recorded. It is difficult to understand

(747) how the rights of any individual would be imperiled, if only so much of the land granted as should lie inside of the line ultimately marked by the town authorities should pass by the grant.

It is certain that the State has no ground of complaint if the result of this mistake be to place in her coffers for the benefit of the public schools the purchase-money for so much of the land covered by water as extends beyond the established high-water mark, just as he acquires no title for so much of the land embraced in his grant as laps upon the older grant. It seems to me, therefore, that the rule laid down by this Court in this case is arbitrary, not in harmony with previous adjudications construing analogous provisions of statutes in relation to entries and grants, and is not supported by reason.

Per Curiam. Modified and affirmed.

Cited: McNamee v. Alexander, 109 N. C., 246, 247; *Wool v. Edenton,* 113 N. C., 35; *S. c.,* 115 N. C., 13; *Board of Education v. Makely,* 139 N. C., 37.

STATE v. RUFUS BEST.

Liquor Selling—Minor—Witness—Evidence—Indictment—Variance.

1. A liquor seller who supplies liquors to a minor to drink, at the request of an adult who pays the price, is guilty of a violation of section 1077 of The Code, and the adult is also guilty as an aider and abettor.
2. A witness is competent to testify to the reputation in his own family as to his own age.
3. An indictment described the person to whom the liquor was sold as B. W. T., Jr., who, being sworn, gave his name merely B. W. T.: *Held*, to be no variance, the "Jr." being only *descriptio personæ*.

INDICTMENT for a misdemeanor, tried before *Womack, J.*, at Fall Term, 1890, of GREENE.

B. W. Taylor, for the State, testified: "I bought liquor from defendant at his bar, March, 1890." The witness was asked, "How old are you reputed to be in your family?" Objected to by defendant. Objection overruled, and witness answered, "I was nineteen years (748) old last August." Defendant excepted. Witness further testified, "I am not married. I bought a half pint from defendant, and paid for it fifteen cents."

The defendant testified: "Sherman Taylor said he wanted me to go to the bar; that he wanted to buy some whiskey; he said he wanted to get Ben Taylor full, or something of the kind; said he was going to make Ben treat. I told him I could not sell Ben liquor because he was a minor. I went into the bar. Sherman called for a half pint. I drew it. Sherman, Ben and John Taylor, and John Fields and others were present. They drank it, Ben, Sherman and John. They were the only ones at the counter drinking. Sherman said then that Ben had to treat; put up three 'shorts.' Ben walked up and threw some money on the counter. I said, 'I can't take the money from you.' I did not touch it. Sherman said, 'That is all right,' and took the money off and threw on the counter other money. I took it, and gave Sherman his change. When Sherman called for the three 'shorts,' I put them up. That was the liquor that Ben tried to pay for. It was not B. W. Taylor's money."

His Honor intimated that he would charge the jury that, if they believed the defendant's testimony, they would find him guilty. The defendant's counsel insisted that the defendant's testimony did not establish a sale or gift to B. W. Taylor, and further contended that, upon the evidence of Taylor himself, there was a fatal variance between the *allegata* and *probata*, in that from the evidence of the State's witness himself he was *B. W. Taylor*, and it was alleged in the indictment that the sale was made to *B. W. Taylor, Jr.*

His Honor instructed the jury to return a verdict of guilty, which they accordingly did. Judgment was thereupon rendered, from which the defendant appealed.

(749) *Attorney-General for the State.*
No counsel contra.

CLARK, J. The defendant testified that he knew that B. W. Taylor was a minor; that at the instance of another person, an adult, he furnished at his barroom said minor and the adult with a drink each of spirituous liquor; that he refused to receive pay from the minor, but received it from the adult. Putting aside the palpable evasion of the law which was thus attempted, the fact remains that the minor, who was unmarried, received and drank spirituous liquor at the hands of the defendant. That he furnished it at the request of, and for a consideration paid by, the adult, makes the "dealer" none the less liable. *S. v. Wallace,* 94 N. C., 827. No one, not even the father of the minor, could have authorized him to furnish the liquor to the minor. *S. v. Lawrence,* 97 N. C., 492. His Honor properly told the jury, if they believed the testimony, to find the defendant guilty. *S. v. Scoggins,* 107 N. C., 959.

The exception to evidence was without merit. The witness was competent to testify to his own age according to the reputation in the family. Abb. Tr. Ev., 87.

The indictment was for a sale to B. W. Taylor, Jr., with a second count charging that defendant did "give away" liquor to the same. The witness merely gave his name as B. W. Taylor. There was nothing in the evidence or circumstances tending to show any doubt as to his identity with the person mentioned in the indictment. This was not a variance. The "Jr." is no part of the name, but a mere *"descriptio personæ."*

It may be observed that the adult who procured the defendant to furnish the liquor to the minor was equally indictable, for though not a "dealer" he was accessory to the violation of the law, and in misdemeanors all accessories are indictable as principals.

Per Curiam. No error.

Cited: *S. v. Holder,* 133 N. C., 712; *Newby v. Edwards,* 153 N. C., 112; *Turner v. Battle,* 175 N. C., 223.

(750)

STATE v. J. M. BURKE.

Indictment—Quashing—False Pretense.

1. A false representation that a mule "was sound, would work well and would not kick," made knowingly with intent to cheat and defraud, and by means of which the prosecutor was cheated and defrauded of his money, etc., constitutes the offense of false pretense.

2. An indictment ought not to be quashed for want of precision or redundancy, when it can be seen from the entire instrument that the charge plainly appears.

MOTION to quash indictment, heard at January Term, 1891, of ROBESON, before *Armfield, J.*

The defendant is charged with the offense of *false pretense,* in violation of the statute (The Code, sec. 1025). The indictment charges that the defendant, at, etc., "unlawfully and knowingly devising and intending to cheat and defraud *of,* did then and there unlawfully, knowingly and designedly, falsely pretend to J. W. McRae that a certain mule which he, the said J. M. Burke, proposed to trade to the said J. W. McRae was sound and worked well and would not kick, whereas, in truth and fact, *mule* was not sound, would not work well and would kick, as he, the said J. M. Burke, then and there well knew, by color and means of which said false pretense and pretenses the said J. M. Burke did then and there unlawfully, knowingly and designedly obtain from the said J. W. McRae $100, being then and there the property of the said J. W. McRae, with intent to cheat and defraud, to the great damage of the said J. W. McRae, contrary," etc.

The defendant appeared and moved to quash the same. The court allowed the motion, and the Solicitor for the State having excepted, the State appealed to this Court.

Attorney-General for the State. (751)
No counsel for defendant.

MERRIMON, C. J. The indictment is not very formal and precise. There is some unnecessary repetition and redundancy in charging the offense that might well be omitted, but it serves every essential purpose. The false pretense, and the purpose to defraud thereby, are charged in the words of the statute, and clearly.

The word "said," which, strictly, ought to appear in the indictment next before the word "mule," at the end of the other words, "whereas,

in truth and fact," is obviously and sufficiently implied from the connection and purpose plainly appearing. The inadvertent omission does not affect the substance or prejudice the defendant.

The false representations as to certain qualities of the mule certainly constituted false pretense when made, as charged, to defraud. They are not the mere "tricks of trade," bluster, puffs and empty boast on the part of one putting his property on the market. They were seriously made with particular motive in connection with a proposition to sell the mule for a price to be increased by reason of them and the confidence they gave rise to. As charged, they were made in business earnest on the part of the defendant and so accepted and acted upon by the prosecutor, and, as charged, they were made with the positive intent to defraud. Thus the offense is sufficiently charged. *S. v. Hefner,* 84 N. C., 751; *S. v. Munday,* 78 N. C., 460; *S. v. Mickle,* 94 N. C., 843; *S. v. Sherrill,* 95 N. C., 663. It was not necessary to charge or prove an intent to defraud any particular person. The Code, sec. 1025. There is error.

Reversed.

Cited: *S. v. Skidmore,* 109 N. C., 796; *S. v. Flowers, ib.,* 843; *S. v. Mangum,* 116 N. C., 1001, 1002; *S. v. Ridge,* 125 N. C., 659; *S. v. Ratliff,* 170 N. C., 709; *S. v. Brown, ib.,* 715.

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(752)

STATE v. F. D. KOONCE, JR.

Appeal from Magistrate's Court—Trial De Novo.

Upon a trial and conviction before a justice of the peace the defendant moved in arrest of judgment, which motion was refused, and he appealed to the Superior Court: *Held,* that the appeal brought up the whole case, and the defendant was entitled to a trial *de novo.*

CRIMINAL ACTION heard upon appeal from a justice of the peace at Fall Term, 1890, of ONSLOW, *Armfield, J.*

The defendant was charged criminally before the mayor of the town of Richlands, in the county of Onslow, with the violation of an *ordinance* of that town, and convicted. He appealed to the Superior Court. In that court, upon motion of the Solicitor for the State, the State warrant was allowed to be amended; "the appeal was withdrawn," and "by agreement" the case was remanded to the mayor for trial. Afterwards, upon

application of defendant, the mayor transferred the case to a justice of the peace to be tried before him. The defendant demanded a jury trial, which was had. There was a verdict of guilty, and thereupon the defendant moved in arrest of judgment. The motion was overruled, and judgment was given against the defendant, and he appealed to the Superior Court. In that court the solicitor "insisted that the defendant, by asking at Spring Term, 1890, that the case be remanded to be settled by the lower court, and by order of the court to that effect, had lost his right to a further appeal." The defendant thereupon said that "he only asked to be heard in this (the Superior) court on his motion in arrest of judgment." The court refused to hear that motion, and granted the motion of the solicitor, to "amend the warrant so as to recite the town *ordinance* on which it is based, and otherwise conform it to the facts found on the trial." The defendant objected, and excepted. It seems (753) the amendments were made, but they do not appear in the transcript of the record. The court overruled the motion in arrest of judgment, gave judgment against the defendant, and he appealed to this Court.

Attorney-General for the State.
S. W. Isler for defendant.

MERRIMON, C. J. The proceedings and conduct of this case have been irregular and confused. The Superior Court should have tried the defendant upon the first appeal from the judgment of the mayor, but he cannot complain that this was not done. The offense charged is but a petty misdemeanor, and the appeal was "withdrawn," it seems, at his instance, and "by agreement" the case was remanded to the mayor to be disposed of by him. Afterwards the defendant had the case transferred to a justice of the peace, and he was tried before that magistrate. It must be taken that he consented to such course of procedure, and he is concluded by it, subject to his right of appeal to the Superior Court.

The appeal by the defendant from the judgment of the justice of the peace took the case into the Superior Court, not to be heard there simply as to a motion in arrest of judgment or on any exception to any pertinent decision, order, or judgment of the justices of the peace in the action, but to be tried upon the whole merits anew. The statute (The Code, sec. 900) explicitly prescribes that "in all cases of appeal (from the judgment of a justice of the peace) the trial shall be anew, without prejudice from the former proceedings." When, therefore, the appeal reached the Superior Court, that court ought to have proceeded in the action as to the trial *de novo,* and it might allow all proper amendments of the proceedings, including the State warrant, to that end. The

(754) defendant might have pleaded *nolo contendere,* guilty or not guilty; and so, before pleading, and afterwards, by permission of the court, he might have moved to quash the warrant. *S. v. Quick,* 72 N. C., 241; *S. v. Powell,* 86 N. C., 640.

The motion in the Superior Court to arrest the judgment in the court of the justice of the peace had no pertinency, because the action was there to be tried anew and without regard to the verdict, motions and judgment before the justice of the peace. The Superior Court was not a court of errors—it had jurisdiction to try and dispose of the case, which it obtained by virtue of the appeal. The court had authority to allow the State warrant to be amended, as it did do, but it could not thereupon at once proceed to judgment against the defendant. It appears that the latter pleaded not guilty, though the plea does not appear in the record before us. The court should have required him to plead or demur. If he pleaded not guilty, he should have been put upon his trial. If he pleaded *nolo contendere,* or guilty, the court might have proceeded to give judgment. But there was no trial, no verdict of a jury, no plea that warranted the judgment from which the defendant appealed. The judgment seems to have been rendered by inadvertence occasioned by the confusion and irregularities in the proceedings in the course of the action.

Error.

Cited: S. v. Warren, 113 N. C., 685; *S. v. Brittain,* 143 N. C., 670; *S. v. Pasley,* 180 N. C., 696; *S. v. Jones,* 181 N. C., 546.

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(755)

STATE v. W. T. EWING AND D. A. EWING.

Landlord and Tenant—Unlawful Seizure of Crop—Special Verdict.

1. To constitute the offense of an unlawful seizure of crops by the landlord, under The Code, sec. 1759, it is not essential that the landlord should take forcible or even manual possession of them—the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner.

2. The fact that the jury, in a criminal action, specially found the facts and submitted them to the court for an opinion as to whether they should acquit or convict, and the court being of the opinion that the defendants were not guilty thereon, so adjudged and directed a verdict of not guilty to be entered, does not constitute a *general* verdict of not guilty, but amounts to a *special* verdict, and from the judgment thereon the State can appeal.

3. The practice in respect to the manner in which special verdicts should be rendered is stated.

INDICTMENT for unlawfully seizing and appropriating crops, tried at Fall Term, 1890, of MONTGOMERY, *Bynum, J.*

The jury found the following special verdict:

"That in February, 1889, one S. T. Usher rented from the defendants, in the county of Montgomery, the turpentine boxes on certain land belonging to the defendants in said county for the ensuing turpentine season; that the turpentine season ordinarily begins in the month of March and lasts until the following March; that said Usher, in the month of September following, paid to the defendants the rent he contracted to pay, it being a moneyed rent; that in December, 1889, defendants rented the lands and the turpentine boxes for the year 1890 to another man; that prior to the first day of January, 1890, the said Usher had not taken from the boxes all of the turpentine of the running of the season of 1889; that on 14 January, 1890, said Usher sent his hands to take from the said boxes the said turpentine, and (756) the hands were forbidden by the defendants from taking the same, and in consequence of said forbidding they did not take the same; that there were about four barrels of turpentine left in the boxes of the crop of 1889 which had been produced by the labor of said Usher and his employees; that said Usher never did get the said turpentine in consequence of the forbidding of his hands by defendants to gather the same; that said Usher was not indebted to defendants or either of them for any advances made to him; that defendants did not get the turpentine, but that it was gathered by their tenant for the year 1890; the defendants received their rent from him."

Upon the special finding of facts by the jury, the court being of the opinion that the defendants were not guilty, so adjudged, and ordered a verdict of not guilty to be entered, and gave judgment discharging the defendants, from which judgment the Solicitor for the State prayed an appeal.

Attorney-General for the State.

J. B. Batchelor and J. C. Black (by brief) for the defendants.

MERRIMON, C. J. The statute (The Code, sec. 1754) prescribes that "when lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all 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

lands shall be paid, and until all the stipulations contained in the lease or agreement shall be performed," etc.; and it further gives the landlord and his assigns a civil remedy, prescribed in case the lessee, cropper, or assigns, or either of them, "shall remove the crop, or any part thereof," from the lands without the consent of the lessor or his assigns, etc. The same statute (The Code, sec. 1755) gives the lessee or cropper, or the assigns of either, a like civil remedy against the lessor or his assigns in case he or they "shall get the actual possession of the crop, or any part thereof, otherwise than by the mode prescribed in the preceding section," etc., and refuse upon notice "to make a fair division of said crop or to pay over to such lessee or cropper, or the assigns of either, such part thereof as he may be entitled to under the lease or agreement," etc. These and other like statutory provisions extend to leases of turpentine trees. The Code, sec. 1762.

(757)

The purpose of the statute (The Code, sec. 1759) which makes it a misdemeanor on the part of the lessee or cropper, or the assigns of either, to remove the crop, or any part thereof, without the consent of the lessor or his assigns, etc., and likewise on the part of the landlord to "unlawfully, willfully, knowingly and without process of law, and unjustly, seize the crop of his tenant when there is nothing due him," etc., is to render the statutory provisions and regulations above referred to more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed.

It appears that the prosecutor had leased turpentine trees from the defendants and made the crop, but had not gathered the whole thereof; that his term of lease was not over, but he was out of the possession of the trees and the land on which they were situate; that he had paid the defendants all the rents due them, and owed them nothing for advancements or expenses; that he sent his servants back to gather and remove the remaining ungathered part of the crop; that they went to do so, and the defendants forbade them to gather the crop so remaining, and accordingly they did not; that the defendants, before the prosecutor's lease was over, leased the same trees to tenants for the next ensuing year, and these tenants were allowed to take the balance of the prosecutor's crop and use it for their own purposes.

(758)

The defendants had possession of the land, the turpentine trees and the boxes in them containing the prosecutor's ungathered crop of turpentine. Such being the facts, clearly the prosecutor might have maintained his civil action, as allowed by the statute above mentioned, against the defendants to recover the ungathered part of his crop. The defendants had no shadow of right to detain it or prevent the owner or his

servants from gathering and removing it. We are also of the opinion that the defendants, in the just sense and contemplation of the statute (The Code, sec. 1759), "unlawfully, willfully, knowingly, and without process of law, and unjustly," seized the crop of their tenant, the prosecutor, when there was nothing due them, and thereby committed a misdemeanor. They violated the spirit and certain purpose of the statute first above referred to, and did that which the penal provision just cited intends to prevent. They had possession of the turpentine trees, the boxes in them containing the ungathered crop of the prosecutor that he had a right to gather, and when they refused to allow his servants to gather the same, they thereby manifested their purpose to, and did, in contemplation of the statute, "seize," take possession and control of such ungathered crop. The word "seize" is used in the sense of taking unlawful actual possession of the crop by force, actually used or plainly implied. To constitute the offense, it is not necessary that the landlord shall take possession of the crop *manu forti,* or manual possession of it at all; it will be complete in this respect if he takes possession and control thereof in such way as prevents and excludes the tenant from gathering and removing his crop in a peaceable and orderly manner. This the statute intends he shall have the right to do.

The defendants asserted their purpose to have and take the (759) exclusive possession when they forbade the prosecutor to remove his crop, and the latter, on that account, desisted from doing so. That such was their purpose was made the more manifest by the fact that they let the turpentine trees to other tenants and allowed them to take the prosecutor's remaining crop.

We are, therefore, of opinion that upon the special verdict the court should have decided that the defendants were guilty.

It was contended on the argument that an appeal did not lie in this case in favor of the State, because, as suggested, there was a verdict of not guilty. This contention is founded in misapprehension. It very obviously appears from the record that the jury intended to, and certainly did, render a special verdict embodying all the material facts of the case. This they did, and no more; and this it was their province to do. This verdict remains and appears as part of the record, and the judgment of the court is founded upon it. The jury could not go further and render two verdicts—one special and the other general—so that both might prevail at the same time. To do so would involve practical absurdity. The court did not set the special verdict aside. It, in effect, simply decided that upon this verdict the defendants were not guilty, and gave judgment in their favor. The entry of the verdict, "not guilty," was not the finding of the jury; it was the order of the court

upon the special verdict, and was not necessary—perhaps it might, ought to have, been omitted, as it served no useful purpose. *S. v. Moore,* 29 N. C., 228.

On the argument it was brought to our attention that some confusion and inconsistency have prevailed in the numerous decisions of this Court in respect to special verdicts in criminal cases. We have examined the cases cited and others, and, upon mature consideration, we think it better that, upon the special verdict in a case, the Court should (760) simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly. Indeed, the simple entry of judgment in favor or against the defendant would be sufficient. This is substantially the practice as pointed out in *S. v. Moore, supra.* It is plain and convenient, will prevent further conflict of decision, and should be observed.

Error.

Cited: S. v. Spray, 113 N. C., 688; *S. v. Gillikin,* 114 N. C., 835; *S. v. Robinson,* 116 N. C., 1048; *S. v. Ditmore,* 177 N. C., 594.

STATE v. WILLIAM BIGGERS ET AL.

Statutes, Repeal and Construction—Fences—Indictment—Jurisdiction.

1. There is no repugnancy or conflict between chapter 516, Laws 1889, and section 1062 of The Code. The latter statute was enacted to protect *enclosures* made by fences, walls, etc., while the former was passed to protect the *fences* therein mentioned erected *on the land,* irrespective of the fact whether they completely surrounded or enclosed it or any part of it. In an indictment under the latter, it is necessary to aver and prove that the fence or wall surrounded or enclosed the field or other premises enumerated therein, while under the former no such averment is required. Of the latter the Superior Court has original jurisdiction; of the former a justice of the peace has original jurisdiction.

2. An indictment which charges that the defendant did cut and destroy "a wire fence enclosing a pasture" may be maintained under The Code, sec. 1062.

3. An older statute will not be held to be repealed by a later one by implication, unless the two are irreconcilably inconsistent.

INDICTMENT tried at Fall Term, 1890, of CABARRUS, before *Bynum, J.*

The defendants were found guilty. There was a motion in arrest of judgment on the following grounds:

"First. It appeared that the offense was committed in May, (761) 1889, and the indictment was found at Fall Term, 1889, and the Superior Court did not have jurisdiction of the offense when the bill was found, or when judgment was to be pronounced.

"Secondly. That there were two statutes in reference to the same offense—section 1062 of The Code, and the Act of 1889, ch. 516—and the one of subsequent date changes the punishment of the same, and the indictment does not by proper averment refer to the statute under which is was found, so that the court can see the measure of punishment to be inflicted."

Motion in arrest allowed, and the court gave judgment discharging the defendants, and the State appealed.

Attorney-General for the State.
W. J. Montgomery (by brief) for defendants.

AVERY, J. The General Assembly of North Carolina passed an act (Laws 1889, ch. 516) which took effect 1 June, 1889, and contained the following provisions:

"Section 1. That any person who shall willfully destroy, cut or injure any part of a wire fence situated on the land of another shall be guilty of a misdemeanor, and upon conviction thereof shall be imprisoned not exceeding thirty days or fined not exceeding $50.

"Sec. 2. That a fence composed partly of wire and partly of wood shall, for the purpose of this act, be deemed and taken to be a wire fence."

The Code, sec. 1062, contains the provision that "any person who shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other enclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or any church, graveyard, factory or other house in which machinery is used, shall be guilty of a misdemeanor." By limiting the punishment as prescribed in the Constitution (Art. XIV, sec. 27) the offense cre- (762) ated by the former act was brought within the jurisdiction of a justice of the peace, while that enacted by The Code, is cognizable in the Superior Court. This indictment was found in the Superior Court and charged that the defendants, "with force and arms at and in the county aforesaid, a certain wire fence (enclosing a pasture) several hundred yards long, the property of H. C. Lefler then and there situate, unlawfully, willfully and violently did cut and destroy for the space and distance of 200 or 300 yards, and that the said William Biggers, James Day, John Biggers and M. C. Biggers, the said wire fence above described, by the means aforesaid, did then and there unlawfully and willfully greatly injure, deface and damage," etc.

The rule laid down in this Court in *S. v. Wise,* 66 N. C., 120, was that where the Legislature had passed two acts in reference to the same offense, and the later act changes the punishment, the indictment must, by proper averment, refer to the statute under which it was found, so that the court may see the exact character of the offense and the nature and measure of the punishment to be imposed. The Act of 1889 does not refer to section 1062 of The Code, and does not purport upon its face to amend it, nor are the provisions of the former act repugnant to those of the previous statute. Though a wire fence may be included in the generic term "fence," the Act of 1846 (The Code, sec. 1062) was passed to protect enclosures made by stone walls, palings, or in any other way, around cultivated fields, pastures, churches or graveyards, while the later act manifestly might have been, and probably was, intended to protect fences made in the ordinary way by fastening wire to wooden posts, and erected as a barrier against trespassers on one side of a piece of land, while on the other three sides no impediment is placed in the way of those who would enter upon it. To constitute the
(763) offense created by the later act, it is not necessary that the land should be completely surrounded or enclosed, but it is sufficient if the wire fencing injured or destroyed be situate upon the land. Should the owner of a piece of woodland, abutting on a public or private highway, erect of wire and posts, instead of using slats, an obstruction like that described in the case of *S. v. Roberts,* 101 N. C., 744, any person injuring or destroying it would now be guilty of a misdemeanor, cognizable in the court of a justice of the peace, but the facts agreed upon in the case would not now, any more than in the year 1888, sustain a charge of injuring a fence enclosing land preferred in the Superior Court, unless it were averred and proven that it surrounded a cultivated field, a pasture, a church or a graveyard. Indeed, it is not improbable that the opinion in that case, published in the Fall of 1888, suggested the propriety of allowing landholders to protect their land against trespassers by the use of wire fences.

The indictment charges the cutting, destroying and injuring of a wire fence "enclosing a pasture," and the State was bound to prove the averment as made that the fence did enclose a pasture. On the other hand, no such averment is necessary in the indictment under the Act of 1889, and though it might lie in a case where a wire fence in fact surrounded a field or pasture, it would be as unnecessary to aver that as to set forth the fact that a wire fence enclosed a piece of woodland.

Where two statutes are not in conflict, it is familiar learning that an indictment is often so drawn that it may be sustained under either, just as it often happens that an indictment may be held good as a charge of the statutory offense, or the offense growing out of the same

transaction at common law. There is no conflict between the two enactments. The later act was passed to protect landowners against a wrong that the court had declared was not indictable under the previous act.

The principle (stated in *S. v. Long,* 78 N. C., 571, and approved in *S. v. Williams,* 97 N. C., 456) that the repeal of an act pend- (764) ing a prosecution for the offense created under it arrests the proceeding and withdraws all authority to pronounce judgment, even after conviction, has no application in our case, because the two statutes are not repugnant, and there was no necessity for a clause saving indictments already pending, unless there had been some conflict. A later statute is held to repeal by implication an older enactment with which it is irreconcilably inconsistent to the extent of such repugnancy; but the two must be reconciled, if it can be done by any fair construction. *S. v. Massey,* 103 N. C., 358; *S. v. Custer,* 65 N. C., 339.

We attach no importance to the fact that the Act of 1889 went into effect on 1 June, 1889, and that the indictment was found at the Fall Term, 1889, and the appeal being by the State from an order arresting judgment, we cannot look beyond the record and take notice of the testimony offered.

We think the indictment is good under section 1062 of The Code, which is not modified or repealed in whole or in part by the Act of 1889. The bill being otherwise in the usual form, or containing all that is essential of approved precedents used in indictments under the provisions of The Code referred to, it is not material that a particular kind of fence was specified instead of using the generic term. The words "enclosing a pasture," in the connection in which they appear in the bill, constitute a sufficient averment that the fence injured or destroyed surrounded and enclosed a pasture.

There was no ground for arresting the judgment, and, therefore, the judgment of the court below is

Reversed.

Cited: S. v. Parker, 139 N. C., 587; *S. v. Perkins,* 141 N. C., 798; *S. v. Godwin,* 145 N. C., 464.

(765)

STATE v. R. P. ROSEMAN.

Assault and Battery—Deadly Weapon—Serious Injury—Jurisdiction—Punishment.

An indictment charged that the defendant made an assault upon the prosecutrix with a "deadly weapon, to wit, a club," etc. On the trial it appeared that the defendant was the keeper of a jail and resided therein with his family; that his wife was seriously ill; that the prosecutrix was imprisoned in the jail and was conducting herself in a loud, boisterous and disorderly manner, and refused to desist when ordered by the defendant; that thereupon he took her to another apartment and gave her a severe whipping with a buggy whip, cutting the flesh on her back and arms. The defendant was convicted and fined $100: *Held*, (1) the Superior Court had jurisdiction; (2) the punishment was within the discretion of the court below and would not be reviewed by the Supreme Court.

INDICTMENT tried at Spring Term, 1891, of ROWAN, *Bynum, J.*

The indictment charges that the defendant made an assault upon the prosecutrix "with a certain deadly weapon, to wit, a club, of the length of 3 feet and 1 inch in diameter," etc. He pleaded not guilty. On the trial it appeared that the prosecutrix was confined in the common jail of Rowan County, and the defendant was the keeper of the jail; that on one night she sang and made much disagreeable noise, to the discomfort of the defendant's wife, who was lying in a room on the first story of the jail and very ill; that the prosecutrix refused to obey the jailer's command to cease making noise, etc. Whereupon, he carried her down (she was confined on the third floor) to the second floor and whipped her; that witness did not see him whipping her, as he (witness) was on the third floor, but heard the licks and heard the woman hollering; that he hit her fifteen or twenty licks—some of the prisoners said twenty-
(766) eight; that he then brought her back upstairs; her arms and back were cut and bleeding; that some of the prisoners told him he ought not to have whipped that woman that way, and that defendant said he had whipped her with a buggy whip, etc.

The prosecutrix testified, among other things, that the defendant carried her down to the second floor, got a whip and whipped her; that she did not know how many licks he gave her; that she had on nothing but her chemise—her arms and neck were bare; that he cut the blood out of her arms and back; that it did not disable her; that the places healed up in a week or two; that the defendant did not take the shackles off her when he whipped her, etc. There was evidence tending to show that the prosecutrix was a low, bad woman, etc.; that the defendant had directed her to hush, and she would not, etc.; that his wife was very ill, etc.

There was a verdict of "guilty," and judgment thereupon that the defendant pay a fine of $100, from which he appealed to this Court, assigning as error, first, that the court had not jurisdiction; and, secondly, that the fine was excessive.

Attorney-General for the State.
John W. Mauney for defendant.

MERRIMON, C. J. Clearly, the court had jurisdiction. The indictment charges an assault with a deadly weapon, describing it, and that serious injury was done. The evidence certainly tended to prove that the assault was made with a deadly weapon, and that serious damage was done; but if it had turned out that the evidence only proved a simple assault, the Superior Court would, nevertheless, have jurisdiction, might receive a verdict of "guilty," and proceed to judgment, as it did do. This is so, because that court has general jurisdiction of assaults, assaults and batteries, and affrays, and, having gained jurisdiction in a particular case, it will continue to hold and (767) exercise the same until it shall be disposed of in the course of procedure. This is settled. The Code, sec. 892; *S. v. Reaves,* 85 N. C., 553; *S. v. Ray,* 89 N. C., 587; *S. v. Huntley,* 91 N. C., 617; *S. v. Shelly,* 98 N. C., 673; *S. v. Earnest, ib.,* 740; *S. v. Phillips,* 104 N. C., 786.

And so, also, if a simple assault had been charged, this would have apparently given the Superior Court jurisdiction, and the burden would have been on the defendant to show that twelve months (Laws 1889, ch. 504) had not elapsed since the offense was committed, and the next before the Superior Court took jurisdiction. *S. v. Earnest, supra,* and the cases there cited.

It must be conceded that the prosecutrix behaved badly, and greatly provoked and annoyed the defendant and distressed his sick wife; but she was in prison and helpless. While the jailer (the defendant) had the right to subdue her outbreak and keep her in subordination by reasonable and proper means, he had not the shadow of right to gratify his feelings of revenge or to inflict upon her such a cruel and terrible beating with a horse-whip. We cannot hesitate to say that the injury inflicted was serious, and that the fine imposed was clearly within the discretion of the court. *S. v. Miller,* 94 N. C., 902, 904.

Affirmed.

Cited: S. v. Nash, 108 N. C., 938.

(768)

STATE v. MARTIN PEEPLES.

Bastardy—Presumption.

1. It is not necessary that a bastardy proceeding should show affirmatively that the mother of the bastard was a single woman—that fact will be presumed.

2. The fact that the mother of the alleged bastard was married only raises a presumption that the child was legitimate.

3. Where it appeared that the affidavit upon which a bastardy warrant issued was sworn before a justice of the peace by the mother, it will be presumed to have been voluntarily made, nothing to the contrary being shown.

BASTARDY PROCEEDING tried before *Bynum, J.*, at February Term, 1891, of FORSYTH, upon an appeal from a justice.

The State introduced the affidavits of the woman, upon which the warrant had been issued, and rested its case. The defendant introduced no evidence, and asked the court to instruct the jury that the affidavit was insufficient and not a *prima facie* case. The court refused, and instructed the jury to return a verdict against the defendant, and entered judgment thereon. Defendant appealed, and assigned as exceptions:

1. That it does not appear that the affidavit of the woman was voluntary.

2. That it did not appear by the affidavit that the mother was a single woman.

3. That the warrant did not conclude, "against the statute in such case made and provided."

Attorney-General and R. B. Glenn for the State.
J. S. Grogan for the defendant.

(769) CLARK, J. 1. An inspection of the affidavit shows that it was sworn out by the woman before a justice of the peace. It appears to be voluntary, and there is nothing to indicate the contrary.

2. It is not necessary that it should appear affirmatively that the woman is a single woman. If she is a married woman, that is a matter of defense, and only then to the extent of raising a presumption that the child is legitimate. *S. v. Pettaway,* 10 N. C., 623. There is no presumption of law that she is married rather than single; indeed, "it is to be assumed she is a single woman until it is made to appear that she is married." *S. v. Allison,* 61 N. C., 346; *S. v. Higgins,* 72 N. C., 226.

In a very recent case (*S. v. McDuffie,* 107 N. C., 885), which was an indictment for fornication and adultery, it is held that the single state, being the first in order of time, is presumed to continue till a change to the married state is shown.

3. The proceeding is, in the main, civil in its nature (*S. v. Carson,* 19 N. C., 368; *S. v. Pate,* 44 N. C., 244; *S. v. Higgins, supra*), and the conclusion, "against the form of the statute," etc., is unnecessary. But were it a criminal action, such conclusion was mere form and immaterial, as has been repeatedly held. *S. v. Sykes,* 104 N. C., 694; *S. v. Kirkman,* 104 N. C., 911; *S. v. Harris,* 106 N. C., 682; *S. v. Peters,* 107 N. C., 876.

Affirmed.

Cited: S. v. Cutshall, 109 N. C., 769; *S. v. Edwards,* 110 N. C., 512; *S. v. Burton,* 113 N. C., 663, 665; *S. v. Ballard,* 122 N. C., 1030; *S. v. Liles,* 134 N. C., 737; *S. v. Blackley,* 138 N. C., 622; *S. v. Connor,* 142 N. C., 708; *S. v. Craft,* 168 N. C., 212.

(770)

STATE v. WILL FESPERMAN.

Assault and Battery—Jurisdiction—Deadly Weapon—Statute—Punishment.

1. Where the indictment charges an assault with a deadly weapon, but the proof shows a simple assault, committed within less than six (now twelve) months since the finding of the bill, the jurisdiction of the Superior Court is not ousted.

2. Chapter 152, Laws 1891, does not take away the jurisdiction of the Superior Courts of assaults with deadly weapons when no serious injury has been inflicted.

3. The Constitution makes the measure of punishment which a justice of the peace may impose the test of his exclusive jurisdiction in criminal actions; therefore, an act which simply declares that justices of the peace shall have exclusive jurisdiction of certain offenses, without fixing the punishment within the constitutional limit, is inoperative, especially where there is an unrepealed statute leaving the punishment to the discretion of the court.

APPEAL at STANLY, Fall Term, 1890, from *Bynum, J.*

Attorney-General for the State.
No counsel contra.

CLARK, J. The indictment charges an assault "with a certain deadly weapon, to wit, a shovel, of the weight of 5 pounds." The special verdict finds that, in fact, the assault was made by the defendant with his fist and within six months before the true bill was found. It has been repeatedly held that when the indictment in the Superior Court charges an assault with a deadly weapon, the court retains jurisdiction, although in the proof simple assault only shall be shown. *S. v. Ray,* 89 N. C., 587; *S. v. Reaves,* 85 N. C., 553; *S. v. Cunningham,* 94 N. C., 824; *S. v. Earnest,* 98 N. C., 740. The cases in which the jurisdiction
(771) of the Superior Court is ousted by showing that the assault was within six months (now twelve months by virtue of chapter 504, Laws 1889) before indictment found, are limited to those in which the charge in itself is of a simple assault. *S. v. Porter,* 101 N. C., 713, and cases there cited. The court below was, therefore, plainly in error in holding as the law stood at the time of the trial (1890), that the Superior Court did not have jurisdiction.

It is insisted, however, that by virtue of chapter 152, Acts 1891, a magistrate has no jurisdiction of an assault with a deadly weapon if no serious damage was done. There is in the act no exception as to pending actions, and the present case differs in that respect from *S. v. Watts,* 85 N. C., 517. But if it is conceded that the act applies to pending cases, we are of opinion that it does not confer jurisdiction of assaults with a deadly weapon upon magistrates in any case.

The Constitution restricts the jurisdiction of magistrates in criminal matters to cases "where the punishment cannot exceed a fine of $50 or imprisonment for thirty days." It is not competent, therefore, for the Legislature to confer jurisdiction upon magistrates of any offenses of which the punishment affixed by law may exceed that limit. The Code, sec. 987, which was not amended, still prescribes that assaults with a deadly weapon may be punished by a fine and imprisonment, in the discretion of the court. It is true that chapter 152, Laws 1891, amending The Code, sec. 892, purports to give magistrates exclusive original jurisdiction of all assaults in which no serious damage is done, and of all criminal matters arising in their counties "where the punishment prescribed by law shall not exceed a fine of $50 or imprisonment for thirty days." We might *surmise* that the intention was to confer jurisdiction upon magistrates in cases where, though a deadly weapon was used, no serious damage was inflicted. But the punishment for assaults with a deadly weapon in all cases, whether serious damage is or is not
(772) inflicted, being left unchanged—"fine and imprisonment, in the discretion of the court" (The Code, sec. 987)—whatever may or may not have been the legislative intent in amending The Code, sec. 892, the amendatory act could not confer upon the justice's court jurisdiction

of an offense the punishment affixed to which may exceed the constitutional limit of such court. The Constitution makes the punishment which the court has authority to impose the test of a magistrate's jurisdiction. It was competent for the Legislature to reduce the punishment of this offense within the jurisdiction of a justice, and the justice would thereupon, *ipso facto,* acquire jurisdiction even without further provision, but an act in terms prescribing that a justice of the peace shall have jurisdiction of an offense, without reducing the punishment within the constitutional limitation upon that offense, is of no effect. This has been often decided. *S. v. Perry,* 71 N. C., 522; *S. v. Cherry,* 72 N. C., 123; *S. v. Heidelburg,* 70 N. C., 496; *S. v. Vermington,* 71 N. C., 264. The judgment is reversed and the case remanded, that the court below may pass sentence upon the special verdict in accordance with this opinion.

Reversed.

Cited: S. v. Price, 111 N. C., 705; *S. v. Wynne,* 116 N. C., 985; *S. v. Fritz,* 133 N. C., 728; *S. v. Taylor, ib.,* 757; *S. v. Lytle,* 138 N. C., 744; *S. v. Lewis,* 142 N. C., 630; *S. v. Hooker,* 145 N. C., 581; *S. v. Holder,* 153 N. C., 608; *S. v. McAden,* 162 N. C., 577; *S. v. Hyman,* 164 N. C., 414, 415; *S. v. Earnhardt,* 170 N. C., 730.

STATE v. WILLIAM KIRBY.

Disturbing Religious Congregations.

The defendant and another engaged in a fight about 35 yards from a church, in which, at the time, a congregation was engaged in religious worship. One who was present at the fight ran to the church and called out, "They are fighting at the fire," whereby the congregation was disturbed. The jury found that the congregation would not have been disturbed but for the fact of their attention being called to the fight in the manner described: *Held,* the defendant was not guilty of disturbing a religious congregation.

INDICTMENT for disturbing a religious congregation, tried (773) before *Bynum, J.,* at March Term, 1891, of WILKES.

The jury found, as a special verdict, that the defendant and another engaged in a fight outside of, and about 35 yards from, the church, while the congregation was assembled for divine worship; that during the fight some one ran to the church and called out, "They are fighting

out yonder at the fire," whereupon many of the congregation ran out and services suspended; that when the members of the congregation got out to the fire the fight was over. The jury further found that the language used by the defendants during the fight and quarrel was not loud enough to have disturbed the congregation, and they were not disturbed by the fuss at the fire, and would not have been disturbed if some one had not run to the church and called out that they were fighting.

The court being of opinion, upon the facts found, that the defendant was not guilty, so held, and the verdict and judgment were accordingly entered. Appeal by the State.

Attorney-General for the State.
No counsel for the defendant.

CLARK, J., after stating the case: The special verdict having found as a fact that "the congregation was not disturbed by the fuss (i.e., the quarrel and fight) at the fire," we do not see how it could be held that the congregation was, notwithstanding, disturbed thereby.

It is found that the congregation was disturbed by some one excitedly reporting that there was a fight. This was not the act of the defendant, nor was it necessarily the result of his actions. It should have appeared clearly, and not by inference only, that by the judgment of the court the defendant was discharged (*S. v. Hazell,* 95 N. C., 623), but the
(774) Attorney-General admits that such was the fact, and consents that the record may be amended so as to show it.

Affirmed.

STATE v. E. W. STUBBS.

Fornication and Adultery—Evidence—Indictment.

1. The declarations of a party made after the commission of the offense with which he is charged, not *res gestæ*, are incompetent as evidence for him.

2. The rejection of evidence cumulative in its nature and of slight importance will not constitute ground for a new trial.

3. Evidence of the conduct of persons indicted for fornication and adultery, since the institution of the prosecution, may be received in explanation of their relations prior to the time of the finding of the bill.

4 An indictment for fornication and adultery which did not charge that defendants did "lewdly and lasciviously associate," etc., but does charge

that they "unlawfully did associate, bed and cohabit together, and did then and there commit fornication and adultery," sufficiently describes the offense.

APPEAL at CATAWBA, Fall Term, 1890, from *Armfield, J.*

The defendant, and a *feme* defendant who did not appeal, were indicted for the offense of fornication and adultery, and pleaded not guilty. There was a trial and verdict of guilty, and judgment thereon, from which the male defendant appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J. The *feme* defendant, on the cross-examination of a witness for the State, asked the latter whether, on some occasion while she was in possession of property of the male defendant, and before the indictment, she had not told the witness that her (775) brother had driven her from home and that her father had paid the male defendant, who had married her cousin, to take her on his farm as a work hand.

The question had reference to declarations of the *feme* defendant made after the offense charged in the indictment. The evidence, if material, was properly rejected. What a party says exculpatory of himself after the offense was committed, and not part of the *res gestæ,* is not evidence for him. Otherwise, he might make evidence for himself. *S. v. McNair,* 93 N. C., 628, and cases there cited; *S. v. Ward,* 103 N. C., 419; *S. v. Moore,* 104 N. C., 744.

The appellant testified in his own behalf, and was asked if he had not heard the *feme* defendant's father order her to leave his house, and if he had not seen letters from her father and brother declaring she could not stay at her father's house. Upon objection, the court excluded reference to the letters. The evidence seems to have been of slight importance, and the mere mention of letters was simply cumulative, if evidence at all. The exclusion complained of was, in any view of it, too slight to constitute ground for a new trial. *Whitehurst v. Hyman,* 90 N. C., 487; *McGowan v. R. R.,* 95 N. C., 417; *Livingston v. Dunlap,* 99 N. C., 268.

The State produced evidence tending to show that the defendants had been seen driving together since the prosecution began, and this was received in connection with other evidence going to show their lascivious association within two years next before this action began. As to this evidence the court instructed the jury "that they could only find the defendants guilty upon proof of this association—bedding and cohabiting with each other within two years next before the finding of the

(776) bill of indictment—but that the evidence offered of acts before that time, and also acts after finding of the bill of indictment, should be considered by them as explaining the relation of the parties within the two years preceding the finding of the bill." This is assigned as error. The objection is unfounded. The evidence objected to was received in connection with other pertinent evidence, and as tending in some degree to prove the adulterous character of the association of the parties. *S. v. Guest,* 100 N. C., 410; *S. v. Wheeler,* 104 N. C., 893.

The motion in arrest of judgment cannot be allowed. The indictment sufficiently charges the substance of the offense. It does not charge, in the terms of the statute, as regularly it should do, that the defendants did "lewdly and lasciviously associate," etc., but it does charge that they "unlawfully did associate, bed and cohabit together, and then and there did commit fornication and adultery, contrary to the form of the statute," etc., and it also charged that they were "not united together in marriage." All this must imply that they did "lewdly and lasciviously associate." *S. v. Lashley,* 84 N. C., 754. It is always safer and better to charge the statutory offense in the words of the statute, when this can be conveniently done, but when the offense is charged substantially, in all respects, the indictment must be upheld as sufficient.

There is no error, and the judgment must be

Affirmed.

Cited: S. v. Varner, 115 N. C., 745; *S. v. Mace,* 118 N. C., 1247; *S. v. Raby,* 121 N. C., 683; *Kinney v. Kinney,* 149 N. C., 326; *S. v. Peterson, ib.,* 535; *S. v. Britt,* 150 N. C., 812.

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(777)

STATE v. W. M. HALL.

Forgery—Indictment—Mistrial.

1. While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument.
2. An indictment charging an intent to defraud A may be sustained by proof of an intent to defraud A and B.
3. It is not now necessary in an indictment for forgery to allege the name of the party intended to be defrauded. The Code, sec. 1191.
4. The trial court may, in its discretion, direct a mistrial as to one of the defendants in an indictment, and proceed to verdict and judgment as to the others.

5. The forgery of an order containing a request that the person intended to be defrauded would send the defendant certain goods therein named as a misdemeanor at common law, and an indictment therefor may be sustained independent of the statute on the subject.

APPEAL at Fall Term, 1890, of STANLY, from *Bynum, J.*

The defendant and one Freeman were indicted at Fall Term, 1889, for forgery of the following paper-writing:

Mr. Miller, pleas send me 3 gals. whiskey I will send you money.
DOLPH SHAVER.

Dec. the 24th 1888.

There were two counts in the bill of indictment, the first charging the forgery with intent to defraud Miller, and the second with intent to defraud Shaver.

At Spring Term, 1890, the defendants were put upon their trial. The defendant Freeman was convicted, but the jury having failed to agree upon a verdict as to the defendant Hall, the court directed a mistrial as to him. At Fall Term, 1890, he was again placed on trial.

It was in evidence that Miller and one Basinger were partners, distilling and selling liquor; that the order set out in the bill was fraudulently signed by said Hall without the authority of Shaver; that it was presented at the place of business of Miller & Basinger to Basinger by said Freeman, who obtained the liquor on it and delivered it subsequently to Hall. The other facts were not set out, as there was no exception taken to the evidence.

The defendant asked the following instructions: (778)

1. That there is a variance between the allegations contained in the bill of indictment and the proof, in that the bill of indictment alleges that the order alleged to be a forgery was made with an intent to defraud Manuel Miller, while the proof showed that the whiskey was obtained from James Basinger.

2. There is no proof that any whiskey was obtained on the order from Miller.

The court refused the instructions asked, and, in lieu thereof, charged the jury that if they found the fact to be that Miller & Basinger were partners in Rowan County, that defendant, in Stanly County, signed the order as set forth in the bill of indictment, that the charge in the bill to defraud Miller would be sustained by this proof if Basinger filled the order believing it to have been signed by Shaver.

To this defendant excepted, and also to the refusal to give the special instructions asked.

Verdict of "guilty." Judgment. Appeal by defendant.

Attorney-General for the State.
J. B. Batchelor and John Devereux, Jr., for defendant.

CLARK, J., after stating the case: To constitute forgery it is essential that there is an intent to defraud. It is not essential that any one be actually defrauded, or that any act be done other than the fraudulent making or altering the writing. The forgery of the order upon Miller and its presentation to his partner was evidence, ample, of the intent to defraud. *S. v. Lane,* 80 N. C., 407; *S. v. Morgan,* 19 N. C., 348. It was immaterial whether Miller himself, or Basinger for him, as his partner, filled the order, or, indeed, whether the order was filled at all or not. This is not an indictment for obtaining goods under false pretense.

Indeed, upon an allegation of an intent to defraud A, it is not a (779) variance to show an intent to defraud A and B. 1 Whart. Cr. Law, 713, 743*a*. And, in fact, it was not necessary to allege the name of any person or corporation intended to be defrauded. The Code, sec. 1191. Besides, there was no instruction refused or exception taken to the charge as to the second count. The alleged errors were clearly such as could not have affected the verdict on the second count. This being so, and there being a general verdict of guilty on both counts, with but one sentence imposed, the law will apply it to the verdict upon the count to which no exception was assigned. *S. v. Toole,* 106 N. C., 736.

The defendant moves here in arrest of judgment—

1. Because, having been indicted jointly with Freeman, who was found guilty at the former term, it was error to make a mistrial as to the defendant and try him alone at the next term. Mistrials (except in capital cases) and severances are matters within the discretion of the trial judge. We see, therefore, nothing, to review in the course pursued here. When several defendants are indicted jointly, it is not unusual to try one or more, and issue *capiases* for others not taken, or, if taken, there may be a continuance as to some of the defendants, in the discretion of the court. Besides, there was no exception at the time, and it is too late to raise this objection after verdict.

2. The second ground urged in arrest of judgment is that the order is not such as is the subject of forgery under the statute. That is true, but the indictment is good for misdemeanor at common law. *S. v. Lamb,* 65 N. C., 419; *S. v. Leak,* 80 N. C., 403; *S. v. Covington,* 94 N. C., 913. And being an offense committed with intent to defraud, the sentence imposed is within the limit authorized by The Code, sec. 1097. There is

No error.

Cited: *S. v. Robbins,* 123 N. C., 738.

(780)

STATE v. W. A. AUSTIN AND ELLEN BROOKS.

Fornication and Adultery—Evidence—Character—Husband and Wife—Witness—Verdict—Waiver.

1. On the trial of an indictment for fornication and adultery, much testimony had been introduced tending to prove the unlawful relations of the defendants. One witness testified that he met the male defendant one night within a short distance of the female defendant's house, going in that direction when he (defendant) said he was going to another place, and that on a subsequent investigation of the matter he denied making such statement: *Held*, that the evidence was competent as corroborative of other testimony of visits to female defendant's residence.

2. A declaration of the wife of defendant, made in his presence in the course of a public investigation of the charge, and the reply made by him thereto, is competent evidence against him.

3. A witness testified that the character of the defendant was good, notwithstanding that on a former trial of the offense charged, the jury had been unable to agree on a verdict, whereupon the defendant proposed to ask the witness what was the current report as to how the jury was divided: *Held*, to be incompetent.

4. Two witnesses testified that they saw the defendants in actual sexual intercourse, and there was other evidence of the male defendant stealthily visiting the female defendant's house at night, being in a room alone with her and the lights extinguished, and of other circumstances of a suspicious nature: *Held*, it was not error to refuse to charge the jury, that if they were not satisfied of the guilt of defendants from the evidence of the witnesses to the actual fact they should acquit.

5. A person charged with an offense has a right to have the verdict rendered in the presence of the judge; but, except in capital cases, this right may be waived and the verdict received by the clerk.

6. The presence of counsel at the rendition of a verdict has never been held to be essential to its validity.

APPEAL at August Term, 1890, of MECKLENBURG Criminal Court, *Meares, J.*

The indictment was found in Union County, and removed for trial. The facts are sufficiently stated in the opinion.

Attorney-General for the State. (781)
D. A. Covington for defendants.

CLARK, J. The defendants were indicted for fornication and adultery.

Exception 1.—One Helms, a witness for the State, testified that he met the male defendant one night about two hundred yards from the female defendant's house, going in the direction of her house, and the defendant told him he was going to Coleman Stewart's to meet Elliott (an Alliance lecturer) and when this matter was tried before the Alliance the defendant denied telling him so and denied meeting him. To this defendant objected. There was evidence by many witnesses of the defendant Austin making nocturnal visits to the female defendant's house; of being seen in the room alone with her at night; of going into her room, the light being put out; and of leaving his horse hitched out at night, and going with his shoes off to her house; of walking up a stream to conceal his tracks; of being seen embracing her and the like. The evidence, therefore, of his being seen near her house after dark, going in that direction, and his saying he was going to meet an Alliance lecturer, which statement he denied on the Alliance trial, when it was shown that he did not meet the Alliance lecturer on that night, and also his denial of meeting the witness, was competent as a circumstance tending to corroborate the other evidence of his visits by night to his codefendant.

"Every circumstance calculated to throw light on the alleged crime and aid the jury in coming to a correct conclusion is competent." *S. v. Bishop,* 98 N. C., 773, and cases there cited; *S. v. Christmas,* 101 N. C., 749.

Exception 2.—The same witness stated, the defendants objecting, that at the Alliance trial (they having been on trial before the local
(782) Alliance for expulsion for this offense) the defendant Austin's wife said that she could account for her husband except that night Helms said he had met him; that her husband got on his horse that night and rode off, saying he was going to Coleman Stewart's, and the defendant Austin had thereupon replied that he did tell his wife so, but after riding one hundred yards he turned and rode back unseen by any one, and went into a room which was not his bedroom and which he was not in the habit of occupying, and slept till nearly daylight, when he rode off to Coleman Stewart's. This evidence was competent as being a statement made by the defendant as to his whereabouts and doings, there being evidence that he did not get to Coleman Stewart's till next morning. What his wife said was competent from having been made in his presence, and from being replied to by him, and as having drawn out his statement.

Exception 3.—One Winchester, witness for the defense, testified that the character of the defendants was good. On cross-examination, he was asked if he would say that the character of the defendants was good at the time, notwithstanding the Alliance trial and the hung jury at the trial held in the Superior Court of Union County, and the witness

answered "Yes." On the redirect examination, the defendant's counsel asked the witness if he knew of his own knowledge how the hung jury stood, or how they were divided, and he answered "No." The defendant's counsel then proposed to ask the witness how the current report or the general rumor was as to how the "hung jury" was divided. On objection by the State, the question was ruled out, and the defendants excepted. The law does not countenance or permit the endless ramification and the countless collateral issues which such a course of examination would introduce. It was held incompetent, on a question as to character, to prove a general report as to any particular act done by the party whose character was being testified to. *S. v. Bullard,* 100 (783) N. C., 486. It was, therefore, certainly incompetent to show in what degree certain twelve men were rumored to have differed in opinion as to a certain act alleged to have been done by the defendants. It was only competent to show the general reputation for character—not the general reputation as to any particular act—still less the reputation how certain men thought as to the truth of a certain alleged particular act. As a test of the witness, it is competent to ask him to name persons whom he has heard say that the character of the person in question was good or bad. *S. v. Perkins,* 66 N. C., 126. The rule extends no further. It was, therefore, incompetent for the State to ask the question as to the "hung jury." The defendant did not object to it. He should have done so, or have asked the court to strike it out. It was no correction of the error to extend the error still further by incompetent and irrelevant inquiries. The court, at least, gave the defendant the same amount of license when it permitted him to show, if he could, if the witness knew how the jury stood. It appeared that he did not, and the court properly refused to inquire as to the reputation of how the jury had stood. The witness was one out of some sixty examined in this case. He was testifying as to the good character of the defendant, and the investigation as to how far his opinion as to the general character of the defendants should be discredited by the effect which would probably be had on the public mind by the report as to how a former jury had divided in opinion as to an act of the defendant (for that is the only legal bearing and relevancy of the testimony) when he had stated he did not know how they stood, is too remote from the issue, which was, whether the defendants, a married man and a widow, had lewdly and lasciviously bedded and cohabited together. In no part of a trial at *nisi prius* is the disposition "to run rabbits" more strongly developed than in the examination of character witnesses. The courts have always repressed it. Its indulgence beyond the well recognized legal limits can serve no good purpose. It would serve (if not repressed) to open old scandals, confuse the jury with multiplicity of issues and pro- (784)

long to a needless and expensive length the trial of causes, without any compensation in the better investigation of the truth as to the real issue before the court and jury. It is better *super stare antiquas vias.*

Exception 4.—The defendants asked the court to charge that the only direct evidence of criminal intimacy between the defendants which had been testified in this case was that of Bob Marsh and John Brooks, and if the jury should not believe this evidence, or should entertain a reasonable doubt as to the truth thereof, it would be their duty to acquit. These two witnesses had testified to finding the defendants in actual sexual intercourse. There was testimony by other witnesses of the male defendant stealthily visiting the chamber of the female by night and remaining some hours; of his going to and coming from her room by night with his shoes off; of being in a room alone with her and then extinguishing the light, and his subsequently being discovered in the act of endeavoring to escape from the room unperceived; of their riding together in a buggy after sun-down; of his kissing her, and much other evidence tending to show an immoral intimacy. The instruction asked, therefore, was, in effect, that unless the jury believed the testimony as to the defendants being seen in the very act, it was their duty to acquit. The instruction was properly refused. *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564. Besides, the instruction, if given, would have been a clear violation of the statute forbidding the judge to express an opinion upon the weight of the testimony. The Code, sec. 413; *Jackson v. Comrs.,* 76 N. C., 282. In telling the jury the value to be given to the testimony, with that of these two witnesses omitted, the court would necessarily have given its opinion as to the weight of their
(785) testimony, and so, by varying the prayers for instructions with the names of the different witnesses, the court, by a process of elimination, might be called on to express its opinion as to the value to be given to the testimony of each and every witness.

Exception 5.—As soon as the jury had retired, after receiving the charge, the court instructed the clerk, from the bench, in a clear and distinct voice, to receive the verdict, and to have the defendants present. The defendants' counsel had then left the court-room, and the defendants had no knowledge of and did not consent to the order. On the return of the jury the clerk received the verdict, both defendants being present. The defendants afterwards moved for a new trial and in arrest of judgment, on the ground that the verdict was received in the absence of the judge and of defendants' counsel and in the recess of the court. The case also states that while the jury were considering their verdict the judge remarked in the presence of the defendants' counsel that he had instructed the clerk to receive the verdict, and the counsel made no response; that as the jury came into the courthouse the clerk told another

of defendants' counsel that he was going in to take the verdict; that he asked if the judge was present, and the clerk replied that he was not, and had instructed him (the clerk) to receive the verdict; that the counsel then did not go into the court-room, but went to the solicitor and told him of the conversation; that in reply to the solicitor's inquiry if he would consent to the clerk's receiving the verdict, he replied that he would not, but before the solicitor could reach the court-room the verdict had been rendered.

The defendants had the right to have the verdict rendered in the presence of the judge, and it is best that it should always be done. But it is certainly competent, except in capital cases, for it to be received by the clerk if no exception is made, and the opportunity is given the defendant to object, "and such practice is very common." *Pearson, C. J.*, in *Houston v. Potts*, 65 N. C., 41. Indeed, in all cases (786) not capital the defendant may even waive his own right to be present, either expressly (*S. v. Epps*, 76 N. C., 55) or by voluntarily withdrawing himself from the jurisdiction of the court (*S. v. Kelly*, 97 N. C., 404; *S. v. Jacobs*, 107 N. C., 772), though his counsel cannot waive it for him. *S. v. Jenkins*, 84 N. C., 812.

In the present instance the defendants were both present in the court-room when the verdict was rendered, and made no objection to the absence of the judge or of their counsel. Had they done so, doubtless the judge and counsel would have been sent for, or if that had been refused the defendants could have then presented the matter as ground for new trial to the court below, and if refused, have appealed. It is true the case states that the defendants did not expressly consent to the verdict being received in the judge's absence but they permitted it to be received in his absence without objection; they were presumably in the court-room when, on the retirement of the jury, the judge instructed the clerk to receive the verdict, and made no objection, and the judge told one of the counsel, personally of such instruction, and received no indication of objection; the clerk, before receiving the verdict, told the other counsel that he was then on his way to do so and received no objection, though an objection then from the counsel or from the defendants would have doubtless caused the judge to be sent for. It is true counsel afterwards told the solicitor he did not consent, but too late to stop the rendition of the verdict. If he wished the judge to be sent for, why did he not make that statement to the clerk?

It is not suggested that the defendants were prejudiced in any way by the judge's absence. If there was any evidence indicating that they had been, we are sure their able and astute counsel would have pointed it out, and the just judge who tried the cause would promptly have set the verdict aside. The motion seems rather based upon (787)

a dislike to the tenor of the verdict itself, and a desire to be relieved from it than upon any grievance sustained by the manner of its rendition. The presence of counsel at the rendition of the verdict has never been held essential to its validity. *S. v. Jones,* 91 N. C., 654. Besides, counsel had notice that the clerk was about to receive the verdict, and did not go in the court-room, nor did he object to the absence of the judge, as he might then have done had he chosen to do so.

Affirmed.

Cited: Ferrell v. Hales, 119 N. C., 212; *Barger v. Alley,* 167 N. C., 363; *S. v. Killian,* 173 N. C., 796.

STATE v. E. H. NEIS.

Retailing—Sale—Coöperative Club.

On indictment for retailing spirituous liquors without license, it appears that defendant, as steward of a club, was given a jug of liquor by individual members thereof, who owned the liquor in common, and that he furnished to one of such members a drink from the jug, taking ten cents in exchange. The amount received was just about the value of the liquor furnished, and was used with other money so received from other joint owners of the liquor in replenishing the jug: *Held,* that there was a sale. Following *S. v. Lockyear,* 95 N. C., 633.

INDICTMENT for retailing spirituous liquors without license, tried before *Moore, J.,* at January Term, 1891, of BUNCOMBE Criminal Court.

The jury returned a special verdict, the nineteenth paragraph of which is as follows:

"That on 28 April, 1890, the defendant, at the club house of the Cosmopolitan Club in the city of Asheville, furnished and dealt out to the said W. E. Williamson a small quantity, to wit, a drink, of
(788) spirituous liquor, so held by the defendant as aforesaid, the said drink being a quantity less than a quart, and being taken by said defendant from a demijohn in which some other members, as aforesaid, had an equal quantity of liquor with said Williamson, and at the same time and place received from said Williamson the sum of ten cents in the legal currency of the United States, which sum was about the value of the quantity of said spirituous liquor so furnished as aforesaid, and that said defendant thereupon handed the said sum of money to the said E. J. Holmes, who afterwards expended it for the purchase of other

spirituous liquors for the said Williamson, and turned the same over to the custody of the defendant for the replenishment of the stock of liquor of said Williamson."

The other facts sufficiently appear in the opinion. Upon the special verdict the court held that the defendant was not guilty, and ordered his discharge. Appeal by the State.

*J. B. Batchelor and John Devereux, Jr., for the State.**
F. H. Busbee for the defendant.

CLARK, J. The transaction presented by the special verdict, stripped of surplusage, is this: The defendant was steward of the Cosmopolitan Club, of Asheville, and was indicted for selling spirituous liquor to its members. In consequence of the decision in the analogous case of *S. v. Lockyear,* 95 N. C., 633 (the state of facts being the same), he pleaded guilty. The club thereupon distributed a part of the liquors on hand to certain of its members, who placed them in the hands of the defendant to be held by him, not for the club, as a club, but for those individual members of the club as tenants in common, the share of each not being kept separate, but mingled in the same casks, jars and demijohns. From time to time, as each of those members wished, (789) he obtained drinks from the defendant for himself and friends, paying therefor in money (or giving tickets, afterwards redeemed in money), as near as may be, the cost price of the drinks so furnished, and with the money the defendant from time to time replenished the stock of liquors.

We can see in this transaction no substantial distinction from the facts in *Lockyear's case.* There, the steward of the club, as a club, received the money for drinks furnished at cost, and with the money replenished the stock of liquors. Here, the individuals of the club, treating themselves as unorganized, furnished through defendant to themselves from a common stock the drinks at cost, and with the money received therefor replenished the common stock.

When, in the present case, an individual received drinks for himself and friends, he clearly did not receive the identical liquor which belonged to himself, but he received liquor which belonged mostly to others, and in which he had a minute undivided interest. For his money he received in exchange liquor which belonged to several others as well as to himself, and converted it to his sole and separate use. Before the transaction, the money was solely his and the liquor belonged to several. By virtue of the transaction, and in exchange for the money,

*The Attorney-General being interested in the case, did not appear in it.

the liquor became his sole and separate property. This is surely a sale. It has every element of a sale. It cannot affect the transaction that subsequently the defendant would purchase the same amount of liquor in value for the party paying the money and mingle it in the common stock. This last act is that of a member of an association keeping up his quota of contribution to the common stock; the other is the purchase by a member of an association from its common agent, and the character and purport of the act are not changed by the subsequent contribution.

It could make no difference that, here, the defendant was the (790) agent of the individual members of the club, acting as an unorganized body, and that in *Lockyear's case* the salesman was agent of individuals acting as an organized club.

If an agent is appointed by several tenants in common to dispose of real or personal property, and he does dispose of any part thereof in exchange for money, it is none the less a sale because the party paying the money and receiving such part to his own use happens to be one of the tenants in common.

And it would still be a sale, although afterwards the money so received should be invested in the purchase of similar property held by the same tenancy in common.

The dealing here is simply what is known as "coöperation," which is an arrangement by which a member of an association procures supplies from the association at cost. The object and the effect of coöperation are not to abolish purchases, for the member still buys from the association, but to procure supplies at cost. This transaction is necessarily either a partition in severalty to the tenant in common, or a purchase. It is clearly not a partition to each tenant in common in severalty of his undivided portion in the common stock, and it is plain that such is not the purpose and intent of the parties, for money is received in exchange, and it is to be used to obtain more liquor. Besides, the person obtaining the liquor not only does not obtain the identical liquor belonging to him, but he could very rarely, if ever, obtain his exact aliquot part unless the stock became very low.

In an almost exactly similar state of facts in *S. v. Essex Club,* 53 N. J. L., 99, *Van Sickle, J.,* says: "The liquor is not the property of the member before it is separated from the common mass and delivered to him under his promise to pay for it, but the property of the company.

It is not the property of the member until after the delivery and (791) appropriation of it by him to his own use. If he should clandestinely enter the club house at night and regale himself with the liquors of the club, it would prove a very shallow defense to an indictment for larceny if he set up that he was a coöwner of the property. As well might a bank cashier, who was likewise a shareholder in

the bank, set up a like plea to a charge of embezzlement. Such specious defenses have received no countenance, except in prosecutions for the illegal sale of ardent spirits."

The fact specially found, that the membership of the club is "composed of gentlemen of the highest social standing," does not throw any light upon the transaction, except that it may be reasonably supposed that they have no desire to evade the law, and by this proceeding wish merely to procure a construction as to the legal nature of this transaction. No set of men have any special privileges under our Constitution, and the parties interested must pay a license tax if other citizens pay it, and be prohibited altogether when others are prohibited.

Nor can it make any difference that no profit was intended to be realized, but that as near as possible the drinks are to be furnished at cost. Profit is not a necessary ingredient of a sale. Indeed, many sales are made at a loss. Besides, if the defendant's contention was sound, "coöperative barrooms" would spring up on all sides, and the Revenue Act, as to the sale of liquor, or the prohibition laws where they prevail, would be a nullity. If the gentlemen composing the Cosmopolitan Club, of Asheville, can be exempted from the license tax by the simple device of treating themselves as unorganized tenants in common of a stock of spirituous liquors and employing an agent to furnish drinks to any of their club and their friends by selling at cost, the same can be done by any 500 or 5,000 patrons of a barroom. The "dealer" would simply become an "agent," and in lieu of profits would receive as compensation for his services a commission on purchases, or some amount out of receipts, and the money received for drinks would be invested (792) as usual, and, as in the present case, to buy more liquor for the customer and his friends. Such an arrangement may be ingenious, but none the less a license tax is requisite to make it legal to furnish drinks in that mode.

S. v. Lockyear, supra, has often been cited with approval in the courts of other States. *S. v. Essex Club,* 53 N. J. L., 99; *S. v. Easton Social Club,* 73 Md., 97; *People v. Soule,* 74 Mich., 250, and other cases.

These authorities, together with those cited in *Lockyear's case* itself, render further citations unnecessary.

Upon the facts found in the special verdict, the defendant should be adjudged guilty. The case must be remanded, with directions that the judgment be so entered and that sentence be imposed in conformity with law.

Error.

Cited: S. v. Burchfield, 149 N. C., 540; *S. v. Colonial Club,* 154 N. C., 184, 193, 195.

STATE v. MARCUS JAMES.

MOTION of the Attorney-General to dismiss the appeal.

Attorney-General for the State.
R. B. Burke for defendant.

Per Curiam: This case was tried at Spring Term, 1890, of ALEXANDER. The appeal was docketed here at Fall Term, 1890. There was no application for *certiorari* at that term (*Pittman v. Kimberly,* 92 N. C., 562), and no excuse is shown for the delay. Under the repeated decisions of this Court, we must direct the entry to be made.

Appeal dismissed.

Cited: Sondley v. Asheville, 110 N. C., 90; *Graham v. Edwards,* 114 N. C., 230; *Burrell v. Hughes,* 120 N. C., 279; *Norwood v. Pratt,* 124 N. C., 747; *Benedict v. Jones,* 131 N. C., 475; *Mirror Co. v. Casualty Co.,* 157 N. C., 30; *McLean v. McDonald,* 175 N. C., 419; *Howard v. Speight,* 180 N. C., 654.

(793)

STATE v. H. W. BRABHAM.

Homicide — Circumstantial Evidence — Corroboration — Identity — Prayers for Instruction—Charge—Jury—Exceptions—Remarks of Doubtful Propriety by the Court.

1. The manner and conduct of the defendant an hour after the homicide for which he was indicted is admissible in evidence, and, taken with other circumstances, may have serious import in establishing his guilt.

2. Where there was evidence tending to show that the wound by which the deceased came to his death was inflicted by a coupling-pin; that a man, like the prisoner, had been seen the night of the homicide to drop out of his pocket a piece of iron about the length of a coupling-pin, which he wrapped in a white cloth, and that something like iron rust was afterwards found upon a handkerchief in his pocket: *Held,* testimony that the coupling-pin was found near the house where the prisoner boarded was admissible.

3. One witness may be allowed, for purposes of corroboration, to testify that another identified a coat whose identity was in question, without first asking him who identified it, if he did so.

4. A substantial compliance with prayers for instruction is no ground for exception.

5. It is no ground for exception that the court stated that "there was no evidence to contradict the State's witnesses" where there was none, and then immediately qualified this by the further statement that questions of contradiction among the witnesses must be determined by the jury.

6. Exceptions too general will not be considered by this Court.

7. Remarks by the court of doubtful propriety are not ground for exception where it appears they did no harm to the prisoner.

HOMICIDE, tried at April Term, 1891, of MECKLENBURG Criminal Court, before *Meares, J.*

The facts are set out in the opinion.

Attorney-General for the State.
J. D. McCall and W. H. Bailey (by brief) for defendant.

SHEPHERD, J. The first exception is addressed to the admis- (794) sion of testimony as to the manner of the prisoner shortly after the commission of the homicide. The testimony tended to show that the homicide was committed between 11 and 12 o'clock on Saturday night, 11 April, 1891; that about 12 o'clock of the same night the prisoner went to the room of the witnesses, Wyche and Davis; that his actions there were unnatural; that he spoke hurriedly and in a low tone, and that his hand trembled and he seemed nervous.

Such testimony alone would raise but a slight conjecture of the prisoner's guilt, but, taken in connection with the other facts in evidence, was very clearly relevant. The evidence offered by the State was entirely circumstantial in its nature, and in such cases facts which are in themselves of but trifling significance may become of serious import in view of their relation to other circumstances attending the transaction. "Everything calculated to elucidate the transaction is admissible, since the conclusion depends upon a number of links which alone are weak, but taken together are strong and able to conclude." *McCann v. State,* 13 Smedes & Mar., 471.

As bearing directly upon the particular point under consideration we cite the case of *Campbell v. State,* 26 Ala., 69. See also Wharton's Cr. Law, 3520.

The second exception is to the testimony of the witness Griffith, "that the (coupling) pin was found on the sidewalk near Pemberton's house, where the prisoner boarded."

There was evidence tending to show that the mortal wound was inflicted with an iron coupling-pin, which was found on the floor near the deceased. The witness stated that this coupling-pin was like the one

seen by him on Saturday morning lying in the grass 23 steps from the boarding-house of the prisoner, and that on Sunday he looked for it and it had disappeared.

(795) One R. J. Johnson testified that on the night of 11 April he came by Mocca's store and saw a colored man standing against the window, with his hand behind him, and that he saw him drop a piece of iron about the length of the coupling-pin introduced in evidence, and that he took it up and wrapped it in a whitish-colored cloth of some kind and put it in his pocket. This witness also stated that he did not know that the prisoner was the man he saw, but that he had the same color and height, wore a brown overcoat and "looked in appearance like the prisoner." It was also in evidence that a handkerchief, soiled apparently with rust, was found in the pocket of the prisoner's overcoat, and that the pocket of the overcoat was "torn or ripped."

For the reasons given in passing upon the first exception, we think that the testimony was admissible and should have been submitted to the jury. *S. v. Christmas,* 101 N. C., 749; *S. v. Bruce,* 106 N. C., 792. In this connection we will state that the sixth exception, as to the admissibility of the testimony of Johnson, is plainly untenable and should also be overruled.

The third exception (the only one argued in the brief of the prisoner's counsel) is, that the court "allowed [the] witness Baker to testify that Benny Mocca identified the coat at the police office (or guard-house) without Benny having been first asked as to the fact, i. e., whether he did so identify it."

Benny Mocca, the son of the deceased, had been examined, and testified that the overcoat produced upon the trial was the same as that worn by the prisoner at the shop of his deceased father on the night of the homicide. This overcoat was identified by other witnesses as the one taken from the valise of the prisoner and identified by Benny at the guard-house in the presence of the witness Baker and the prisoner.

Whatever may be the ruling in other States upon the subject, it is well settled in North Carolina that such testimony as Baker's is admissible for the purpose of corroborating a witness who has been

(796) impeached or stands in such a relationship to the parties or the action as to subject his testimony to suspicion or discredit. *Jones v. Jones,* 80 N. C., 247; *S. v. Boon,* 82 N. C., 648; *S. v. Whitfield,* 92 N. C., 831.

No point, however, is made as to whether the witness Benny Mocca had been impeached, but the exception is based entirely upon the failure of the State to ask him when on the stand whether he had, in effect, made such a statement as to the identity of the overcoat at the guard-house.

Such preliminary questions are necessary where it is proposed to discredit a witness by proof of conflicting statements concerning collateral matter indicating bias, feeling, and the like (*S. v. Morton,* 107 N. C., 890, and cases cited), and this is because the witness should have an opportunity of explaining such statements (*S. v. Wright,* 75 N. C., 439), but this reason has no application where the purpose of the testimony is to sustain the witness, and we have been unable to find any authority in support of such a principle. Testimony of this character was admitted without preliminary inquiry in *S. v. Dove,* 32 N. C., 469, and *S. v. Ward,* 103 N. C., 419, and we do not understand that any practice to the contrary has generally obtained in this State.

We cannot see how the testimony is open to the grave objections urged by counsel. Benny, on the trial, identified the coat then exhibited as that worn by the prisoner. This was *substantive* testimony. Baker simply testified that before the trial and at the guard-house the same witness had, in effect, made a similar statement about the same overcoat. This was only *corroborative* testimony, and admitted alone for that purpose, and we must assume, in the absence of any exception in this particular (the entire charge as to the recapitulation of the evidence not being set forth), that as such only it was submitted to the jury. *S. v. Powell,* 106 N. C., 637.

The fourth exception is "because his Honor refused to give the (797) instructions as prayed for by the prisoner, and, without giving the first, instructed the jury that it was not denied by the State." The latter part of this exception seems to be founded upon a misapprehension, as the court not only stated that the propositions of law contained in the first instruction were substantially correct, but actually gave them in almost the precise language as prayed for. Upon a careful scrutiny of the charge, we are of opinion that it substantially responded to all of the instructions requested by the prisoner.

In *S. v. Parker,* 61 N. C., 475, *Pearson, C. J.,* said that all that the law requires is that the jury shall be clearly instructed that unless, after due consideration of all the evidence, they are "fully satisfied," or "entirely convinced," or "satisfied beyond a reasonable doubt" of the guilt of the prisoner, it is their duty to acquit, and every attempt on the part of the court to lay down a "formula" for the instruction of the jury by which to "gauge" the degrees of conviction has resulted in no good. *S. v. Sears,* 61 N. C., 146; *S. v. Knox, ib.,* 312; *S. v. Gee,* 92 N. C., 756. His Honor told the jury that every material circumstance relied upon by the State must be established beyond a reasonable doubt, and "that material circumstances were those circumstances in the case which pointed to the guilt of the prisoner, and that the material circumstances relied on, and which were established beyond a reasonable doubt

by the State, must be so strong as to exclude any reasonable hypothesis of the innocence of the prisoner." This surely was as favorable to the prisoner as the law permits, and we have no hesitation in overruling the exception.

The fifth exception is also without merit. It was true, as stated by the court, that the prisoner offered no evidence to contradict the testimony of the State's witnesses. This was but the statement of a fact, and was relieved of any possible prejudicial effect by its immediate con-
(798) nection with the remarks, that "whether there was any contradiction between any of the witnesses in the case is a question to be determined by the jury. The court cannot express any opinion upon the testimony." Neither was there error in stating that, in the absence of testimony to the contrary, every witness was presumed to be of good character. It will be observed that in this connection the jury were told that, although a witness was of good character, they were not bound to believe him if his statements were unwarranted, etc.

The seventh exception, "to the charge as a whole," is too general to be considered. *S. v. Nipper,* 95 N. C., 653, and *McKinnon v. Morrison,* 104 N. C., 354.

The eighth exception. While we doubt the propriety of the remark of the court as to what some writers had said about the reliability of circumstantial testimony, we are sure that the jury could not have understood that such was the opinion of his Honor in respect to this case, or that they were to be influenced by it in the slightest degree. This very clearly appears from the immediately succeeding language, in which the jury were referred to a former part of the charge as to the degree of proof requisite to a conviction.

The ninth and tenth exceptions are not sustained by the record, which very plainly fails to disclose that his Honor charged "that where a witness' character is not assailed, he is to be believed." These exceptions are also overruled.

After a careful examination of the whole record, we are of the opinion that the case was fairly tried, and that there is no reason why the verdict of the jury should be disturbed. There is

No error.

Cited: Williams v. Lumber Co., 118 N. C., 934; *Burnett v. R. R.,* 120 N. C., 518, 519; *S. v. Ridge,* 125 N. C., 657; *S. v. Parker,* 134 N. C., 215; *Tise v. Thomasville,* 151 N. C., 283; *S. v. Plyler,* 153 N. C., 634; *S. v. Pitt,* 166 N. C., 272; *Muse v. Motor Co.,* 175 N. C., 469; *S. v. Atwood,* 176 N. C., 709.

(799)

STATE v. W. B. BAKER.

Indictment—Failure to Work the Public Roads—Special Courts—Road Law of Mecklenburg County—Township Trustees—Redistricting—Sufficiency of Notice.

1. Where the defendant was indicted for failing to work the public roads under the special act for Mecklenburg County, and the indictment charged that he was duly assigned to work on a public road specified, situated within a particular township and county named; that he was between the ages of 18 and 45 years; that he was duly summoned to work on that road at a time specified, and that he willfully and unlawfully, etc., failed and omitted to work as he was bound to do, concluding in the usual form, is substantially sufficient.

2. Where the township trustees had failed, under a special county road law, to lay off new road districts according to the strict intention of the act, but had adopted those laid off under the general law: *Held*, that as there was sufficient certainty in the location of such districts to fix the liability of the defendant subject to road duty, he could not, after conviction on an indictment for not working the road, take advantage of such failure and irregularity by a motion in arrest of judgment.

3. A notice by the supervisor to a person subject to road duty directing him to meet the supervisor at a time and place designated "to work the road," the place of meeting being a branch crossing the road to be worked, is sufficient, especially where it further appeared that such person had under previous notice worked that same road.

APPEAL from MECKLENBURG Criminal Court, October Term, 1890, *Meares, J.*, presiding.

Defendant was tried and convicted at the October Term, 1890, of Mecklenburg Criminal Court, by *Meares, J.*, upon appeal from a magistrate, under Laws 1885, ch. 134, known as the "Mecklenburg Road Law."

The warrant charges:

"That W. B. Baker, late of the township of Crab Orchard, county of Mecklenburg, State of North Carolina, on 31 July, 1889, and 1 August, 1889, and for three days prior thereto, the said W. B. Baker had been duly summoned as a hand to work on a certain public road, (800) known as the Rocky River Road, situate in the township, county, and State aforesaid, and that said W. B. Baker was then and during all that time between the ages of 18 and 45 years, liable to work on said public road, and had been duly assigned to the same; and that, three days and more before the first named day, the said W. B. Baker, being then and there liable as aforesaid and having been summoned as aforesaid, did, on the days and year aforesaid, to wit, 31 July and 1 August,

1889, in the township and county aforesaid, with force and arms, willfully and unlawfully fail and omit to attend and work on said public road as he had been summoned and was in law bound to do, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The old law is contained in The Code, sec. 2014. The new law is found in section 1, chapter 134, Laws 1885.

A motion in arrest of judgment was made by the defendant, because—

1. It was not alleged that defendant was, at the time laid in the warrant, a resident of any road district in which he was required to work.

2. The warrant does not allege that the defendant was notified or "warned" to attend and work at any place designated on the public road named.

3. The warrant does not allege that the defendant had not been permanently disabled in the military service of the State.

4. It does not allege that the defendant had not paid the supervisor of the road district $3 in lieu of work.

The defendant moved for a new trial on the ground—

1. That it was error for the court to refuse to charge his prayer for instruction that the township trustees had sufficiently complied with the act for the purpose of this action.

2. It was error to charge that the notice to the defendant (801) was sufficient.

The other facts appear in the opinion.

Attorney-General for the State.
Dowd & Harris (by brief) for defendant.

MERRIMON, C. J. The motion here in arrest of judgment cannot be allowed. Nothing appears, or fails to appear, in the record that could properly prevent the entry of the judgment appealed from. The defendant was charged by a State warrant with a petty misdemeanor, before a justice of the peace, and, though the offense is not charged with great precision and particularity, the Court can at once see what it is, and the defendant can learn from the warrant all that is necessary to enable him to make defense and to defend himself in case of a subsequent prosecution.

It is charged that he was liable and duly assigned to work on a public road, specified, situate within a particular township and county named; that he was within the ages of 18 and 45 years; that he was duly summoned to work on that road at a time specified, and that he willfully and unlawfully failed and omitted to work as he was bound to do, etc. This was sufficient. It is not expected nor essential, in criminal pro-

ceedings before justices of the peace, that all the precision and niceties of pleading shall be observed as required in the Superior Courts. It is sufficient if the substance of the offense is charged, and the court and defendant can certainly see what it is. Moreover, when such proceedings are defective, the courts should exercise liberally the large powers conferred upon them to amend the same. A mere technicality not affecting the substance should not be allowed to defeat or delay the administration of criminal justice. (802)

The statute (Laws 1885, ch. 134) prescribes and embodies a system in respect to "roads and highways" in the county of Mecklenburg. In many material respects it is very different from the general statute on the subject of "Roads, Ferries, and Bridges," and it must be so interpreted as to effectuate its purposes appearing from its terms and necessary and reasonable implication.

It appeared on the trial that the board of trustees of the township had not divided the township into suitable road districts as required by the third section of the statute just cited, nor had they observed its requirements in other respects as they should have done and ought to be compelled to do, with a view to better and perfect the road system prescribed, but the evidence went to prove that they "adopted the districts of the old board, making such alterations as they thought advisable, allotting certain farms to a section."

This was treated as "districting the township."

The court instructed the jury that the statute above cited prescribed no particular form to be observed in laying off the township road districts, and that if they believed the evidence above recited, the district as described was sufficient for the purposes of this action. The defendant excepted, contending that the provisions of the statute are mandatory in numerous particulars specified by him, and that he could not be convicted, as the statute, in these respects, had not been observed by the township board of trustees.

The third section of the statute requires that the township trustees shall "divide their respective townships into suitable road districts," and to "furnish each supervisor with a plot of his district." A leading purpose of such districts is to designate with certainty the roads with which the superintendent is to be charged, the hands liable to work on public roads subject to his authority, and to fix his and their liability and amenability for any omission of duty. The evi- (803) dence went to prove that the township trustees adopted the road districts in their township as they found them when they came into office, and designated the farms, the hands on which should do road service in the particular district where the farms were situate. Now, although the township trustees had failed to discharge their duty fully

and properly, as they should have done, still the public road—a section of it—was designated and the hands liable to do road service were assigned to duty on it. There was sufficient certainty in all respects to fix the duty and liability of the defendant, and the court properly so decided.

The evidence went to prove that the supervisor was appointed with instructions as to the road and hands subject to his authority. He received a list of the farms, the hands on which were assigned to the road mentioned in the warrant. He testified on the trial that he personally notified the defendant to work that road on days specified; that he told him to "meet me (himself) at Hunter's Branch to work the road Wednesday and Thursday morning (the days designated). I don't think I mentioned any road." He further testified that the branch mentioned crossed the road mentioned in the warrant; that on a later occasion he gave the defendant like notice to work on the same road, and he went and worked as directed. The defendant insisted that this notice was not sufficient. We think it was reasonable and sufficient. The defendant was notified to meet the supervisor on the morning of days specified, at a branch that crossed the public road to be worked, to do road service. He knew that he was liable to do such service, and the fair implication from the notice was that he was required to do road service on the road specified in the warrant, which was the road the branch crossed, at the times mentioned to him. The notice was sufficiently definite, though informal, to inform him that he was required to meet the supervisor and do service he knew he owed on the
(804) particular road that crossed the branch named, or certainly on one the supervisor would point out at the time appointed.

What has thus been said substantially disposes of the special instructions asked for by the defendant. These were founded upon highly technical grounds, and the denial of them could not prejudice any pertinent right of the defendant. Upon the merits, the conviction was a proper one.

No error.

APPENDIX "A"

AMENDMENTS TO RULES OF PRACTICE.

Amend Rule 13 by inserting in next to last line thereof after the word "office" the following: "or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him," so that the whole shall read as follows:

RULE 13—CASES HEARD OUT OF THEIR ORDER.

In cases where the State is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the Attorney-General, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, may make the like assignment in respect to it.

REHEARING.

RULE 53—WHAT TO CONTAIN.

The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and that the judgment complained of has been performed or secured. Such petition shall be accompanied with certificate of at least two members of the bar who have no interest in the subject-matter and have never been of counsel for either party to the suit; that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this Court, who shall endorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner; but the petition shall not be filed until he, or one of his associate *Justices,* shall endorse thereon that the case is a proper one to be reheard, and notice of the action had shall be given to the petitioner by the clerk of this Court.

The rehearing may be granted as to the whole case, or restricted to specified points, as may be directed by the *Justice* who grants the application.

Wilson v. Lineberger, 90—180; Lockhart v. Bell, 90—499; Strickland v. Draughan, 91—103; White v. Jones, 92—388; Weathersbee v. Farrar, 98—255; Dupree v. Insurance Co., 93—237; Hannon v. Grizzard, 99—161.

APPENDIX "B"

PORTRAIT OF CHIEF JUSTICE SMITH.

PRESENTED TO THE SUPREME COURT ON WEDNESDAY, 25 FEBRUARY, 1891.

Mr. George H. Snow said:

May it please the Court, it is my pleasant duty to present to this Honorable Court this portrait of its late *Chief Justice,* the Honorable *William N. H. Smith.*

The gift is from his family to this high Court, and through it to the young men of the State; and in being the tongue of the occasion and hour, I shall best please myself if the thoughts presented shall fill the imagination of those who hear, that they have no remembrance of the words.

William N. H. Smith was born in North Carolina on 24 September, 1812, and died on 14 November, 1889. He graduated at Yale College in 1834, and from its law school afterwards. From 1840 to 1849 he served in the General Assembly of this State. From 1849 to 1857 he was the Solicitor of the First Judicial District.

In 1859 he was elected to the Congress of the United States, and upon entering that body was made the Whig candidate for speaker, his opponent being the Honorable John Sherman, now the Senator from Ohio.

When the vote was taken *Mr. Smith* had a majority of one, but before the result was announced the clerk of the House notified two members who had not voted of how the vote stood. They immediately went to *Mr. Smith* and offered not to vote, which would elect him, or vote and certainly elect him, if he would form the Ways and Means Committee in the interest of a high tariff. This *Mr. Smith* would have done if let alone, but when coupled with that condition he declined to make any promise, saying that if elected he must be unfettered. The two members voted against him, and the much coveted honor went to another.

He served during the entire war in the Confederate Congress. After the war had closed he returned to the practice of his profession, and continued in the enjoyment of a large and lucrative practice until 1878, when he was appointed, by Governor Vance, *Chief Justice* of this Court, which office he held until he passed out of the sunlight and starlight into the shadows. He lived among us for nearly eighty years, and the lessons of his life are impressive ones.

He was a typical North Carolinian, unostentatious in his manners, simple in his tastes, of positive opinions and strong convictions, never shrinking from their avowal, always ready to maintain them by argument, considerate of the opinions of others, his mind a storehouse of

knowledge, an honest man and a Christian gentleman; but the most striking feature in his character was his active, earnest and unfaltering fealty to duty, and this was so exacting that, though he possessed literary tastes and was an accomplished classical scholar, they were subordinated to the active, controlling and absorbing principle of his life duty, and to this was added a high sense of honor which kept his conscience keenly alive to the many obligations imposed by his public and private relations.

He was prepared for the battle of life by a very thorough education, both mental and physical, and immediately attracted attention by his wisdom in the legislative halls, to be more forcibly emphasized as the brilliant solicitor of a district which was then renowned for the learning and culture of its bar and people.

His motto seemed to be, "Too low they build, who build beneath the stars." Upward and onward he pressed until he stood beneath the dome of the nation's capitol, to be there tempted as few men have been and maintained their integrity. His fame had preceded him. We behold the unparalleled spectacle of a young man, at the threshold of his entrance to the Congress of the United States, offered the speakership upon his complying with a condition which today would be too readily accepted; but his delicate sense of honor, formed by inheritance, education and association, enabled him to put aside this dazzling and glittering crown for one which the angels give.

Let us pause while the rich incense of this noble act diffuses itself into the hearts and minds of his people. I know of no public man, nor have I read of one, who has more honored his people at so great a sacrifice to ambition; and, for one, I solemnly declare that I had rather wear the laurel which his victory gave than a monarch's crown.

'Tis said that "the falling drop makes its sepulcher in the sand, not a footstep in the snow or along the ground but prints in characters more or less lasting a map of its march, and every act of a man inscribes itself in the memories of its fellows."

I would that I could write upon the wind, the storm and the lightning's flash the simple story of how this great North Carolinian preserved his integrity and thereby honored his people, that we and those who come after us may imitate him, and while we live

> "To know no bliss but that which virtue gives,
> And when we die to leave our name
> A light, a landmark on the cliffs of fame."

This act was not the result of accident. Like the forces of nature, which are forged in the laboratories of the Almighty and set in motion—traveling myriads of miles and years, acquiring strength as they speed their rapid flight—meet together at the same time and place and form

those grand constellations in the heavens, which are "the wonder He showeth unto the children of men," so in man's nature those great moral and intellectual forces, which are forged in a mother's heart and set in motion by her teachings, gain strength and character as they are nurtured and fostered by labor, love and honor—culminating in those great moral and intellectual constellations which make men almost godlike.

In the twilight of his life he was the *Chief Justice* of this Court, and his knowledge of the law, coupled with his ripened experience, has enriched the judicial literature of this Commonwealth and broadened the channels of the law.

He was a conspicuous figure when he stood alone, and always grew by contrast. He was never commonplace in anything. He was a firm believer in God and the Christian religion, and he so lived that he was gathered unto his fathers, "having the testimony of a good conscience; in the confidence of a certain faith; in the comfort of a reasonable, religious and holy hope; in favor with God and in perfect charity with the world." "That man lives twice that lives the first life well." His life is worthy of imitation by the old as well as the young, and the student of great men will turn with profit to a history of his life work.

These are not words of mere eulogy which an enlightened civilization invokes for the dead, but the sweet perfume which the memory of a noble and stainless life emits when touched by the softness of retrospection.

This portrait presents his lineaments in a wonderfully realistic manner; and in this quiet room, singularly free from turmoil and strife, dedicated to the science of the law, and in which he presided for so many years as the *Chief Justice* of this Court with such marked ability, it is fitting that it should be placed by the side of his illustrious predecessors who, like him, "went down with the sun and left even upon the mountain top of death a light that made it lovely."

Vita enim mortuorum in memoriam vivorum est posita.

Acceptance by Chief Justice Merrimon.

The Court accepts with much satisfaction the very excellent portrait of the late *Chief Justice Smith,* donated by his family. It is a fit memorial of him, and will serve to remind us, and all who shall visit this chamber in the future, of his sturdy virtues, his great ability and learning, and the useful and distinguished services rendered by him as the head of the Supreme Court through a period of many years. The clerk will note on the records the presentation of this gift, and our acceptance of it.

INDEX

CLERK:

1. Prior to the enactment of section 72 of The Code (November, 1883), clerks of the Superior Courts were not liable upon their official bonds for moneys received by them in the capacity of receivers of funds belonging to infants; but now, by virtue of that section, such bonds are responsible for all moneys and effects which may come to their hands by color of their office or under any decree or order of a judge, though such order or decree may have been irregular or even void for want of jurisdiction. *Presson v. Boone*, 78.

2. A bond executed prior to, but current at, the time of the enactment of that section would be liable for all such moneys and effects received thereafter while the bond was in force. *Ib.*

3. Where it was shown that in December, 1882, the clerk of a Superior Court, who had theretofore been appointed a receiver of funds belonging to a minor, received from an administrator a sum of money belonging to a minor, and gave a receipt therefor, signed "Clerk of the Superior Court and receiver of," etc.: *Held*, that he was liable upon his bond *as clerk*, inasmuch as, under sections 1543, 1544 of The Code, it was made his official duty to receive and account for all moneys, etc., paid into his office by executors and administrators—and it will be presumed he received the money by virtue of that authority. *Ib.*

4. In an action to recover from the clerk and his sureties moneys received by him in his official capacity, the plaintiff is entitled to interest at 6 per cent per annum from the time of its receipt by the officer, and to 12 per cent from the time of demand and refusal to pay. *Ib.*

CONTRACT:

CONTRACT—*Continued.*

13. A vendee in an executory contract to convey lands having failed to pay the purchase-money when it became due, subsequently purchased his notes therefor at an administrator's sale for a nominal amount, and then brought an action to compel the vendor's representatives to convey to him: *Held*, (1) that a specific performance would not be decreed until the vendee had paid the price stipulated in the contract of sale; (2) that the defendants having prayed for affirmative relief, it was not error to decree that the land should be sold and the proceeds applied to the satisfaction of the balance due, if the plaintiff did not pay within a time fixed. *Burnap v. Sidberry*, 307.

14. Where the law of the place of the performance of a contract for the sale and delivery of goods prohibits such transactions on Sunday, the courts will not recognize any market price alleged to be prevalent on that day. *McAbsher v. R. R.*, 344.

15. The plaintiffs made an oral contract with a common carrier by which the latter agreed to furnish cars for the transportation of plaintiff's property on a day certain, but failed to do so; a short time thereafter the carrier did ship the goods, for which it gave a bill of lading: *Held*, that the prior oral contract was not merged in the latter, and the plaintiffs could maintain an action for damages for a breach thereof. *Hamilton v. R. R.*, 96 N. C., 398, approved. *Ib.*

16. It is a general principle that the validity of a contract and its construction are determined by the law of the place where it is made, and if valid there, it is valid everywhere. *Taylor v. Sharp*, 377.

17. S being the owner of certain lands, conveyed them by deed absolute to B upon the parol promise of the latter that from the proceeds of any sale the vendee might make, after paying expenses, etc., the vendor should be paid a part: *Held*, not to be within the statute of frauds. *Sprague v. Bond*, 382.

18. While such an agreement constitutes no trust, nor passes any interest in the land itself, and while equity would not compel a sale by the vendee, yet, where the latter makes a voluntary sale, the vendor has the right to call for an account and to recover his share of proceeds under the agreement. *Ib.*

19. It is not within the scope of the authority of a chief engineer of a railway company to enter into contracts on behalf of his employer with subordinate agents or servants in respect to their wages. *Gillis v. R. R.*, 441.

20. Where the terms of a contract are fixed, the court and not the jury is its proper interpreter. *Spragins v. White*, 449.

21. In an action for the price of a certain lot of shoes, the defense was that they were not delivered at the time agreed on, the agreement being that the defendant bought the goods upon plaintiffs' promise to have them at a fixed place in two weeks; so the instruction of the court that the jury must inquire what was meant by it, was error. *Ib.*

EMINENT DOMAIN—*Continued.*

conveyance from the owner; (3) by the performance of some act or payment of some consideration by virtue of an executory agreement enforceable in a court of equity between the owner and the corporation; (4) by completing a road over lands and thereby exposing the corporation to liability for compensation, when such right and liability are provided by statute. *Ib.*

5. The conduct of the company in relation to the right of way had been such as to justify the belief on the part of the plaintiff, when he bought in 1869, that the purpose of completing the road had been abandoned. *Ib.*

6. As the plaintiff had no notice of the contract signed by C, his bargainor, the fact that grading had been done on the land did not preclude the plaintiff from claiming damage when the grading should be completed. *Ib.*

7. If C had not aliened the land and had brought the action himself, the courts would not, in the exercise of their discretionary power, enforce the agreement by requiring C to perform his contract, made upon the implied stipulation that the road would be completed within a reasonable time by the company or its assignees. *Ib.*

8. As the defendant is deemed to have abandoned its claim under the contract, it is not necessary to determine how long an adverse occupancy by the plaintiff was necessary to divest the equitable right to the easement. *Ib.*

ENTRY AND GRANT:

1. Where the plaintiff offered a junior grant, issued upon a senior entry, for the purpose of showing title out of the State, and also testimony tending to show seven years continuous adverse possession under colorable title on the part of those through whom he claimed, and the defendant offered a grant of older date than that introduced by the plaintiff, issued upon a junior entry, but also offered mesne conveyances to connect himself with both the older and younger grants: *Held*, (1) that the plaintiff was not precluded from using either grant to show that the State did not controvert his title in connection with proof of possession under colorable title by himself or those through whom he claimed; (2) that no equities being set up in the pleadings, the older title is deemed paramount, and one who connects himself with it is considered the true owner; (3) that where two of five heirs at law, to whom the legal title had passed by conveyances and descent from the senior grantee, were *sui juris* during the seven years when the land was occupied by B, under whom the plaintiff claims, such heirs at law, and those claiming under them, could not avoid the consequences of their *laches* in failing to sue the trespasser, by showing that during the period of such occupancy their rights to sue under the junior grant had not accrued; (4) that the junior grantee, and those claiming under him, took but a bare right to bring an action to establish their equity, and until the legal title should be conveyed to them under a decree of court, the junior title was available only as color; (5) whether the husband of one to whom the junior title had passed by

See also p. 10.