ANNOTATIONS INCLUDE 181 N. C.

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VOL. 112

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1893

REPORTED BY

ROBERT T. GRAY

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BY

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1893

JESSE R. STARNES v. R. R. HILL.

Contingent and Vested Remainders—Shelley's Case.

1. A limitation to M. J. P. for and during the term of her natural life, and in the event that R. O. P. shall outlive her, then to him for and during the term of his natural life, and after the termination of the said life estates then to the heirs of R. O. P.: *Held*, that R. O. P. takes a contingent remainder, and that until the happening of the contingency the rule in *Shelley's case* cannot operate so as to vest in him an indefeasible fee.

2. That, should R. O. P. fail to survive M. J. P., his heirs will take as purchasers, no estate having vested in their ancestor, the word "heirs" being *descriptio personarum.*

3. The rule in *Shelley's case* has not been abolished by section 5, chapter 43, Rev. Code; The Code, 1329, now C. S. 1739.

ACTION for specific performance, tried at September Term, 1892, of BUNCOMBE, upon a case agreed, before *Bynum, J.*

The deed from William A. Holland and wife, the construction of which is the subject of this controversy, is as follows: (3)

This indenture, made this 2 April, 1875, between William A. Holland and wife, Mira McD. Holland, of the county of Buncombe, and State of North Carolina, of the first part, and C. A. Moore, trustee, of the second part, witnesseth:

That, whereas, on 1 July, 1874, the said William A. Holland and wife, Mira McD. Holland, bargained and sold to R. O. Patterson for and in consideration of one thousand dollars ($1,000) to them in hand paid on

said last-named day, the lot hereinafter described, and by writing under their hands and seals agreed to convey to the said R. O. Patterson by good and sufficient deed the same; and, whereas, the purchase-money has been paid in full, and the said R. O. Patterson has directed that the deed be made to C. A. Moore, the party of the second part, for said lot for the uses and trusts and purposes hereinafter mentioned:

Now, therefore, in consideration of the premises and the further consideration of the sum of one dollar to said parties of the first part, in hand paid by the said party of the second part, the said parties of the first part do hereby give, grant, bargain, sell and convey, and by these presents have bargained, sold and conveyed unto the said party of the second part, and his heirs forever, a certain lot in the town of Asheville, etc. (Here follows the description.)

To have and to hold to the said party of the second part and his heirs forever. In special trust and confidence, however, that the said C. A. Moore and his heirs will hold the same to the use of Madara J. Patterson for and during the time of her natural life, and in the event that the said R. O. Patterson shall outlive his said wife, Madara J., that the said

(4) C. A. Moore and his heirs will then hold the same to the use of said R. O. Patterson for and during the term of his natural life; and after the termination of the said life estates that the said C. A. Moore and his heirs will then hold the same to the use of the heirs of the said R. O. Patterson, and them and their heirs forever.

And the said William A. Holland and wife, Mira McD. Holland, for themselves and their heirs, do hereby covenant to and with the said C. A. Moore and his heirs that they are seized in fee simple of the said premises, and that they have right and full power to convey the same, and that the same is free from all encumbrances; and they do further covenant for themselves and for their heirs, to and with the said C. A. Moore and his heirs, that they will warrant and defend the title to the said premises against the lawful claims of all persons whomsoever.

In witness whereof, the said parties of the first part and C. A. Moore, trustee, as aforesaid, have hereunto set their hands and seals, the day and date above written.

WM. A. HOLLAND. [SEAL.]
MIRA MCD. HOLLAND. [SEAL.]
C. A. MOORE. [SEAL.]

On 21 March, 1878, the above-described land was conveyed for a valuable consideration by C. A. Moore, trustee, and said Robert O. Patterson and wife, Madara J., to one F. E. A. Roberts in fee.

(5) It further appears that the plaintiff thereafter purchased the said land of the said Roberts, and on 16 October, 1891, entered

into a contract with the defendant whereby the defendant contracted to purchase the same of the plaintiff for the sum of $20,000, executing his note to plaintiff for said sum, payable on 18 November, 1891.

This action is brought by the plaintiff to compel specific performance of the contract, and the defendant resists the same on the ground that the plaintiff is unable to execute to him a title in fee to the premises, alleging in his answer "that the title to the land acquired by the plaintiff, and offered by the plaintiff to this defendant, is materially defective and imperfect, and that the plaintiff, on account of said defects, *has no valid title whatsoever* to said land, and cannot specifically perform his agreement to convey to this defendant said lot of land by a good, perfect and valid title, and that therefore the defendant ought not, in equity and good conscience, to be compelled to specifically perform his contract to purchase the land and to pay said note for $20,000 executed for the purchase-money thereof."

The plaintiff in his reply alleged that the whole of the purchase-money expressed in the deed to C. A. Moore was paid by said R. O. Patterson. His Honor rendered judgment against the defendant, and decreed that he specifically perform the contract, and from this judgment the defendant appealed.

W. W. Jones for plaintiff.
Gudger & Martin for defendant.

SHEPHERD, C. J. It is well settled that "in limitations of a (6) trust, either of a real or personal estate, . . . the construction of limitations ought to be made according to the construction of limitations of a legal estate unless the intent of the testator or author of the trust plainly appears to the contrary." Fearne Cont. Rem., 125.

As there is nothing in the deed from W. A. Holland and wife to C. A. Moore, trustee, from which we are at liberty to infer an intention that the terms therein employed were to be understood in any other than their technical sense, it must follow, in accordance with the foregoing principle, that the limitations under consideration must be determined by the rules of the common law applicable to limitations of a strictly legal character. Under the provisions of the deed the said C. A. Moore was seized in fee to the use of Madara J. Patterson during her natural life, and *in the event* that R. O. Patterson should outlive the said Madara, his wife, then to the said R. O. Patterson for and during the term of his natural life, and after the determination of the said life-estates then "to the use of the heirs of said R. O. Patterson, and them and their heirs forever." The deed under which the plaintiff claims

purports to convey a fee simple, and was executed by the said trustee and Madara J. and R. O. Patterson, all of whom, together with several children of the said Patterson and wife, are now living.

We are called upon to define the interests of the various parties under the said limitations, and more especially to determine whether the parties to the deed just mentioned could convey an indefeasible fee in the premises. It is insisted by the plaintiff that R. O. Patterson took a vested remainder for life, and that, as the limitation over was to his heirs, he was, under the rule in *Shelley's case,* seized of an absolute estate in fee simple. On the other hand, it is argued by the defendant that the life estate of the said Patterson was contingent upon the event
(7) of his surviving his wife, and that until the happening of such event no interest vested in him which, under the said rule of law, could unite with the inheritance so as to destroy the remainder limited to his heirs, who would take as purchasers if he failed to survive his said wife.

In support of the plaintiff's contention we are referred to the principle laid down by Mr. Fearne (supra, 217) in a passage which has often been quoted in text-books and judicial opinions, but seldom accompanied with the explanation of the learned author in its immediate connection. *Ib.,* 216, 217. The language is as follows: "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." It is urged that, inasmuch as the death of Madara J. is an event which must happen, and as R. O. Patterson is a person *in esse,* the latter would have the capacity of taking the possession should the preceding estate of the said Madara J. be presently determined by her death, and therefore, under the foregoing rule, his estate would be a vested remainder. The fallacy of the argument may be found in the failure to observe that at common law the particular estate may be determined during the lifetime of its tenant (as by forfeiture or surrender, Fearne, *supra,* 217; Tiedeman Real Prop., 401; 4 Kent Com., 254), in which case it is entirely clear that the remainder to R. O. Patterson would be defeated, because the *event* upon the happening of which his interest was to vest, to wit, the survival of his wife, would not have transpired during the continuance of the particular estate (Fearne, 217; 2 Minor Inst., 170, 171), and it is common learning that the contingency must happen during the continuance of the particular estate or *eo instanti* it determines. 2 Blk. Com.,
(8) 168.

If it be granted for the purposes of this argument that no merger or surrender can have the effect of destroying the particular

estate in this instance, and if it be said that under the modern system of tenures such estate may no longer be forfeited as in feudal times, the answer is that the rule which distinguishes a vested from a contingent remainder has for centuries been a rule of property of the common law, and "to disregard rules of interpretation sanctioned by a succession of ages and by the decisions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property but would introduce a latitude of construction boundless in its range and pernicious in its consequences." 4 Kent Com., 231. "We have many laws, the origin of which cannot at this distant period be traced at all; yet justly should we laugh at the man urging that as an argument against the present validity of such laws; and surely a law for which no reason at all now appears has no more original ground in the present state of things than a law whose origin may be traced up to a circumstance which does not now exist." Fearne, *supra,* 87.

In *Perrin v. Blake* (1 W. Bl., 672, and note i; 4 Burrows, 2579), *Judge Blackstone* remarked: "There is hardly an ancient rule of property but what had in it more or less of feudal tincture," and, after instancing several, he observes that "whatever their parentage was they are now adopted by the common law of England, incorporated into its body and so interwoven into its policy that no court of justice in this kingdom had either the power or (he trusted) the inclination to disturb them."

In view of the fact that, except where changed by statute, the rule of the common law which we have been discussing is generally recognized and acted upon in all its rigor, regardless of the fact that some of its reasons no longer exist, there can be no serious doubt of (9) the entire applicability of the language of the distinguished jurists from whom we have quoted. It may be observed in this connection that waste is still recognized by the laws of this State as a ground of forfeiture. The Code, sec. 624; *Sherrill v. Connor,* 107 N. C., 630.

We return to the rule as laid down by Fearne. This may be illustrated by a limitation to A for life, and then to B for life. Now, here B may die before A, in which event he would never actually enjoy the possession; but during his life he has "a fixed right of future enjoyment" (4 Kent Com., 203) which, upon the determination of A's estate, whether by death or otherwise, entitles him to the immediate possession irrespective of the concurrence of any collateral contingency, and *his* remainder is therefore vested. In other words, the term "vested remainder" imports *ex vi termini* "a present title" in the remainderman. So that if the limitation in the above illustration had been to B and his heirs, the latter would have taken although B had died before A. In

Gray on Perpetuities, 63, the learned author thus distinguished a vested from a contingent remainder: "A remainder is vested in A when throughout its continuance A, or A and his heirs, have the right to the immediate possession, *whenever and however* the preceding estates determine; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estates; or again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estates." Fearne, 217; 1 Cruise Real Prop., 211; Tiedeman Real Prop., 401; 2 Washburn Real Prop., 595.

(10) In accordance with these principles 2 Blackstone, 171, puts a case "on all fours" with the one before us, and declares the limitations to be a contingent remainder. "A remainder (he remarks) may also be contingent where the person to whom it is limited is fixed and certain but the *event* upon which it is to take effect is vague and uncertain, as where land is given to A for life, and in case B survives him then with the remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event—the uncertainty of his surviving A. During the joint lives of A and B it is contingent, and if B dies first it can never vest in his heirs, but is forever gone. But if A dies first the remainder to B becomes vested." 1 Cruise, *supra,* 205; Boone Real Prop., 174; *Bamforth v. Bamforth,* 123 Mass., 282.

It is true that the law favors the vesting of estates, and in many instances the courts have construed limitations to be conditions subsequent instead of conditions precedent. Thus, "on a devise to A for life, remainder to his children; but if any child dies in the lifetime of A, his share to go to those who survive; the share of each child is said to be vested subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent." Gray, *supra,* 108. "The distinction," says the same author, "is that if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is contingent; but if after the words giving a vested interest, a clause is added divesting it, the remainder is vested." Several of the authorities cited by counsel fall within the latter branch of the proposition and clearly have no bearing upon this case, as no ingenuity is equal to the task of construing the present limitation as one vesting a present interest subject to be divested upon a condition subsequent. It is plain that if it vests at all, it must remain vested. The cases cited from our Reports do not in the

(11) least impinge upon the principle we have stated. In *McNeely v. McNeely,* 82 N. C., 183, a testator, "after devising to his wife for life, gave all the lands 'that I have to my son Billy, at the death of

his mother, by him seeing to her,'" the Court held that the words "by him seeing to her" were not operative as a condition precedent, but was the mere expression of a wish that he should take care of his mother. It was therefore properly held to be a vested remainder. In *Brinson v. Wharton,* 43 N. C., 80, the decision was influenced entirely by the construction of the will. It was declared that the testator intended to give the property to his wife during her life and then to his children, to be equally divided between them, with a proviso that, if his wife should marry, her particular estate in the whole should determine and she would be entitled to a child's part. Under this construction, it was, of course, held that the children took a *present interest* to be enjoyed in the future, that is, after the determination of the estate given to the wife, subject only to the contingency of letting in the wife as to one share of the particular estate determined by her marriage. "This contingency (says the Court) not having happened is out of the case, and it is the ordinary one of a gift to a widow for life, and then to the children to be equally divided." We are unable to see how this case is authority for the position that a remainder limited upon a precedent condition can be vested until such a condition is fulfilled. In *Rives v. Frizzle,* 43 N. C., 237, the Court simply decided that the words "after" or "upon" the death of a person "do not make a contingency, but merely denote the commencement of a remainder in point of enjoyment." There could hardly be found in the language words which more aptly express a contingency than those used in the present case. In *Elwood v. Plummer,* 78 N. C., 392, the land devised in trust for "two of the testator's daughters during their natural lifetime, to be equally divided, (12) and after the death of either, in trust in part for her three grandchildren until the death of the other daughter, at which time said plantation is to be equally divided between said three grandchildren, of whom R. A. Plummer was one." The Court said that "both the object of the gift and the event of its full enjoyment are certain, which makes a vested remainder." Here there was no condition precedent to the vesting of the remainder, and there was a present capacity to take effect upon the determination, in whatever manner, of the life estates. We cannot see how any of these decisions are in point. Neither do we find anything in the other cases, to which we have been referred, that can be regarded as authority against so well settled a principle of the common law as that which we have stated.

In *Croxall v. Sherard,* 5 Wall., 288, cited for plaintiff, it was said that "where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue."

Similar decisions were made by the Supreme Courts of Alabama and Illinois, and all of them have been severely criticized by eminent authority. Mr. Gray (*supra,* 107, note 2) suggests that in these cases "an expression of opinion upon the point in question was not really necessary to a decision upon the merits. At any rate (he remarks) it would seem that these decisions, as well as those in Indiana and New York present an exceptional view of the common-law conception of a remainder in other jurisdictions." While the cases are not directly in point, it may be well to add that their reasoning seems to be identical with the New York decisions, based upon statutory definitions and in reliance upon *Chancellor Kent's* statement that the statutory definition ex-
(13) pressed the common-law notion of a vested remainder. Mr. Gray (*supra*) further remarks that it is doubtful whether such legislation was intended to change the common law; but he says "the Courts have decided, and it would seem correctly, that it has done so." This latter view seems to be the correct one (*Moore v. Littell,* 41 N. Y., 66), and therefore destroys the force of decisions based upon or influenced by such statutory definitions, and practically leaves nothing which seriously conflicts with the common-law principles which we have enunciated.

We are therefore of the opinion that R. O. Patterson took but a contingent remainder, and that until the happening of the contingency, the rule in *Shelley's case* could not operate so as to defeat the contingent remainders of his heirs as purchasers. Granting, however, that the limitation could possibly be construed to vest in him a present interest so as to put in operation the rule in *Shelley's case,* still he would take but a defeasible estate, as under all of the authorities his failure to survive his wife would operate (if we can venture to use the expression in reference to such a limitation) as a condition subsequent, by which his estate would be divested in favor of the said heirs. So, treating the limitation either way, the plaintiff has not acquired such an absolute estate in fee as is necessary to enable him to comply with the terms of the contract which he seeks to enforce against the defendant.

It may further be observed that the position that the warranty in the deed of the life tenant can defeat the remainder of the said heirs by way of rebutter, is wholly untenable. The Code, sec. 1334; *Moore v. Parker,* 34 N. C., 123.

We will now endeavor to ascertain the interests of the parties in the event that R. O. Patterson should survive his wife, and, while under the view we have taken, we might abstain from doing so, yet, as the answer denies the plaintiff has any "valid title whatever to the land," and the parties may be left somewhat at sea in respect to their
(14) rights under the limitations in the deed, and a construction at this

time may avoid future litigation, we have concluded to proceed further in the discussion and pass upon the remaining questions presented in the record. We are all the more inclined to pursue this course because it involves the consideration of a question which was thoroughly argued by counsel, and the determination of which is of serious interest to the profession.

The question is whether the rule in *Shelley's case* still obtains in North Carolina. It is insisted that this ancient rule was abolished in 1854 by section 5, chapter 43, Rev. Code, which provision was brought forward and now constitutes section 1329 Code of 1883.* As the existence of the rule has for many years been unquestionably recognized in North Carolina as one of the "ligaments of property" (the only doubt upon the subject having been suggested by *dicta* of comparatively recent date), and under it many titles have vested and been transferred, the question now presented is one of very great importance and demands the most serious consideration of the Court. Before attempting a construction of the provision referred to, it may be well to make some general observations upon the probable origin and policy of the rule in order to ascertain, if we can, whether it be in accord with the general current of enlightened jurisprudence in modern times and more especially with the policy of our own laws. It is believed that such an inquiry may lend us valuable aid in our efforts to discharge the delicate and responsible duty of interpreting the legislative will.

The rule under consideration takes its name from an early case decided in the reign of Queen Elizabeth (*Shelley's case,* 1 Rep., 94), though it was at that time considered as an ancient dogma of common law and has been traced by *Justice Blackstone* to a case (15) decided in the reign of Edward II. The earliest intelligible decision upon the subject, however, is to be found in the case of the Provost of Beverly, in the time of Edward III, and reported in the Year Books, in which the rule is substantially declared as in *Shelley's case.* Various theories have been suggested as furnishing a reason for the rule in the first instance, some authors with much plausibility tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that, in case of such a limitation, the estate was in fact to go to the heirs of the grantee named; that though he had a right to enjoy it during life, he had no right to cut off the descent by alienation, and that when, therefore, the word 'heirs' in the progress of estates came to be regarded as a mere term of limitation, giving the grantee a complete ownership with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and

*Now C. S., 1739.

after his death to his heirs, the effect at common law being the same in both forms of limitation." 2 Wash. Real Prop., 647; Williams Real Prop., 254.

Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce and the alienation of lands assumed the form of perpetual leases, granted in consideration of certain services or rents reserved to the grantor and his heirs, and, as such services or rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed. Williams Real Prop., 39.

It is not to be doubted that this construction was aided and greatly strengthened by other considerations such as the prevention of frauds upon feudal lords and specially creditors (2 Fearne, ch. 12, sec.
(16) 3), the prevention of the inheritance from being, as was supposed, in abeyance (*Justice Blackstone's* argument in *Perrin v. Blake,* 1 Ex. Chamber, 4 Burr., 2579), and to preserve the marked distinction between title by descent and purchase. Hargrave Law Tracts. "But whatever may have been the grounds of the rule in its origin, another reason subsequently existed as an inducement to the preservation of the rule from legislative abolition and judicial discouragement, after the feudal reason had ceased with the feudal system itself, and that subsequent reason is the *desire to facilitate alienation* by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." 2 Fearne, sec. 421.

In *Perrin v. Blake, supra, Justice Blackstone* said: "Another foundation of the rule probably was laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor." See, also, Rawles' Note, Williams Real Prop., 253.

In *Polk v. Farris,* 30 Am. Dec., 400, *Reese, J.,* in a very able opinion in vindication of the rule, uses this language: "It is a rule or canon of property, which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance that the rule, a gothic column, found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system." In *Hillman v. Bauslaugh,* 53 Am. Dec., 474, the distinguished *Chief Justice Gibson* says:

"Though of feudal origin, it is not a relic of barbarism, or a
(17) part of the rubbish of the dark ages. . . . It has other than

feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor and making it alienable a generation sooner than it otherwise would be."

That this result accords most thoroughly with the general tendency of juridical evolution is apparent from the progress of the law and the gradual falling away of entails and other restraints on alienation from the times of Henry I to the present. It seems clear that in a highly complex state of society, with greatly diversified industries and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property, and that such has been the spirit of the legislation in this State is manifest from a perusal of the various statutes enacted upon the subject.

We are not unaware of the fact that in some of the States the rule has been partially, if not wholly, abolished. Such legislation was probably influenced by the presumed lack of conformity with the supposed intention of the grantor or testator; but to this it has been answered that "when a case arises fulfilling the requirements for the application of the rule, it is not against the *intention* of the testator. It is only applicable when the intention of the testator has been discovered by the ordinary canons of descent." 2 Fearne, sec. 434. "The rule is not a means to *discover the intention* of the grantor or testator, but, supposing the intention ascertained, the rule *controls* it, so far as it is repugnant to the policy of the law, giving effect to the *general and legal,* rather than the more particular and prescribed, intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other, to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together without more or less of general mischief to the public welfare, and the rule prevails simply to subordinate the (18) particular and apparently less important design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated." 2 Minor Inst., 395, cited with approval in *Leathers v. Gray,* 96 N. C., 548.

As the Courts are astute in discovering the intention from the context of the conveyance and readily give effect to every word from which such intention can reasonably and legitimately be inferred, it does not often occur that the application of the rule has the effect of subverting the real intention of the grantor or testator. But granting that it does, it is urged with great force that particular instances of hardship can better be endured than the uncertainty and confusion of titles resulting from sudden and radical changes in well-settled rules of property. In reference to this very question, *Chancellor Kent* remarks that "it is a

question for experience to decide whether the attainable advantages suggested by a change in the law will overbalance the inconvenience of increasing fetters upon alienation and shaking confidence in the law by such an entire and complete renunciation of a settled rule of property memorable for its antiquity and for patient cultivation and discipline which it has received." 4 Com., 233. "Certain established maxims as to the legal import and effect of technical expressions will render the decisions of title to property as little dependent as the nature of things will admit upon the occasional opinion, humor, ingenuity or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained, and under them a permanent peaceful enjoyment may be expected." 1 Fearne, 171.

(19) It may be further observed that the rule in *Shelley's case* is by no means the only principle of law which may thwart the intention of the grantor or testator in the interest of public policy; as for instance, the intention cannot change the rule against perpetuities, nor impose a general restraint upon alienation. If the views of the eminent jurists and authors from whom we have so liberally quoted be sound, there is certainly no reason for looking upon the rule with disfavor, but, on the contrary, it is highly useful, and should be jealously guarded and preserved.

But whatever may be the better policy (and this it is not our province to determine), its great antiquity and general prevalence, as well as its earnest endorsement by so many great lawyers of the present as of past centuries, should alone be sufficient to entitle it to a fair and patient hearing when the question of its abolition arises upon the construction of a statute which, for the particular purpose for which it is now invoked, must be regarded as obscurely worded and sufficiently ambiguous to admit of an entirely different application.

This "ancient landmark of the law" was, we believe, on a celebrated occasion, shown but slight respect by so great a judge as *Lord Mansfield*, but the controversy which immediately sprang up between his Lordship and Mr. Fearne did not, it is said, result to the advantage of the former, and the rule was more firmly settled than ever in the jurisprudence of England. See Campbell's Life of Mansfield.

We will now attempt a construction of the act in question:

"Any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appears by the deed or the will." Rev. Code, ch. 43, sec. 5; The Code, sec. 1329.

The word "limitation" has two well-known and distinct meanings: in the one, the primary meaning, it signifies a marking out the bounds or

limits of the estate created; in the other, it signifies simply the (20) creation of an estate (2 Fearne, sec. 24), and it is evidently used in the secondary sense in the above act. It will appear hereafter that its framers had a very definite purpose in view, and it seems that, in effectuating this purpose, they endeavored to avoid any interference with the rule in *Shelley's case.* This must be apparent, because the rule has nothing whatever to do with limitations to the heirs of a person *unless there is a precedent limitation of a freehold estate to that person,* and yet the act does not make the slightest reference to this essential element of the said rule. It is impossible to suppose that the gentlemen who prepared the Revised Code and incorporated this section should have been inattentive to this defect if it had been their purpose to abrogate the rule. Their abilities and learning need no eulogy from us; they are a part of the heritage of the legal profession of this State of which we may be justly proud. And this is a point which may be very strongly insisted upon, that if these commissioners had intended to abolish the rule they could have done it and would have done it in such a manner as to leave no doubt upon the subject. That there is a doubt is the most powerful reason for sustaining the rule. Acts abridging the common law must be strictly construed (1 Kent Com., 464), "for it is not to be presumed that the Legislature intended to make any innovation of the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly pronounced, for if the parliament had had that design it is naturally said they would have expressed it." Potter's Dwarris, 185; *Brown v. Berry,* 3 Dall., 365; *Shaw v. R. R.,* 101 U. S., 557.

That very important omission, to which we have adverted, is (21) rendered still more significant when it is considered that in all of the statutes abolishing the rule, which we have been able to examine, there is an express reference to the *precedent life estate* given in the same conveyance in which there is a limitation to the heirs of the life tenant. This will strikingly appear from an examination of the statutes, of which we give the following as illustrations:

The Virginia Code (1850) enacts that "When any estate, real or personal, is given by deed or will to any person for his life and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body."

In New York it is provided that "When a remainder shall be limited to the heirs or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination

of the life estate, shall be the heirs or heirs of the body of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder so limited to them." 4 Kent, 232.

In Maine, New Hampshire and several other States in which the rule has been abolished, the statutes, while differing in phraseology, all contain provisions substantially similar to those we have reproduced.

Another argument against the construction contended for is, that in a large number of cases arising under the rule, perhaps the majority, the words of the act *can have no operation.* As an illustration of our meaning take the case of a limitation to A for life, and after his death to his heirs. A never has any children, and consequently there are no heirs (of that sort) to be construed into children. It is plain that the case must be left as at common law; that is, A will take a fee. In other words, the rule in *Shelley's case* is applicable to *every case* where an estate
(22) is limited to one for life, with a remainder to the heirs of the first taker, whether the tenant for life has children or not; but the act, by its very terms, can only extend to those cases, if to any, in which the first taker has children. The alleged abrogation, therefore, is by no means coextensive with the rule, as is the effect of the statutes to which we have referred. These statutes are framed so as to prevent any enlargement of the life estate even if there be no children, and to confer a *remainder* upon such persons as shall, in any sense, be the heirs of the life tenant. Can it be inferred that such profound lawyers as our Code commissioners would attempt to abolish such a well-known and firmly established principle of the common law by an act the words of which they knew could reach only a few of the great number of cases under the rule, especially when the words can find a much more direct and natural interpretation, as we will presently attempt to show?

The inapplicability, however, of the words of the act to the rule under consideration seems to us to be placed beyond question by the fact that they are equally applicable to ordinary limitations in fee simple; and we do not suppose that any one will seriously contend that the act abolished fee simple estates generally. If an estate to A for life, remainder to the heirs of A, he having living children, is converted into an estate for life in A, with a vested remainder in his children, by the words of an act which says that "in every limitation to the heirs of a living person the word heirs shall be construed to mean children," why, may it be asked, does not the same act convert an estate to A and his heirs, he having living children, into an estate in common in A and his children? Certainly a limitation to A and his children, he having living children, will create a tenancy in common in A and his children, and surely the commissioners did not intend any such startling result.

Courts will restrain the literal meaning of a statute if its words (23) would extend to cases not intended by the Legislature. *"Scire leges non hoc est verba earum tenere sed vim ac potestatem,* and the reason and the intention of the lawgiver will control the strict letter of the law, when the latter would lead to a palpable injustice, contradiction and absurdity." 1 Kent Com., 462; Potter's Dwarris, 209, note; *Brewer v. Blaugh,* 14 Peters, 178; Lieber Hermeneutics, 45.

And here it may not be inappropriate to say that it seems to be the opinion of many of the ablest law-writers that the act does not necessarily abolish the rule. Thus Mr. Washburn, in the fourth edition of his work on Real Property (Vol. 2, 607), undertakes to give a list of the States with reference to the acts which have abolished the rule, and he does not include North Carolina, although he was familiar with our act, as is shown by a reference to section 3, chapter 43, of the Revised Code. The same observation applies to Mr. Rawle, the learned editor of Williams on Real Property. He also gives a list of the States which have abolished the rule, without including North Carolina. The same may be said of Mr. Freeman, the very able and discriminating editor of the American Decisions, in a note to 30 Am. Dec., 415, and also of the editors of Jarman on Wills and Lawson R. & R.

We will now attempt to give our construction of the act. It seems to us that its main object (and its phraseology nicely adapts it to the purpose) was to convert a contingent into a vested remainder under certain circumstances. For instance, an estate to A for life, remainder to the heirs of B, B living and having children. Now, at common law, this created a contingent remainder in the heirs of B, for *nemo est hæres viventis,* and if A died before B the heirs or children of B took nothing. Under the act in question the children of B would take a vested remainder, and upon the death of A would get the estate whether B was living or not. And it is singular that the only case which we (24) have been able to find in our reports in which the Court has adjudged the act to be applicable was similar to this. In *Smith v. Brisson,* 90 N. C., 284, the limitation was as follows: "To Rowland Mercer and the heirs of his body, and if the said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son, James A. Mercer." Rowland Mercer died without ever having had children. James A. Mercer was living at the date of the deed and had children at that time, and the Court held that the act (The Code, sec. 1329) applied, and construed the deed as if the limitation over had read, "the said land shall go to the children of my son, James A. Mercer." It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless

there was something in the deed which indicated "that by 'the heirs' was meant the *children* of the person named." 3 Washburn Real Prop., 282. The act in question provides that in such a case the word "heirs" shall be construed to mean "children," and the limitation therefore would be good.

Our construction that the act does not affect the rule in *Shelley's case* finds strong support from its position in the Revised Code, which we are at liberty to consider under the mixim *noscitur a sociis.* Indeed, the whole structure of chapter 43 seems to have for its prime object the greater alienability of estates than existed at common law:

Section 1 converts fee tails into fee simple estates, and uses no ambiguous terms.

Section 2 converts joint tenancy into tenancy in common.

Section 3 makes certain contingent limitations vest much sooner than at common law; and then comes section 5, the provisions of which we have under consideration.

(25) This object was further advanced by the act of 1879 (The Code, sec. 1280) providing that "all conveyances shall be construed to be in fee simple unless otherwise plainly expressed," showing plainly the legislative policy. The construction insisted upon by the defendant would, it seems, run counter to the general trend of our policy which favors the early vesting of estates (*Hilliard v. Kearney,* 45 N. C., 221), and it would also place the act entirely out of harmony with its environment.

We do not regard it as serving any useful purpose to refer to the queries thrown out in various cases, extending from *King v. Utley,* 85 N. C., 59, to the present time, because the point did not arise and the question is expressly reserved in all of them. It is often remarked that great legislative changes in the law are usually preceded by some decision of the courts of a novel or striking character, calculated to arrest public attention, and we have made such investigation as we could with a view of discovering such a case as would probably cause the passage of the act. In this we have not been particularly successful. Certainly we find nothing which indicates that courts, lawyers or laymen were dissatisfied with *Shelley's case,* or that the question was particularly interesting at that time. We do find a case or two in which the Court applied the rule, but there is nothing unusual to distinguish them from the thousands of similar cases decided within the last four or five hundred years. It is possible, however, that the act grew out of the discussion arising upon the much litigated case of *Ward v. Stone,* 17 N. C., 509, which came several times before the Court and which seems to have established the proposition that in a legacy to the "heirs" of a person,

which person *the will itself recognizes as living,* the word "heirs" (26) is to be construed "children." While supported by authority, it seems rather arbitrary that the construction of the word "heirs" in a will should depend upon whether the will recognizes the ancestor as living, and not upon the *fact* of his being alive. It is not unreasonable to suppose that the discussion in this case may have influenced the action of the commissioners; but, however this may be, we are entirely satisfied from the language used that it was not their purpose to work so great a change in the law governing the limitations of property.

The importance of the question involving, as it probably does, the validity of the titles to a large amount of real estate, has induced us to discuss the subject at a somewhat unusual length, and we are glad that our conception of the law is in harmony with the views so long entertained and acted upon by the profession.

The rule in *Shelley's case* being still in force in North Carolina, its application to the present case will be as follows: If R. O. Patterson should survive his wife he will take a vested equitable freehold estate and, as the limitations apply to interests of the same quality and the trusts are not executory (Fearne, 51, 55, 90; 2 Thos. Coke Lit., 145), the inheritance will, under said rule, unite with the said estate, and he will then be seized of an indefeasible equitable estate in fee simple: This estate will inure to the benefit of the plaintiff by way of feeding the estoppel worked by the covenants of warranty in the deed of the said R. O. Patterson. *Bell v. Adams,* 81 N. C., 118; *Southerland v. Stout,* 68 N. C., 446; *Fortescue v. Satterthwaite,* 23 N. C., 566; 7 A. & E., 9, 10, notes.

Until the contingency happens, the "heirs" of R. O. Patterson have a contingent remainder in fee, expectant upon the determination of the life estate of Madara J., she surviving her said husband. In this event they will take, not under said Patterson, but as *purchasers,* the word "heirs" being *descriptio personarum* only.

We thing his Honor was correct in holding that the rule in (27) *Shelley's case* had not been abolished, but for the reasons given we think he erred in holding that the defendant was compelled to accept the title offered by the plaintiff.

ERROR. REVERSED.

NOTE.—It may not be improper to say that since the preparation of this opinion the writer has been assured by *ex-Justice Rodman,* the distinguished survivor of those connected with the supervision and publication of the Revised Code, that it was not the purpose of the Commission to abolish the rule in *Shelley's case.*

Cited: Clark v. Cox, 115 N. C., 96; *Whitesides v. Cooper, ib.,* 574; *Wright v. Brown,* 116 N. C., 29; *Tucker v. Williams,* 117 N. C., 121; *Nichols v. Gladden, ib.,* 499; *Dawson v. Quinnerly,* 118 N. C., 190; *Chamblee v. Broughton,* 120 N. C., 175; *May v. Lewis,* 132 N. C., 116; *Hauser v. Craft,* 134 N. C., 329; *Bowen v. Hackney,* 136 N. C., 190, 192; *Tyson v. Sinclair,* 138 N. C., 24; *Campbell v. Everhart,* 139 N. C., 511; *Faison v. Odom,* 144 N. C., 109; *Condor v. Secrest,* 149 N. C., 297; *Richardson v. Richardson,* 152 N. C., 707; *Puckett v. Morgan,* 158 N. C., 346; *Cotten v. Moseley,* 159 N. C., 5; *Robeson v. Moore,* 168 N. C., 389; *Springs v. Hopkins,* 171 N. C., 492; *Lee v. Oates, ib.,* 727; *Cohoon v. Upton,* 174 N. C., 89; *Kirkman v. Smith, ib.,* 605; *Williams v. Biggs,* 176 N. C., 49; *Thompson v. Humphrey,* 179 N. C., 52, 53; *Starling v. Newsom,* 180 N. C., 441; *Blackledge v. Simmons, ib.,* 541.

OCTAVIUS TAYLOR, EXECUTOR OF B. W. BRITT, v. L. H. TAYLOR.

Abandonment of Contract—Landlord and Tenant—Evidence.

1. While a vendee may, by parol agreement with the vendor in consideration of the rescission of the contract of purchase, become the latter's tenant without surrendering possession of the land, yet, in order to avoid the contract upon this ground, the vendor or those claiming under him must show an unconditional surrender by the vendee of his rights, and the acts or conduct relied upon as evidence of abandonment must be positive, unequivocal and inconsistent with the contract of purchase.

2. Where occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under the provisions of section 1754 of The Code, is vested in the landlord.

3. It is the province, if not the duty, of the *nisi prius* judge to instruct the jury upon the testimony what acts constitute a renunciation of the contract, and it is error for him to leave to them to determine whether the contract still subsists without giving a definition of what amounts to abandonment.

4. Where the vendee refused to surrender the vendor's bond for title, and his notes given for the purchase money remained in the possession of the vendor or one claiming under him, proof that the vendee had at various times agreed to pay rent was not, of itself, evidence to show abandonment, and it was error in the judge to submit the question of abandonment to the jury upon such testimony.

(28) APPEAL at April Term, 1892, of GREENE, from *Winston, J.* In this action the ancillary remedy of claim and delivery was

resorted to for the purpose of enforcing an alleged lien for rent and advances for agricultural purposes. The plaintiff's testator Britt died 15 September, 1891. The crop of that year was seized by the plaintiff executor to satisfy a claim of $125 (note) and $160 (advances made by the testator). In 1889 plaintiff's testator had contracted to convey to defendant the land on which the crop seized was raised in 1891, and had executed and delivered a bond for title, which defendant still holds and offered on the trial to show that he was a vendee, not a tenant, and that the proceeding could not be maintained against him. It was admitted also that plaintiff held and claimed as devisee of the land under the testator's will five notes, executed for the purchase-money by the defendant to Britt, each for the sum of $400, the first due 1 January, 1891, and the last 1 January, 1894.

The main question involved was whether the testimony offered to show abandonment was sufficient to go to the jury for that purpose. The following testimony was admitted in the face of the objection of the defendant to any evidence tending to show a renting of the land in controversy known as the Mewborn place:

The plaintiff, Octavius Taylor, testified as follows: "I am Britt's executor, and took possession of his property. Defendant lived on the land in controversy and raised the crops sued for on said land in 1891. I demanded the rents and an account for advances made him by Britt to make said crop: Supplies, $160; rents, $125. Defendant said the rent was $160, but it fell to $125. Defendant told me that (29) the rent for 1891 was $125, the value of the crop in controversy about $200—two bales of cotton, 1,600 pounds of seed cotton, four stacks of fodder, one hundred and eighty bushels cotton seed, twenty-five barrels of corn. Defendant has left and abandoned the premises this year; he since then come to me to rent the land for this year (1892), but I would not rent to him." (The above evidence was excepted to by defendant.)

Cross-examined: "Defendant told me in 1891 he could not pay for the land; I think this was after the death of Britt. I found defendant's notes for the purchase-money for the land among Britt's papers when I qualified as executor, and have seen the contract of purchase in defendant's possession. Defendant gave Britt a mortgage in 1891 on a mule, and paid the mortgage; this was for the purchase of the mule. Britt devised the land in controversy to his sister (wife of Whitted), and I turned over the notes of the defendant for the purchase-money to her."

Thomas Moye testified for the plaintiff as follows: "I lived on Britt's land and heard defendant and Britt talking, in the spring of 1891, and the defendant was grumbling about rent. Britt said $125 was the least he would take if he would clear two acres of land; defendant agreed

to clear two acres. This conversation took place at Britt's store." (The defendant's objection to this evidence was overruled, and he excepted.)

Upon cross-examination this witness stated that he did not hear the defendant agree to give $125 as rent.

The plaintiff was recalled, and testified that there were no credits on the notes, which were for $400 each.

(30) Whitted, the brother-in-law of Britt, says: "My wife is now in possession of the land." In order to show abandonment the court permitted this witness to say that the defendant came to rent the land of his wife for 1892. (Defendant's objection was overruled, and he excepted.) "I told him I would rent to him if he would cancel the contract of purchase. I offered to give up the notes if he would cancel the contract. My wife holds the notes yet against the defendant, and we would like to have our money for them."

The plaintiff rested, and the defendant offered the written contract of purchase and the bond for title in evidence, and offered no other testimony. The other material facts are stated in the opinion. The defendant appealed.

George Rountree for plaintiff.
George M. Lindsay for defendant.

AVERY, J. A vendee may, by parol agreement with the vendor in consideration of rescinding the contract of purchase, become the tenant of the latter as to the land without surrendering possession, provided no rights have supervened that would be defeated by such rescission. *Riley v. Jordan,* 75 N. C., 180; 12 A. & E., 263, note 5; Wood on Landlord and Tenant, page 14, note 8; *Durant v. Taylor,* 89 N. C., 351. But in order to avoid the contract upon this ground the vendor, or those claiming under him, must show an unconditional surrender by the vendee of his rights (*Riley v. Jordan, supra*), and acts or conduct relied upon as evidence of abandonment must be "positive, unequivocal and inconsistent with the contract." *Faw v. Whittington,* 72 N. C., 321; *Holden v. Purifoy,* 108 N. C., 163. Where as in the case at bar the vendee enters under a bond for title and has executed notes for the purchase-money which are held by the vendor, the surrender of bond and notes by the holders to the maker and obligor respectively has been re-

(31) peatedly declared such a renunciation as would annul the contract of purchase. *Faw v. Whittington, supra; McDougald v. Graham,* 75 N. C., 310; *Fall v. Carpenter,* 21 N. C., 237; *Holden v. Purifoy, supra; Miller v. Pierce,* 104 N. C., 389; *Fortune v. Watkins,* 94 N. C., 304.

If the defendant's relation to the representatives of B. W. Britt is still that of vendee to vendor, though he may be in contemplation of law for some purposes considered a tenant at will, he is not a lessee within the provisions of the statute (The Code, sec. 1754), the title to whose crop is deemed vested in the landlord. *McCombs v. Wallace,* 66 N. C., 481; *McMillan v. Love,* 72 N. C., 18; *Parker v. Allen,* 84 N. C., 466; *Hughes v. Mason,* 84 N. C., 472. The section mentioned applies to cases where "lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper," and is, like section 1756, plainly inapplicable where the occupant of land is a vendee or mortgagor.

The question now presented is whether the parties to the original contract, or those succeeding to their rights had directly or by an unavoidable implication arising from acts inconsistent with a purpose to insist on its enforcement, annulled or abandoned it and entered into a new agreement by which the defendant became a lessee instead of a vendee. It is, however, the province of the *nisi prius* judge, if not his duty, to instruct the jury upon the testimony what acts, if ascertained by them to have been done by the parties, constituted a renunciation of the contract. It was error in him to leave the jury without a definition of what amounted to an abandonment to determine whether the contract of purchase was still subsisting; and especially was this true if the evidence was not sufficient, in any phase of it, to be submitted as tending to show a renunciation or annulment of the original agreement by the parties thereto. *Faw v. Whittington, supra.*

The judge told the jury that "if they should believe from the (32) evidence that defendant had entered upon the land under this contract of purchase, and had thereafter abandoned his contract of purchase and had rented from B. W. Britt, the plaintiff, as Britt's executor, by virtue of the landlord and tenant act, would be the owner of all the crops raised on the land until the rents and advances were paid." Britt died, 15 September, 1891, and the crops of that year raised by the defendant on the land, which Britt had previously contracted to sell to him, were seized by the plaintiff, his executor, to satisfy a lien for the rent of that year ($125), and for advances to the amount of $150. It was admitted that the defendant still held the bond for title, bearing date in the year 1889, and that the sister of Britt and wife of the witness Whitted held the five notes executed for the purchase-money, each for the sum of $400, the first due 1 January, 1890, and the last 1 January, 1894.

The exception to the charge must, therefore, be sustained if there was not sufficient evidence to be submitted to the jury upon the question of abandonment. The testimony bearing upon the subject was objected to

at the time of its admission as insufficient and incompetent evidence of abandonment, and the defendant thus presented the same objection at two stages of the trial.

In speaking of the surrender of a deed by the grantee before registration, the Court said of the decisions in *Hare v. Jernigan,* 76 N. C., 471, and *Beaman v. Simmons, ib.,* 43: "These later cases have introduced a new principle into our law, which we are not disposed to push beyond the point to which it has already gone." *Phifer v. Barnhardt,* 88 N. C., 333. Up to that time, it seems to have been settled, first, that a purchaser claiming by virtue of a constructive trust against another who had purchased for him and advanced the purchase-money, might
(33) by an unconditional surrender of his rights become by parol agreement a tenant under the purchaser or grantee (*Riley v. Jordan, supra*); second, that a grantee claiming under an unregistered deed might, if third parties had acquired no supervening rights under the conveyance, surrender the deed and thereby revest in the grantor any equitable interest that may have passed by it (*Hare v. Jernigan, supra,* and *Hogan v. Strayhorn,* 65 N. C., 279); third, that where the contract is executory, the redelivery of the bond or agreement to the vendor and the return of the notes for the purchase-money to the maker constitute unequivocal evidence of a purpose on both sides to abandon and annul the agreement entirely. *McDougald v. Graham, supra; Beaman v. Simmons, supra.*

It seems that the wife of the plaintiff executor had acquired the possession of the land in the early portion of the year 1892, when the defendant approached the plaintiff and proposed to rent the land in controversy for that year. The plaintiff offered on behalf of Mrs. Whitted, who claimed the land as devisee of Britt, to lease to defendant, provided he would surrender the bond for title executed by Britt and accept his five unpaid notes, but the defendant did not accede to the proposition and still holds the bond, which has been registered and was offered in evidence and relied upon to show that he occupies the relation of vendee to plaintiffs, to whom the legal title passed by the devise. In view of the refusal to surrender the bond, and the fact that the notes were in the possession of Britt when he died, and are now held by his daughter, we think that the learned judge who tried the case below erred when, in the face of the objections made in the progress of the trial, he submitted the question of abandonment to the jury and refused a motion for new trial founded upon an exception to the charge. The proof of the
(34) declarations of the defendant at various times to the effect that he had agreed to pay $125 as rent for the year 1891 was not, of itself or in connection with any other testimony admitted, evidence to be submitted to the jury to show abandonment, when the notes were

still held by the payee and the bond was in the hands of the obligee. The abandonment was not proved, directly or by unavoidable inference, in any view of the testimony.

The question as to the necessity for ascertaining, by admissions of the parties or a finding of the jury, the value of property seized by virtue of the proceeding of claim and delivery, is eliminated by resting our decision upon the ground of the want of evidence of abandonment; but it may be well to say that the late statute, as to the form of the judgment in such proceeding, is discussed and construed in *Hall v. Tillman,* 110 N. C., 220.

For the reasons given, we think that the court below erred.

NEW TRIAL.

Cited: Crinkley v. Egerton, 113 N. C., 448, 450, 451; *Jones v. Jones,* 117 N. C., 258; *Gorrell v. Alspaugh,* 120 N. C., 368; *Ford v. Green,* 121 N. C., 73, 74; *Hemmings v. Doss,* 125 N. C., 402; *May v. Getty,* 140 N. C., 316; *Redding v. Vogt, ib.,* 568; *Hairston v. Bescherer,* 141 N. C., 208; *Lewis v. Gay,* 151 N. C., 170; *Eubanks v. Becton,* 158 N. C., 238.

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(35)

THE STATE AND GUILFORD COUNTY v. THE GEORGIA COMPANY

Taxes, Remedies for Collection of, by the State—Insolvent Corporation —Creditor's Bill—Receiver.

1. The State and county, having, through the board of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who cannot find any property of the corporation upon which to levy, are *creditors,* holding a *debt* against such corporation, and are entitled, under sections 668 and 701 of The Code, to bring a proceeding in the nature of a creditor's bill against such corporation, with or without proceedings for its dissolution.

2. The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the Superior Court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect the revenue, and not the sovereign.

3. A county is a delegated part of the authority of the State, and the joinder of a county with the State cannot affect the latter's right to sue—a right which it has by implication, under various statutes, aside from the fact that it has inherently all remedies not voluntarily and unequivocally relinquished.

4. The fact that an individual can be *indicted* for failure to list his property for taxation does not bar the State from proceeding by suit to enforce the payment of taxes; no more does the right which the State has to have the charter of a corporation declared forfeited for nonpayment of taxes on its property, preclude the State from seeking the appointment of a receiver of such corporation in order that it may get what it might not reach by the bootless remedy afforded by a suit for dissolution.

AVERY, J., concurring.

CREDITOR'S BILL, by the State and Guilford County, against the Georgia Company, heard on complaint and demurrer at December Term, 1892, of GUILFORD, before *Brown, J.*, who sustained the demurrer and ordered the action to be dismissed.

The plaintiffs appealed.

R. M. Douglas and L. M. Scott for plaintiffs.
D. Schenck and P. B. Means for defendants.

CLARK, J. This is a civil action, in the nature of a creditor's bill, brought by the State and county, for the appointment of a receiver for the defendant corporation to collect its assets and pay its debts. It stands on complaint and demurrer; therefore, all the allegations of fact in the complaint, for the purposes of this appeal, are admitted
(36) to be true.

These allegations are, that on 6 June, 1889, the Board of Commissioners of Guilford County, upon due notice and after full hearing, assessed against the defendant the sum of $62,445.78 as State and county taxes and penalties for the year 1888; that the said taxes were returned by the sheriff as uncollectible; that defendant gave notice of appeal, but abandoned its appeal and removed all its property and effects, which were of great value, from the State, for the purpose of preventing the collection of taxes and in fraud of its creditors; that defendant is insolvent or in imminent danger of insolvency; that defendant has forfeited its corporate rights, and that the plaintiffs have exercised due diligence and exhausted all apparent means of collecting their debts. The complaint also alleges the organization of defendant corporation under the laws of this State; its domicile in Guilford County; the issue of its stock and bonds; the acquisition of its property and its liability to taxation. These taxes were assessed in conformity to section 91, chapter 218, Laws 1889.

It is well settled that the board of county commissioners, when sitting with the justices of the peace, has succeeded to all the powers of the old county court in matters of taxation. The board exercises judicial powers, has a clerk and a seal, and keeps a record of its proceedings. The Code, secs. 715, 716. Within its jurisdiction it is a court of record.

"The tax list is a judgment against every person for the amount of the tax, and the copy delivered to the sheriff is an execution." *Huggins v. Hinson,* 61 N. C., 126, cited and approved in *Comrs. v. Piercy,* 72 N. C., 181; *London v. Wilmington,* 78 N. C., 109; *Gore v. Mastin,* 66 N. C., 371; *R. R. v. Lewis,* 99 N. C., 62, and *Comrs. v. Murphy,* 107 N. C., 36. Indeed, every revenue act, from 1869 down to the present, expressly provides that the tax-list shall have "the force and effect of a judgment and execution." The plaintiffs have, therefore, a judgment and execution, with a return of *nulla bona* by the sheriff. (37)

In *Jones v. Ashford,* 79 N. C., 172, the Court says: "The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona,* has always been regarded as one of the extreme tests of due diligence"; and, further, "The return of the execution unsatisfied is evidence of the exhaustion of its legal means of collection," citing *Camden v. Doremus,* 3 How., 515.

The defendant insists that a tax is not a debt. It is not a debt in its more limited sense; that is, it is not liable to set-off and the other incidents of a simple contract between individuals. This is so on grounds of public policy, and also because, though a debt (or due), it does not arise out of contract. *Gatling v. Comrs.,* 92 N. C., 536. But it is a debt in the higher sense of the word. In this sense it is defined by Bouvier as "Any kind of a just demand"; by the Century Dictionary as "That which is due from one person to another, whether money, goods, or services"; and by Webster, substantially the same, with "thing owed, obligation, liability," given as synonyms. All causes of action become debts after judgment. *Dellinger v. Tweed,* 66 N. C., 206; Rap. and Law. Law Dict., pp. 352 and 696. The old action on a judgment was an action for debt (3 Blk., 159), and so is an action for a penalty. "The government has the same right to enforce a duty as a debt, and may enforce it in the same way." *People v. Seymour,* 16 Cal., 332. When a tax is imposed the taxpayer becomes a debtor. *Bank v. U. S.,* 19 Wall., 227; *Attorney-General v.* ....., 2 Anstruther, 558, cited and approved in 19 Wall., 227. "Debt lies in favor of the United States against an importer for the duties due on goods imported." *U. S. v. Lyman,* 1 Mason C. C., 482. In this case the argument for the government was by Mr. Webster, and the opinion of *Judge Story* (38) was approved in *Bank v. U. S., supra.*

Whatever construction may be placed upon the word "debt," no such restricted meaning is ever applied to the words "credit and creditor." "A creditor is he who has a right to require the fulfillment of an obligation or contract." Bouvier's Law Dict. Credits comprise "every claim or demand for money, labor, interest, or other valuable things due or to become due." Laws 1891, ch. 326, sec. 85.

The plaintiffs, being creditors, could formerly bring a creditor's bill in equity, and now, under sections 668 and 701 of The Code, against the corporation, with or without proceedings enforcing its dissolution.

Defendant further contends that, whether the State and county are creditors or not, they are precluded from bringing a creditor's suit to enforce payment of their claims, because there is a specific remedy for the collection of taxes in the revenue act itself (Laws 1891, ch. 326, sec. 77), which they insist the plaintiffs must pursue. The specific remedy pointed out restricts only the officers who collect the revenue, and not the sovereign, or the county which *pro hac vice* stands in the place of the sovereign. "General statutes do not bind the sovereign unless specially mentioned in them." "Every plea of the State is cognizable in a court of record." *S. v. Garland,* 29 N. C., 48, cited and approved in *S. v. Adair,* 68 N. C., 68, and *Harris ex parte,* 73 N. C., 65; *Bank v. U. S., supra,* and cases there cited; *Meredith v. U. S.,* 13 Peters, 486. The county is a part of the delegated authority of the State, and is *pro hac vice* the State. *U. S. v. R. R.,* 17 Wall., 322. In any event, the joinder of the county with the State cannot affect the right of the State to sue. Moreover, this right to sue is recognized by clear implication in section 3324 of The Code, authorizing the Governor to employ counsel in
(39) every case in any court in which the State is interested, and also in section 48, chapter 179, Acts 1889, appropriating $2,500 to be expended by the State Treasurer to secure the collection of taxes. The same provision occurs in the act of 1891. Why employ counsel if they cannot be heard in court? The imposition of a tax clearly implies the intention to collect. If the plaintiffs cannot bring a creditor's suit, they cannot prove their claims in a suit brought by another, and would thus be compelled to stand idle and see a private creditor or even a stockholder bring suit and absorb the entire assets of the delinquent corporation. Thus the sovereign would be placed beneath the subject, the creator below the corporation of its own creation.

The principle that the absence of an adequate statutory remedy preserves the right of action is recognized by all the authorities. *Gatling v. Comrs., supra;* Cooley on Taxation, p. 13, note and cases therein cited.

Moreover, throughout all the authorities a clear distinction seems to run between the cases where a private plaintiff brings an action to compel and levy the collection of taxes to pay a debt due him, and where the sovereign seeks to collect its own taxes for the general purposes of government. The citizen has only such remedies as are given to him; the State has inherently all remedies not voluntarily and unequivocally relinquished.

There being no distinction between actions at law and suits in equity in this State, any proper relief can be granted in a civil action. A

creditor's suit is of itself a very comprehensive and liberal action. It is not demurrable, because remedy might have been had by supplementary proceedings. *Bronson v. Ins. Co.,* 85 N. C., 411; *Hughes v. Whitaker,* 84 N. C., 640. It is not demurrable because the cause of action is dormant. *Bacon v. Berry,* 85 N. C., 124. It can be brought before judgment. *Bank v. Harris,* 84 N. C., 206; *Mebane v. Layton,* 86 N. C., 571. It is an old and well-settled mode of procedure, fully (40) adequate to settle all conflicting interests.

Nor can we see the force of defendant's contention that because the State had the right to have its charter declared forfeited because of its failure to pay its taxes, therefore the State has no right to this remedy. The forfeiture was a penalty, which the State could insist on or waive at its election. It was not compelled to enforce it. It is strange that the defendant should insist on the State's resorting to this course, unless it may be that the defendant, having removed itself and its assets out of the State, and now having no agent here, as admitted by the demurrer, if it can force the State to resort to some other proceeding and abandon the present one, it may be more difficult for the State to recover the sum due by the defendant. The present action asks for the appointment of a receiver, and has all the requisites of the one the defendant insists the plaintiff should take, except that it does not ask for a dissolution of the corporation. Why should the defendant object on that ground?

If the defendant had been an individual owing taxes on several million dollars of shares, which he afterwards removed out of the State, leaving no tangible property upon which the sheriff could levy, he surely could not defeat proceedings such as these on the ground that the State had a remedy against him by indictment for failure to list his property for taxation. Nor can this defendant do so on the ground that the State could punish it by declaring the charter forfeited. The State is not seeking to punish, but to collect the debt due it. Besides, it would be small punishment to declare a charter forfeited when the defendant is doing no business in the State, has now no property here, and could secure another charter before a clerk in some other State. (41) Indeed, it would seem that the defendant is one of those companies which are chartered in one State without any intention of doing business therein, but to operate entirely in other States, such as are termed, technically, in the text-books and by law writers, "tramp corporations." 26 Am. Law Rev., 193; 25 *ib.,* 352.

If this was a creditor's bill by private individuals seeking to collect a debt of $60,000 against a debtor who had fraudulently removed his assets out of the State, they would be entitled to the present remedy for the appointment of a receiver. To restrict the plaintiffs to supplementary proceedings would be impracticable, since, aside from the ques-

tion whether the appointment of a receiver by a clerk could be authenticated under the act of Congress for the purpose of proceedings in another State, in this case the judgment fixing the debt is in a court in which no supplementary proceedings can be obtained. The remedy on such judgments is necessarily by action in the Superior Court to reach any property which cannot be touched by a levy. Corporations have the same rights before the courts as individuals, neither more nor less. If the State can, under similar circumstances, proceed to collect taxes of an individual without being restricted to an indictment, neither is it restricted as to a corporation to proceedings to declare a forfeiture of the charter. If private individuals under these circumstances can have a receiver appointed, the State and county have a remedy at least as broad.

The day has gone by in North Carolina when men, by uniting themselves into a corporation, can obtain exemption from taxation which they could not obtain as individuals. Const., Art. V, sec. 3. Neither can corporations now claim to be exempt in the enforcement of the collection of taxes from any process which would lie in favor of or against individuals for the collection of taxes or other debts. Indeed,
(42) the debt due the State for taxes is a preferred debt. It is expressly recognized as a debt, and preferred by the statute for the settlement of estates of deceased persons (The Code, sec. 1416) and in bankruptcy proceedings. It also has the distinction that neither the homestead nor offsets can be claimed against it. In all this there is evidence that public policy provides not a lesser, but a broader remedy for the collection of taxes than for other indebtedness. When there is property subject to levy, taxes are collectible usually in that mode. But when the property has been spirited away, the State does not necessarily lose its debt, but has at least the same remedies for its collection as are given to its humblest citizens.

It is hardly necessary to note that this is not a proceeding to assess the defendant for taxation. That has been done in the appropriate forum, the amount due has been adjudged, and the defendant has acquiesced by abandoning any appeal therefrom. The present proceeding is to enforce collection of the taxes, so adjudged due, by proceedings which would be open to any one else against a debtor who had removed all his property from the jurisdiction of the court. The demurrer should have been overruled.

REVERSED.

AVERY, J., concurring: I concur in the conclusion of the Court, but rest my opinion upon additional authorities and somewhat different grounds. In *Wilson v. Bynum,* 92 N. C., 717, the Court said: "The

Code has not taken away from the Superior Court any jurisdiction heretofore exercised by courts of equity, except, *perhaps,* in cases exclusively within the jurisdiction of a justice of the peace." *Wadsworth v. Davis,* 63 N. C., 251. (43)

Courts of equity have always entertained creditors' bills brought to enforce the collection of a judgment, after a return of *nulla bona,* out of property not subject to execution, and also to compel a personal representative to subject assets to debts of a decedent, yet the statutory mode of proceeding has been repeatedly declared not to be exclusive. *Clement v. Cozart,* 107 N. C., 695; *Wilson v. Bynum, supra; Allison v. Davidson,* 21 N. C., 46; *Simmons v. Whitaker,* 37 N. C., 129; *Martin v. Harding,* 38 N. C., 603.

There is no common-law principle or constitutional or statutory provision which precludes the State or county, in the exercise of governmental functions, from pursuing a remedy allowed to every individual upon a return of *nulla bona* to an execution, or where it is admitted by a demurrer that the debtor has property not subject to execution. The necessity for the appointment of a receiver being shown by the complaint, which is admitted to be true, the right of the court, in the exercise of its equitable jurisdiction, to take the property into its custody by such appointment cannot be successfully questioned. The county of Guilford is a judgment creditor, and, execution having been returned unsatisfied, why should the county be denied the remedy conceded to any citizen of the State and an opportunity be afforded by such a groundless technicality for a corporation to evade the payment of a debt which is justly due to the county and is of the very highest dignity?

Cited: Wilmington v. Sprunt, 114 N. C., 312; *Davie v. Blackburn,* 117 N. C., 385; *Barcello v. Hapgood,* 118 N. C., 726; *Worth v. Wright* 122 N. C., 336, 337; *Wilmington v. Bryan,* 141 N. C., 679, 686; *Graded School v. McDowell,* 157 N. C., 317; *Berry v. Davis,* 158 N. C., 173; *Wilmington v. Moore,* 170 N. C., 53; *Comrs. v. Hall,* 177 N. C., 491; *Cherokee v. McClelland,* 179 N. C., 130; *Chatham v. Realty Co.,* 180 N. C., 503; *Brunswick-Balk Co. v. Mecklenburg,* 181 N. C., 388.

(44)

J. C. DUCKER AND WIFE, MARCELLA DUCKER, v. W. R. WHITSON, ADMR. OF W. R. MURRAY.

Action on Sealed Note—Consideration—Undue Influence—Mental Capacity—Issues.

1. In an action against the administrator of a deceased father who had executed a note to his daughter, which, together with other notes to his wife and other children, and a contemporaneous writing, stating the notes were to be paid out of his estate and not to be reckoned as advancements, he had left with C., an attorney, the administrator defended, alleging lack of consideration, undue influence by a son of his intestate, mental incapacity, nondelivery of note, and on the ground that the note and accompanying paper constituted an executory contract, not binding on the deceased, in favor of the plaintiff, a distributee, issues as to mental capacity, undue influence and delivery were sufficient and fairly presented the whole matter in controversy.

2. The attorney, C., having testified as to the execution of the note sued on, and the accompanying paper, it was proper, as bearing on the question of delivery, to ask C. what deceased had told him to do with the notes—whether to hold them, subject to his order, or to deliver to the payees.

3. When defendant asked a witness, whom he had introduced to show incapacity of deceased, whether he (the witness) had not suggested the appointment of a guardian for the deceased: *Held*, the question was *leading*, and the court did not err in disallowing it.

4. The testimony of a sister of plaintiff, to whom a note similar to that sued on was executed, to the effect that before and after the date of the note her father "was very bright," was not objectionable, under section 590 of The Code, in relation to transactions with a decedent.

5. Where a note, under seal, was executed by a father and delivered to his daughter, or to another for her, and in an accompanying and contemporaneous paper the fact appeared that the payee was his daughter, and that the note was intended to be paid out of his estate after his death, in addition to her distributive share: *Held*, that such fact was not sufficient to rebut the consideration imported by the seal, and even if the note had been a voluntary bond and intended as a gift, the seal imported a consideration and rendered it enforceable.

(45) APPEAL from *Bynum, J.*, at August Term, 1892, of BUNCOMBE.

Action brought by the payee of a note (the *feme* plaintiff) and her husband against the defendant, administrator of W. R. Murray, deceased, father of *feme* plaintiff. The note was as follows:

One day after date, I promise to pay to the order of Marcella Murray three hundred and thirty-three 33-100 dollars, value received, this 10 September, 1889. W. R. MURRAY. [SEAL]

Witness: M. E. CARTER.

The defendant denied the execution of the note by his intestate, and for second cause of defense alleged:

1. That at the time of the pretended execution of said alleged note to the plaintiff by the defendant's intestate the said intestate also executed a paper-writing, which was to be taken as a part of the transaction, concerning the execution of said alleged note and others therein mentioned, and delivered said paper-writing with said note and the others mentioned to M. E. Carter. The said paper-writing is as follows:

MR. M. E. CARTER:—The note of four hundred dollars this day executed by me to my wife, Eliza, payable one day after date, and three notes of three hundred and thirty-three 33-100 dollars each, executed by me to my son, John C. Murray, and my two daughters, Terrissa and Marcella Murray, respectively, payable one day after date, and all left with you, are intended to be paid out of my estate, in addition to their shares, respectively, as my wife and children, and are not to be considered as advancements. W. R. MURRAY.

This 10 September, 1889.

2. That the said notes described in said paper-writing, and (46) bearing even date with the said paper-writing, were executed, if at all, without any valid consideration in law, and, as he is advised and believes, cannot be enforced in this court, the same being, as he is also informed and believes, an executory contract and not binding in law against the estate of the defendant's intestate, the plaintiff herein being his daughter and one of the distributees.

3. That at the time of the execution of the said notes and paper-writing, the intestate was weak in body and mind, and did not have sufficient mental capacity to make a contract; that owing to his mental incapacity said intestate did not know the nature of his property, its value, nor its relations, nor to whom he was attempting to dispose of his property.

4. That prior to the time of the execution of the said notes, one John C. Murray, who is the son of the said intestate and the brother of the plaintiff herein, had been the confidential agent and manager for the said intestate, W. R. Murray, and had obtained an undue influence over the said intestate; that the said John C. Murray induced the said intestate to leave his home and come to Asheville, where he executed said notes and the said paper-writing; that from information and belief the defendant alleges that the said John C. Murray employed the attorney who drew the papers and in whose custody and control they were left;

that these notes and paper-writing were signed by the said intestate at a time when he was under the undue and controlling influence of the said John C. Murray, who unduly influenced him to sign the same.

5. That from information and belief, it was the purpose of the said John C. Murray, in inducing his said father, the defendant's intestate, to execute said notes and paper-writing, to obtain control of the sum of
(47) $1,400 then deposited to the credit of the said intestate in the National Bank at Asheville, and to deprive the other distributees of their share of the estate at the death of said W. R. Murray; that at the time of the execution of the said notes and paper-writing the plaintiff was quite old and feeble and not expected to live but a short time; that since the death of said intestate the widow (one of the payees) has had dower assigned and her year's allowance; that this sum of $1,400 was and did constitute the principal portion of the personal estate of the said intestate, and that if those notes be enforced the other distributees, there being several of them, will be deprived of their share which may have come to the hands of the defendant, and he is advised and believes that he holds the personal property of the intestate, including the $1,400, in trust for all the distributees, after payment of debts and costs of administration.

6. That from information and belief, none of the payees named in said notes, except the said John C. Murray, were present at the execution of the same; that they knew nothing of the same and had no desire to have more than their legal share of intestate's property, and from information and belief the defendant avers that the said John C. Murray intended to become the beneficiary of these notes, if only to use the money to his personal profit.

7. That no money was delivered to the payees of said notes prior to the death of the said intestate, the $1,400 having come to the possession of the defendant as administrator. The four notes described in said paper-writing in the aggregate make the sum of $1,400, corresponding to the amount which the said intestate had in bank.

(48) The plaintiff tendered the following issues, which were submitted by the court, and responded to as follows:

1. Did W. R. Murray, at the time he executed the note sued on, have capacity to understand the nature of the act he was doing, the nature and value of his property, and for whose benefit he was executing it? Answer: "Yes."

2. Did the said Murray execute said note in consequence of undue influence exerted over him by John Murray? Answer: "No."

3. Was the note delivered to the plaintiff or his agent for him? Answer: "Yes."

The defendant tendered the following issues:

1. Was the intestate, at the time of the execution of the paper sued on, of such a state of mind as not to know the nature of his property, its value, and to whom and how he was disposing of the same?

2. Was the said Murray, at the time, under the undue influence of John Murray, one of his sons?

3. Is the defendant, as administrator, indebted to plaintiff? If so, in what sum?

The court submitted the issues tendered by the plaintiffs, and refused to submit those tendered by the defendant, and the defendant excepted and appealed from the judgment rendered.

The testimony on the trial sent up in the case is very voluminous, but the exceptions are sufficiently stated in the opinion.

H. B. Carter for plaintiffs.
Charles A. Moore and W. H. Malone for defendant.

MACRAE, J. The first exception is to the refusal of his Honor to submit the issues tendered by defendant and the submission of those tendered by the plaintiffs. (49)

There is no substantial difference in the first and second issues tendered on each side. While the answer denies the execution of the note sued on, the real defense is that set up in the second defense, which, admitting the manual signing and sealing of the note or bond, avers the execution at the same time of a separate paper, which constitutes part of the transaction; the want of consideration, the fact that the two papers constitute an executory contract not binding upon defendant's intestate because the plaintiff is one of the distributees of intestate; that there was no delivery of said papers to plaintiff; that their execution was obtained by reason of undue influence exercised upon intestate by John C. Murray, and, finally, the want of mental capacity on the part of plaintiff to make a contract at the time of the execution aforesaid.

The issues submitted, with the instructions thereon, seem to have presented fairly the matters in controversy:

First. Did the intestate, at the time of the execution of the note sued on, have sufficient mental capacity to make a contract?

Second. Did he execute it in consequence of undue influence exerted over him by John Murray?

Third. Was the note delivered?

M. E. Carter, a witness for plaintiffs, having testified to the execution of the note sued on, as well as several other notes, and of a contemporaneous paper, the plaintiff proposed to ask him what intestate told him to do with the notes, and to this the defendant objected and excepted.

An examination of the paper will show that this testimony was not offered to contradict or explain it, but upon the question of the purpose of the delivery of the note to Carter. Delivery or nondelivery was a question of fact to be proven *aliunde,* in this instance, and it was competent to ask the question for the purpose of showing whether it
(50) was left with Mr. Carter, to be held by him, subject to the order of the maker, or to be delivered to the payee.

Joseph Garren was offered as a witness by defendant upon the question of the condition of intestate's mind and his liability to be influenced by one in whom he had confidence, and after the witness had testified in chief, and before he was turned over, the defendant's counsel proposed to ask him if he (witness) did not at the time suggest that intestate should have a guardian appointed for him. To this, plaintiff objected. The objection was sustained, and defendant excepted. The question was a leading one. It was in the discretion of his Honor to have permitted it, and the refusal to do so is not a matter which can be assigned for error. 1 Greenleaf on Evidence (14 Ed.), sec. 435, and note.

After much testimony offered on both sides as to the mental capacity of intestate, Clarissa Murray was offered as a witness for plaintiff, and the plaintiff proposed to ask her what, in her opinion, was the condition of her father's (intestate's) mind when he left home, based upon her knowledge and observation of him at the time. Defendant objected to the question, because the witness had not stated any conversation or conduct of his, or anything which had passed between them, or any other fact upon which she could base an opinion. This objection was overruled, and defendant excepted. The witness testified that intestate's mind was bright and clear; that she had known and lived with him all her life; that she had seen him make contracts and manage his affairs, and that she based her knowledge on this; that she saw him when he came back after the notes were executed, and his mind was bright; that he was postmaster and a justice of the peace, and attended to the business; and witness testified to her opinion that he had mental capacity sufficient to make a contract. To all of the foregoing the defend-
(51) ant excepted. She further testified that her brother John gave her one of the notes and she kept it a day or two and gave it back to him.

Although it is not clearly stated, we may take it that this witness is a daughter of intestate and that she is the same as the *Terrissa* who was the person mentioned in M. E. Carter's testimony, to whom one of the notes was made payable. If the objection was under section 590 of The Code, because she was interested in the event of this action, we fail to see anything in her testimony in relation to a personal transaction or

communication with intestate. Indeed, such testimony seems to have been carefully avoided. It may be, if she had been asked as to anything which had passed between herself and the intestate, the objection would have been promptly made, under section 590. She testified to the grounds of her opinion, upon her knowledge of his mental condition, from his other acts than with herself, and that upon his return from making the notes his mind was bright, thus fixing the time as shortly before, and directly after, the act in question.

His Honor, in substance, charged the jury, upon the first issue, that the burden was on the plaintiff to prove the execution of the note, and that when she had done this she had made out a *prima facie* case. He arrayed the contentions of the parties and the testimony offered in support thereof on this issue, and left it to the jury to determine whether the plaintiff had satisfied them, by a preponderance of evidence, that the note was signed and sealed by intestate, that he delivered it to Carter for the plaintiff, and that Carter accepted it as agent for plaintiff; and if they were so satisfied as to the mental capacity of intestate, the law presumes he had it, and the burden is on the defendant to disprove it by a preponderance of evidence; that mere weakness of mind is not sufficient to invalidate a contract; that if he knew what he (52) was doing, to whom and for whose benefit it was made, that it was for the payment of money, and the amount of money he was about to dispose of, he had sufficient mental capacity, and this instruction was reiterated, in substance. He further instructed the jury, upon this issue, that if defendant's intestate had shown mental incapacity prior to the execution of the note, the burden was upon the plaintiff to show that it was executed at a time when he had the capacity to contract. This was the substance of his Honor's charge on the first issue, and we think it covered all of the prayers to which the defendant was entitled.

The defendant contends that there was no testimony upon which his Honor could have left it to the jury to determine whether the note was left with Carter as the agent of plaintiff and to deliver to her. Having admitted the testimony of Carter as to what intestate told him to do with the notes, it follows that his testimony was to be considered upon the question of delivery, and whether the intestate left it with Carter to hand over to the plaintiff, the payee. And we do not think that Carter's testimony would warrant the instruction asked, that if John Murray took the note with the understanding between him and Carter that it was to be handed to plaintiff and by her handed back to Carter, this would be no delivery. The law is plain as to the delivery of a deed or bond by the maker to a third party for the benefit of the grantee or obligee. Shortly stated, "The delivery of a deed is the parting with it under such circumstances as prevent its recall." *Kirk v. Turner,* 16

N. C., 14. "The delivery to a stranger, to become a delivery to the party, must be a delivery for the use or benefit of the party, and not rejected, but accepted by the party." *Whichard v. Jordan,* 51
(53) N. C., 54; *Houston v. Phillips,* 50 N. C., 302. See, also, 2 A. & E., 458. The difficulty arises in the application to particular cases.

The fourth prayer for instructions seems to have been given almost in its very words. It is too late now to cite authorities that it is not necessary for the judge to give the instructions as prayed for *verbatim.* We conclude that there was no error in the instructions given, or in the refusal to give those asked for, but not given.

We come now to the last exception, upon the law of the case, whether, under all the testimony and findings of the jury, the note as explained by the contemporaneous paper was enforceable at law.

The note was under seal, importing a consideration. There is nothing in the contemporaneous paper to show want of consideration:

MR. M. E. CARTER:—The note of $400 this day executed by me to my wife, Eliza, payable one day after date, and the three notes of $333.33 each, executed by me to my son, John C. Murray, and my two daughters, Terrissa and Marcella Murray, respectively, payable one day after date, and all left with you, are intended to be paid out of my estate, in addition to their shares, respectively, as my wife and children, and are not to be considered as advancements.

This 10 September, 1889. W. R. MURRAY. [SEAL]

We cannot say that the fact appearing in this paper that the payee was his daughter was sufficient to rebut the consideration imported by the seal, or that by a fair construction of this paper it appears that there was no consideration for the note but that of love and affection, which, defendant contends, is not sufficient to support a promise. But if we treat the note as a voluntary bond, intended as a gift, the seal imports a consideration, and there is respectable authority to
(54) the effect that it can be enforced. 8 A. & E., 1321, and cases cited.

NO ERROR.

Cited: Bank v. Carr, 130 N. C., 481; *Hicks v. Hicks,* 142 N. C., 233.

JOHN L. BAILEY v. B. B. BARRON AND WIFE.

Judgment Against Feme Covert—Charge on Separate Estate—Homestead.

1. A contract of a *feme covert* cannot, by the terms of the same, in the absence of a deed debarring her from claiming a homestead in her land, be made such a "charge" upon the land as will deprive her of the right to claim the exemptions allowed her by the Constitution.

2. Where a judgment of the Superior Court declared the indebtedness of the husband and wife to be a "charge" upon the separate estate of the wife, and a commissioner was appointed to make sale of her land for the payment of such indebtedness: *Held*, that such adjudicated charge was subordinate to her right to have, free from sale under execution or other final process, the exemption secured by the Constitution to resident debtors, and it was the duty of the commissioner to first allot the homestead to which the *feme covert* was entitled, and then to sell the excess. In such case the allotted homestead cannot be sold to satisfy the plaintiff's "*charge*" until the homestead estate or right ends.

ACTION to Spring Term, 1890, of EDGECOMBE, for the recovery of the amount due on two sealed notes, and to charge the separate estate of the *feme* defendant with their payment. The notes sued on were given for supplies furnished by the plaintiff for the necessary personal expenses of the *feme* defendant, for the support of her family and the expenses of her farm, which the action sought to charge with the debt. Following the signatures and seals of the husband and wife on each (55) note were the following stipulations:

And I, Mrs. A. Barron, wife of B. B. Barron, expressly charge the payment of this note upon my separate estate, the consideration of the payment of the same. A. BARRON.

And I, B. B. Barron, husband of Mrs. A. Barron, hereby consent for my said wife to sign this note, and to bind her separate estate for the payment of the same. B. B. BARRON.

The complaint specifically set out the lands and personal property belonging to the *feme* defendant, and the prayer was that said notes should be declared a charge upon the said property of the *feme* defendant; that said property be applied to the payment of the indebtedness due to the plaintiff, and that a commissioner be appointed to sell the said property for that purpose, etc.

At Spring Term, 1890, judgment was rendered, by consent of the parties, in favor of the plaintiff, as follows: "That the plaintiff do

recover of the *feme* defendant (the same to be paid out of her separate estate) $1,437.82, with 8 per cent interest thereon from 1 January, 1890, and the costs of this action, to be taxed by the clerk; that said indebtedness is hereby declared a charge on the separate estate of the said *feme* defendant, the real estate consisting of, etc. . . . And, further, that if this indebtedness, principal and interest and costs, be not paid on or before the first day of December next, then Jacob Battle, who is hereby appointed a commissioner for that purpose, shall sell said real estate at public auction at the courthouse door, etc., etc. A report of
(56) sale to be filed and this cause retained for further orders. The lien of the plaintiff for his said indebtedness dates from 3 April, 1890, when his notice of *lis pendens* was duly filed."

In July, 1892, the commissioner advertised the lands for sale on the first Monday in August, 1892; and thereupon, and before sale was made, the *feme* defendant, who was the owner of the same, applied to the commissioner in writing to have her homestead allotted to her in the 246-acre tract, that being all the land she owned, and which is described in the complaint, and the commissioner refused to allot the same to her. Thereupon, on 27 July, 1892, the *feme* defendant applied to *Bryan, J.*, at chambers in New Bern, to have said judgment set aside because it was void, and, if not void, to have the same modified so as to require the commissioner to allot to her a homestead in said tract, which motion was denied. To this ruling the *feme* defendant excepted, and caused her exception to be noted, and it was agreed between the parties that the same should be heard upon appeal from the final judgment in this cause.

The said commissioner proceeded to sell the land without allotting the homestead, and made his report to the said court at Fall Term, 1892. On the coming on of said report for confirmation before *Shuford, J.*, the *feme* defendant excepted thereto, as appears from the judgment of confirmation herein. The court overruled said exceptions and confirmed the report, to which the *feme* defendant excepted and appealed.

Bunn and Battle for plaintiff.
John L. Bridgers for defendants.

BURWELL, J. We think that a proper construction of the judgment rendered in this cause at Spring Term, 1890, will give to the *feme* defendant all that she claims, and that no reforming or correction
(57) of that judgment is necessary to secure to her the exemptions that are hers according to the provisions of the Constitution of the State.

The allegations contained in the verified complaint entitled the plaintiff, under the decision of this Court in the case of *Flaum v. Wallace,*

103 N. C., 296, to an adjudication that the *feme* defendant was indebted to plaintiff as alleged, and that this indebtedness was a charge on her separate *personal* estate. The decision of this Court in *Farthing v. Shields,* 106 N. C., 289, had not then been announced, and it seems from the prayer of the complaint, and the judgment itself, that the plaintiff's counsel insisted that, as no answer or demurrer was filed, he was entitled to a judgment declaring the indebtedness a charge on the separate *real* estate of the *feme* defendant also, and that the defendant's counsel consented to this, notwithstanding the fact that upon the allegations of the complaint the plaintiff was not entitled to a charge on the real estate under the law, as afterwards fixed by the decision in *Farthing v. Shields, supra,* if the coverture of the *feme* defendant had been pleaded.

In *Flaum v. Wallace, supra,* it is decided that where it is adjudged that the debt is a charge on the separate personal estate of the *feme* defendant, she "can claim the same exemption from execution as she would be entitled to if she were a *feme sole.*" The "charge" which is put upon the *feme's* separate personal estate by such an adjudication is subordinate to her right to have, free from sale under execution or other final process, the exemption secured to all resident debtors by the Constitution.

In the judgment now under consideration it is declared that the "said indebtedness is hereby declared a charge on the separate estate of the said *feme* defendant, described in the complaint"; that is, upon *her personal and real* estate, for both are described in the com- (58) plaint.

It seems, therefore, that the adjudicated "charge" upon the real estate of the *feme* defendant, like that against her personal estate, must be subordinate to her homestead right, unless it appear from the complaint that she has by a proper deed debarred herself from claiming a homestead out of the lands described, or a judgment has been entered against her which estops her from asserting such claim. There is no allegation in the complaint that she has by deed assigned this right, and we think that the judgment, construed in connection with the pleading, as is proper, must be understood to direct the commissioner thereby appointed to sell the land only after there had been allotted to the *feme* defendant such part thereof as was exempt from sale under execution or other final process. The power to sell was conferred on the commissioner in order that the "charge" on the *feme* defendant's real estate, which had been adjudicated in favor of the plaintiff according to the prayer of the complaint, and upon motion of his counsel, might be enforced. That charge, as has been said, is subordinate to the *feme*

defendant's right to exemption. The authority to sell must be exercised by the commissioner in subordination to that right, for the sale is to be made merely to enforce the adjudged lien or charge.

The sale made and reported should have been set aside, and the commissioner should have been directed to have her homestead allotted to the *feme* defendant and then to sell the excess. The portion so allotted to her cannot be sold to satisfy plaintiff's charge until the homestead estate or right ends.

REVERSED.

Cited: Bank v. Ireland, 127 N. C., 242, 243; *Harvey v. Johnson,* 133 N. C., 355.

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(59)

ARMSTRONG, CATOR & CO. v. N. W. AND L. C. BEST.

Contract of Married Woman—Lex Loci Contractus—Private International Law.

1. The common-law disability of a married woman to make a contract obtains in this State, except in cases specially permitted by statute.

2. While it is generally settled that if a contract is valid according to the laws of a State where it is made, it is valid everywhere in respect to matters bearing upon its execution, interpretation and validity, yet as to the capacity of the contracting party the law of the domicile prevails. Therefore, where a married woman, domiciled in this State, not being a free-trader and not having the written assent of her husband, made a contract in another State according to whose laws a *feme covert* can contract: *Held,* that such contract cannot be enforced in the courts of this State.

ACTION heard before *Bryan, J.,* at January Term, 1892, of WAYNE, upon the following agreed statement of facts:

It is agreed that at the time the goods for the purchase-money of which this action is brought were bought, the plaintiffs were merchants, doing business in the city of Baltimore, in the State of Maryland, and the defendant, L. C. Best, was carrying on the trade of milliner and merchant in the city of Goldsboro, State of North Carolina, in her own name, as a licensed trader; that said goods were ordered by the defendant L. C. Best of the plaintiffs, and they were shipped by the plaintiffs to her from their place of business in the city of Baltimore, and were to be paid for by defendant L. C. Best at the end of sixty days; that at that time, and since, the defendant was and is a citizen and resident of the State of North Carolina, and a married woman, living with her

husband, the defendant N. W. Best. The goods have not been (60) paid for, except the credits set out in the accounts filed, and those not paid for were worth the agreed price of $212.43; that the defendant has never been a free-trader under the statutes of North Carolina, and her husband has never consented in writing to the orders of said goods and to the sale thereof.

Judgment was rendered for defendants, and plaintiffs appealed.

W. C. Munroe for plaintiffs.
Allen & Dortch for defendants.

SHEPHERD, C. J. If the contract, which is the subject of this action, was made in this State, it is well settled that it would be void by reason of the common-law disability of the *feme* defendant to make any contract whatever upon which a personal judgment can be rendered against her, except in the cases provided by statute. *Pippen v. Wesson,* 74 N. C., 437; *Dougherty v. Sprinkle,* 88 N. C., 300; *Baker v. Garris,* 108 N. C., 218; *Flaum v. Wallace,* 103 N. C., 296; *Farthing v. Shields,* 106 N. C., 289.

The plaintiffs, however, insist that the contract was made in the city of Baltimore, Md., their place of business, where they accepted the proposal of the defendant by shipping the goods according to her order. In this they are correct, for if a contract is completed in another State "it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter across the boundary line between the two States." *Milliken v. Pratt,* 125 Mass., 374. As was said by *Lord Lyndhurst,* "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills,* 1 Dow. & Cl., 342. So, if one in New York orders goods from Boston, "either by a carrier whom he points out, or in the usual course of trade, this would be a completion, a making, of the contract, and it would be a Boston contract, whether he gave no note or a note payable in (61) Boston, or one without express place of payment." 2 Parsons Con., 586.

The contract, then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that State, and, therefore, enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one, according to the laws of Maryland, as the statute of that State seems to recognize the legal capacity of a married woman only to the extent of contracting with reference to property acquired by her "skill, industry, or personal labor."

Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this State.

It is well settled that the law of one State has *proprio vigore* no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other States is the result of that international comity (more properly called private international law) which is the product of modern civilization. *Hornthal v. Burwell,* 109 N. C., 10. It is left to each State or nation to say how far it will recognize this comity and to what extent it will be permitted to control its own laws. It has, however, been very generally settled 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. *Taylor v. Sharp,* 108 N. C., 377. An exception 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. We remarked in *Taylor v. Sharp, supra,* that this was not considered by *Mr.* (62) *Justice Story* (Conflict Laws, 103, 104) as the doctrine of the common law, and we also stated the conclusion of *Gray, C. J.,* in *Milliken v. Pratt, supra,* that the general current of the 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. The proposition, though denied by *Dr. Wharton* as to infants and *femes covert* (Conflict of Laws, 112, 118), seems to be generally accepted in this country in so far as it relates to the enforcement of contracts in courts other than those of the domicile. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicile, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicile. In such a case a very important qualification of private international law is to be considered, and this is, that no State or Nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank v. Earle,* 13 Peters, 519, *Chief Justice Taney,* speaking for the Court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests." To the same effect is the language of *Story,* that no State will enforce a foreign law if it be "repugnant to its policy or prejudicial to its interests."

Conflict of Laws, 37. That this qualifying principle is applicable to cases like the present is manifest, not only by reason and necessity, but also by the decisions of other courts. Even in *Milliken v. Pratt, supra,* in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is (63) the settled policy of the State, "for the protection of its own citizens, it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract."

In *Robertson v. Queen,* 87 Tenn., 445, the contract was made by the *feme* defendant in Kentucky, where she resided and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar cases of *Sharp v. Taylor, supra,* and *Wood c. Wheeler,* 111 N. C., 231, that the plaintiff was entitled to recover. The Court, however, said: "If this were a suit against a married woman, a citizen of this State, on a contract made out of the State, there would be much force in the insistence of the defendant."

In *Johnson v. Gawtry,* 11 Mo. App., 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another State, her capacity to make the contract, and its validity, are to be determined by the law of Missouri in a suit in a Missouri court to enforce such contract.

In *Bank v. Williams,* 46 Miss., 618, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicile, and under whose laws the contract was void by reason of her coverture. The opinion of the Court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The Court said: "It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid, or not, in the forum of his domicile, as they (64) may infringe, or not, its interests, laws, and policies." After speaking of the separate estate of the wife, and the statutes prescribing how it may be charged, the Court, referring to the foreign plaintiff, says: "But he must satisfy the court that his debt was such a charge upon her estate or its income as she had the power to make; otherwise, it would be a violation of the tenure—the conditions of her title—to allow him to subject it. But the creditor may say, 'I cannot bring this debt within the terms defined by your law; nevertheless, it was such a contract as a married woman could make by the law of Louisiana.

Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife.' 'No,' says the Court; 'you cannot get here any fruit of a judgment; there is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts, law or equity, except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from and independent of a property which may discharge it.' "

In North Carolina it has been conclusively determined that the common-law disability of a *feme covert* still obtains, and that, except in the cases provided by statute, her promise, as was said by *Ruffin, J.*, is "as void as it ever was, with no power in any court to proceed to judgment against her *in personam.*" *Dougherty v. Sprinkle, supra.* The Constitution and laws made in pursuance thereof protect her separate estate and prescribe the manner in which she may dispose of or charge it, and the assent of the husband is generally necessary.

This brief reference to our laws in respect to married women is sufficient to show that the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the
(65) interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws, and to hold that she may subject it to execution upon a personal judgment by reason of a promise made during a short visit to another State, or, as in this case, by a simple order for goods, would afford an easy method of charging her property in contravention of the public policy and laws of the domicile. It is further to be observed that in North Carolina, as a general rule, the written assent of the husband is necessary in order to give any effect whatever to her obligations; yet this wholesome provision may easily be evaded, even in the very presence of the husband and despite his protest, by a simple correspondence by the wife with parties in another State, which may technically amount to a foreign contract. In this way she could indirectly dispose of or charge all of her real or personal property, entirely freed from the restraint of her husband or the methods prescribed by the *lex rei situs.* We cannot assent to the proposition that a foreign law, thus introduced and so utterly subversive of the laws regulating a large amount of property within the limits of this State, will be recognized and enforced by our courts.

The courts of our State have perfect jurisdiction over all personal and real property within its limits belonging to the wife, and if our laws in respect to the manner in which it may be charged conflict with those of another State, it cannot be made a question in our own courts as to which shall prevail. It is certainly competent for any State to adopt

laws to protect its own property, as well as to regulate it, and "No nation," says *Story,* "will suffer the laws of another to interfere with her own, to the injury of her citizens. That whether they do, or not, must depend on the condition of the country in which the (66) foreign law is sought to be enforced—the particular nature of her legislation, her policy, and the character of her institutions. . . . That whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger." Conflict of Laws, 28.

For the reasons given, we cannot recognize the present contract as an enforceable one in our courts.

We think his Honor was correct in his ruling that the plaintiffs were not entitled to recover.

AFFIRMED.

Cited: S. v. Wernwag, 116 N. C., 1063; *Bank v. Howell,* 118 N. C., 274; *Smith v. Ingram,* 130 N. C., 104, 110; *Holshouser v. Copper Co.,* 138 N. C., 258; *Williamson v. Tel. Co.,* 151 N. C., 229; *Bank v. Granite Co.,* 155 N. C., 45; *Archbell v. Archbell,* 158 N. C., 418; *Bluthenthal v. Kennedy,* 165 N. C., 373; *Smith v. Express Co.,* 166 N. C., 158.

J. M. MAYO AND WIFE AND TRUSTEE v. FARRAR & JONES.

Married Woman—Trustee—Validity of Mortgage.

1. Where land had been conveyed to a trustee in trust for the sole and separate use of F. M. (a *feme covert*) and her heirs, subject to her exclusive control, with full power in her to convey said property by deed or will—by will, as if she were a *feme sole;* by deed, in which her husband and trustee must unite; their receipt to be a full discharge to said trustee for all rents and profits; she to occupy and use said property as the full beneficial owner thereof—a mortgage given by the husband and wife upon said land, without the joinder of the trustee, was inoperative and void.

2. When a *feme covert,* owning land under the limitation of a deed of settlement, acts under such settlement, she is not only subject to its express restrictions as to the manner of exercising such power as is granted to her, but she is dependent upon a strict construction of its terms for authority to make any disposition whatever of the property embraced in it.

3. A party cannot in this Court assign as error the refusal of a judgment for which he did not ask below; and where, in an action to enjoin the sale of land which husband and wife had attempted to convey by way of mort-

gage to secure their notes, the defendant mortgagees, after resisting the injunction, demanded that the lands should be sold or that possession should be given with perception of profits for the payment of the notes, but did not ask for judgment against the husband, either before or after adjudication of the invalidity of the mortgage, this Court will not modify the judgment so as to permit a recovery against him.

(67) APPEAL at Fall Term, 1892, of EDGECOMBE, from *Shuford, J.*

The action was brought by husband and wife and trustee under a deed of settlement to enjoin a sale under mortgage of *feme* plaintiff's land embraced in the settlement, because the trustee did not join in the deed. The land subsequently conveyed by the husband and wife to the defendant had belonged to the husband, but had been conveyed (by way of compensation for lands of the wife sold for the husband's benefit) to W. T. Mayo, in trust, however, for the sole and separate use of the said Florence L. Mayo and her heirs, subject to her exclusive control, with full power in her to convey said property by deed or will—by will, as if she were a *feme sole; by deed, in which her husband and trustee* must unite; their receipt to be a full discharge to said trustee for all rents and profits; she to occupy and use said property as the full beneficial owner thereof.

The complaint recited the deed to W. T. Mayo in trust for Florence L., the *feme covert,* and the mortgage by which the husband and wife attempted to convey the lands to secure the individual debt of her husband, which mortgage the plaintiffs claimed to be invalid for lack of the joinder of the trustee.

The defendants, in their answer, denied that the indebtedness intended to be secured by the mortgage was all the indebtedness of the husband, but that $1,255 thereof was for advances made by defendants to J. M. Mayo and wife, and $2,000 thereof was advanced at the time of taking the mortgage to enable Mayo and wife to carry on their agricultural operations, and that the said sum of $2,000 was used for said
(68) purpose and to remove to Florida, where they soon became and are now residents.

Defendants admitted that W. T. Mayo, trustee, did not join in the mortgage, but insisted that it was not void on that account, but that the *feme* plaintiff, being the beneficial owner and entitled to the use, occupation and profits of the land, which were not restricted by the terms of the trust, could and did convey the same by mortgage.

Upon the trial the plaintiffs moved for judgment on the pleadings, the allegations of the answer being taken *pro confesso,* on the ground that the mortgage was invalid. Defendants resisted the motion and asked for judgment and that the lands be charged with the payment thereof, and that if this relief should not be granted, then the use, occu-

pation, rents and profits, which were not restricted by the terms of the trust, should be charged with the payment thereof, and a receiver be appointed to collect and apply the rents, etc., to the satisfaction of the debt.

The court adjudged the deed of mortgage to be invalid, inoperative and void, by reason of the failure of the trustee to join therein, and that it was ineffectual to charge the separate personal property of the *feme* plaintiff, or the rents and profits of the land, with the payment of the debt. From this judgment the defendants appealed.

Don Gilliam for plaintiffs.
Fred. Philips and John L. Bridgers for defendants.

AVERY, J. The Court said (*Ruffin, J.,* delivering the opinion), in *Hardy v. Holly,* 84 N. C., 661: "We must take it to be the settled law of this State, at least, that a married woman, as to her separate property, is to be deemed a *feme sole* only to the extent of the *power* expressly given in the deed of settlement. Her power of disposition is not absolute, but limited to the mode and manner pointed to in the (69) instrument, and when that is silent she is powerless." True, the *feme* plaintiff reserved "full power to convey by deed or will—by will, as if she were a *feme sole;* by deed, in which her husband and trustee must unite." The mode of conveyance pointed out in explicit terms is by deed, in which husband, wife and trustee "must" all join; and as it is obvious that the restrictions upon her power have been disregarded by the attempt to convey without the joinder of the trustee, we must either hold the mortgage inoperative as a conveyance of her separate land, or overrule *Hardy's case, supra.* In that case the *feme sole* reserved the power to remove the trustee and appoint another, and to direct the trustee, in writing, as to all sales of her property or reinvestments of the fund arising from such sales, yet a mortgage deed made by her and her husband, the trustee failing to unite with them, was declared void and a sale under it enjoined, as in this case in the court below, and the decree was upon appeal affirmed in this Court.

Where a *feme covert* derives title in any manner other than under the limitation of a deed of settlement, she can alien her estate in land only by joinder of her husband in the conveyance, with privy examination in conformity to the statute. *Clayton v. Rose,* 87 N. C., 106; *Thurber v. LaRoque,* 105 N. C., 301; *Farthing v. Shields,* 106 N. C., 289. When she acts under such settlement, she is not only subject to its express restrictions as to the manner of exercising such power as is granted to her, but she is dependent upon a strict construction of its terms for authority to make any disposition whatever of the property embraced

in it. *Kemp v. Kemp,* 85 N. C., 491; *Hardy v. Holly, supra.* This Court is classified by a prominent text writer as one of those that
(70) "regard the wife's power over her separate estate as resulting not from the existence of the equitable separate estate itself, but from the permissive provisions of the instrument creating such estate." 3 Pom. Eq. Jur., sec. 1105; *ib.,* p. 30, note 1.

As we understand the statement of the case, though the averments of the answer were admitted to be true, the defendants did not move the court at the hearing for judgment against J. M. Mayo, the husband, on the notes admitted to have been executed by him, but, after resisting the prayer of plaintiffs for injunction, demanded a judgment against husband and wife, charging the lands described in the mortgage with the payment, or for the possession of said land with perception of profits in satisfaction of the debt. They could not, after judgment, assign as error the refusal of a judgment for which they did not ask. When they failed to move the court for judgment against J. M. Mayo, the judge was warranted in assuming that defendants did not, for reasons satisfactory to themselves, desire any relief in addition to that specifically mentioned. It would be unjust to the court below, and impose costs wrongfully upon plaintiffs, should we direct the judgment to be so modified as to permit a recovery against the husband, when his Honor would doubtless have so ordered upon a bare suggestion at the hearing before him. The judgment is

AFFIRMED.

Cited: Monroe v. Trenholm, post, 640; *Broughton v. Lane,* 113 N. C., 18, 19; *Kirby v. Boyette,* 116 N. C., 167; *S. c.,* 118 N. C., 254, 256; *Cameron v. Hicks,* 141 N. C., 28.

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(71)

AUGUSTUS MAGGETT v. E. E. ROBERTS.

Suit for Penalty—Void Marriage License—Failure of Register to Record—Appeal.

1. A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to the person who is to be married, or to some one for him; and if at the time of such issuance the register has become *functus officio,* the failure to record it does not render him liable to the penalty imposed by sections 1818 and 1819 of The Code for failure to record the substance of each marriage license issued.

2. If the filling up and handing the paper previously signed to the party proposing to be married was done, not by the register, but by an agent, and at the time the register was *functus officio*, the paper would be equally invalid because lacking the signature of a *de facto* register, and there could be no penalty for not recording it.

3. The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it.

4. A marriage is not invalid because solemnized without a license or under an illegal license.

5. If a party to a marriage is under the age authorized by law, the register cannot excuse himself from liability because his deputy or agent made proper inquiry, if he did not make the inquiry himself. The trust is personal to him.

6. A ruling in this Court, on a former appeal, that the lower court ought to have sustained a demurrer to one of the causes of action set up in the complaint, did not warrant that court in excluding evidence on such cause of action as *res judicata*, but it should have entered judgment sustaining the demurrer, and then might have permitted the plaintiff to amend.

APPEAL from *Brown, J.*, at Spring Term, 1892, of NORTHAMPTON.

The plaintiff sought to recover from the defendant, former register of deeds of said county, the penalties imposed by sections 1818 and 1819 of The Code, for breach of official duty. The complaint alleged three causes of action: (1) failure to record the issuance and (72) the substance of a license alleged to have been issued by defendant, during his term of office, for the marriage of William Parker and Mary Sykes; (2) similar default in relation to the license for the marriage of John Harris and Cintha Garner; (3) the issuance of a license for the marriage of Henry Futrell and Roxana Lassiter, dated during his term of office, without having received or having on file the written consent of the mother of Roxana, who was alleged to be under 16 years of age. Defendant denied that he had issued the licenses named in the first and second causes of action, and as a defense to the third cause pleaded that it was *res judicata*, setting up the judgment of this Court in *State on relation of Maggett v. Roberts*, 108 N. C., 174.

The testimony was to the following effect: That the defendant went out of office as register of deeds on 20 December, 1886; that before the expiration of his term he signed in blank and delivered to several justices of the peace marriage licenses, to be filled up by them as occasion might require; that the Parker-Sykes license was filled up by the justice of the peace who married the parties on 25 February, 1887, sixty-five days after defendant went out of office; that the Harris-Garner marriage was solemnized 22 December, two days after defendant's term expired. The defendant's name was signed to the license and the words, "To J. W.

Grant, Esq.," in the body of the license, were in the handwriting of defendant, but the remaining part of the blank was filled out in the handwriting of the justice, J. W. Grant, who married the parties. It was admitted that there was no record of the issuance or of the substance of the license for either the Parker-Sykes or the Harris-
(73) Garner license.

The court instructed the jury that if the facts testified to were true, the license was void; that the register of deeds could not delegate such authority while in office, and, if he could do so, such authority terminated with the expiration of his office. Upon the issues submitted the jury found that the defendant did not issue the Parker-Sykes and the Harris-Garner licenses. Testimony as to the Futrell-Lassiter license was excluded, upon the ground that the cause of action thereon was *res judicata,* to which plaintiff excepted.

Judgment being rendered for the defendant, the plaintiff appealed.

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

CLARK, J. When the blank signed by the register was handed to his agent it was not a marriage license. It was a valueless piece of paper. When filled out by such agent and handed to the party who was to use it, it was then "issued." Should either party named in the license be under 18 years of age, any inquiry in such respect made by such agent, however diligent and careful, would not absolve the register from liability by failure himself to make such inquiry, it being a trust, personal to him, under The Code, secs. 1814, 1816. *Cole v. Laws,* 108 N. C., 185.

If at the time the license was issued, *i. e.,* was filled up and given to the party who was to be married, or to some one for him, the person who signed it had then ceased to be register, the paper would not be a valid license, and whatever deception he might be guilty of, or whatever other liability he might thereby incur, he would not be liable under The Code, secs. 1818, 1819, for failure to record the substance of such paper.

If the issue, *i. e.,* the filling up and handing the paper previously
(74) signed to the party proposing to be married, was done not by the register, but by an agent, and at that time the register was *functus officio* the paper would be equally invalid, because lacking the signature of one then a *de facto* register, and there could be no penalty for not recording it. The marriage under an invalid license, or with no license, as has been repeatedly held, would be good, if valid in other respects. The Code, sec. 1812; *S. v. Robbins,* 28 N. C., 23; *S. v. Parker,* 106 N. C., 711. The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200 prescribed by The

Code, sec. 1817. *S. v. Parker* and *S. v. Robbins, supra.* The presumption is, of course, that the license was issued during the term of office of the person signing it, when it is in evidence that he had been an incumbent of that office. The burden is on the party asserting the contrary.

Applying these principles to our case, the evidence is uncontradicted that the defendant ceased to be register of deeds on 20 December, 1886, and that the license for the marriage of William Parker and Mary Sikes was on 25 February, 1887, filled out and handed to Parker by the minister to whom such blanks, together with others, all signed by the defendant, had been given by the defendant to be used when needed, and for any one desiring to be married.

The marriage was, of course, valid. The minister was liable for the penalty prescribed for marrying without license. The defendant, however, could not be held liable for not recording a paper which, though signed by him, was not a license because issued after he was *functus officio.*

The marriage of John Harris and Cintha Garner took place on 22 December, 1886, two days after the defendant went out of office. The presumption was that the license was issued when the defendant was in office and, if so, he was liable to the penalty sued for on (75) account of his failure to record the substance of the license at the time of issue. The mere fact that the marriage was solemnized two days after the date when the defendant went out of office was not sufficient evidence of itself and unsupported to go to the jury to rebut the presumption that it was legally issued, *i. e.,* during his term. It was error to refuse the plaintiff's prayer to that effect.

When this case was here on a former appeal, 108 N. C., 174, the Court held, citing *Bowles v. Cochran,* 93 N. C., 398, that the court below should have sustained the demurrer to the third cause of action for failure to allege that the license to a person under eighteen years of age was issued "knowingly or without reasonable inquiry." When the case subsequently came up for trial below, the court excluded any evidence upon that cause of action upon the ground that it was *res judicata.* This was error. The court below, in accordance with the opinion here, should have reversed the former action of that court and have entered judgment sustaining the demurrer, and thereupon the plaintiff might have been permitted to amend by inserting those words. The Code, secs. 272 and 273. There was no adjudication here beyond the ruling that there was error in not having sustained the demurrer below. Even had the court below, either before or after the appeal, sustained the demurrer and dismissed the action, this judgment, being not upon the merits but merely for omission of a material allegation in the complaint, could not be

pleaded as *res judicata* to a new action brought to enforce the same right. Gould on Pleading, 445. *A fortiori* there is not *res judicata* when the same action is pending and no judgment on the demurrer has yet been entered up. The omission of the material allegation that the license was issued for the marriage of a person under eighteen years of age,
(76) "knowingly, and without reasonable inquiry," seems to have been due to the fact that the copy of the license appended to the complaint, as an exhibit, recites the age of the female at sixteen. This raises a very strong presumption that the license was issued "knowingly," but it is not conclusive, as it may be shown that such entry was inadvertent, or was a mere clerical error, or that the girl, in fact, was over eighteen. At any rate, it is not an allegation, as required, but a mere inference to be drawn, and, therefore, demurrable on that ground as argumentative. As the case goes back, however, it is proper to say that an amendment now by the court below to make the allegation direct, if asked for by the plaintiff, would be in accordance with the spirit of The Code, especially as the plaintiff, by taking a nonsuit as to that cause of action, could bring a new action for the same cause within a year with the omitted words supplied in the new complaint.

PER CURIAM. ERROR.

IN RE VENIE S. HAYES (WIDOW).

Widow's Year's Allowance—Construction of Statute—Number of Dependent Family.

The purpose of sections 2116 and 2117 of The Code is to provide for the dependent family of the deceased residing with the widow at the death of her husband, and not at the date of her application; and, therefore, where, according to the report of the commissioners, two children under fifteen years of age resided with the widow at the death of her husband, and one died before the application for year's provision was filed: *Held*, that the widow was entitled, under the statute, to an allowance for two children.

(77) PETITION for a year's provision under the statute heard, on appeal, before *Shuford, J.*, at Spring Term, 1892, of GATES.

At the time of the death of T. E. Hayes, September, 1891, he left him surviving and living in his house his said widow and four children under the age of fifteen years, of which children two were the children of the petitioner and two were the children of a former wife.

The petitioner continued to live in the husband's house with his family, including his children by his former wife, until the death of one

of her own children, in December, and she soon thereafter removed with her remaining child, and was living to herself when, in February, 1892, she filed her application.

The commissioners found the number of the family, under the statute, to consist of the widow and her own two children, one of which had died, as above stated, before the application was made for her year's provision, and they allowed the petitioner $500, less the amount used of husband's estate after his death by her.

The administrator excepted to the report on the ground that, under the above statement of facts, the commissioners ought to have found that the family consisted only of the widow and one child, and that they ought to have allowed her only four hundred dollars, less amount of estate of husband used after his death by her.

The clerk sustained the exception and modified the report accordingly, and the petitioner appealed to the Superior Court.

The judge on appeal overruled the judgment of the clerk, and the administrator appealed.

W. D. Pruden for petitioner.
L. L. Smith for administrator.

MACRAE, J. We see no reason why we should disregard the (78) plain words of the statute and restrict the allotment of the year's support, as contended for by the administrator, to the measure of the family at the time of the application.

Section 2116 of The Code provides that "every widow of an intestate . . . . shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom for the support of herself and her family for one year after his decease." The next section fixes the amount, and section 2119 (that which we are now to construe) defines the word "family" to be "besides the widow, every child either of the deceased or of the widow, and every other person to whom the deceased or widow stood in the place of a parent, who was residing with the deceased at his death and whose age did not then exceed fifteen years."

The widow seems not to have claimed that the allotment should be made to cover the two children by the former marriage who were part of the family at the death of the intestate, as no mention of them is made in the record. The facts of this case afford an apt illustration of the reason why the section should receive a literal interpretation. The provision was made for widows in 1796, because under the then existing laws it was in the power of the administrator to expose to sale the whole crop and provisions of the deceased, and thereby deprive the widow of

the means of subsistence for herself and family. It was personal to her, and if she died pending the proceedings and before the allotment, it abated and could not be laid off to the children. *Ex parte Dunn,* 63 N. C., 137, and cases cited. Its purpose, as said in *Kimball v. Deming,* 27 N. C., 418, "was to make provision for the pressing wants of the widow personally, and to enable her at that mournful juncture to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time were allowed for selecting suitable situations for them."

(79) The number of children residing in the family at the death of the intestate, according to the report of the commissioners, was two. The amount of the allotment was fixed by the statute and was personal to the widow. How necessary must it have been to her then, when the death of her husband was followed probably by the sickness, and soon by the death, of one of the children—this sad event, we may well presume, entailing more of expense and of immediate necessity upon her than the amount of the allowance to her on account of the child!

We cannot conclude that it was the intention of the statute to deprive the widow of this portion of the allowance because of the death of the child before the filing of her petition.

AFFIRMED.

Cited: Hollomon v. Hollomon, 125 N. C., 34; *Drewry v. Bank,* 173 N. C., 667.

WILLIAM RICH v. RUFUS HOBSON.

Claim and Delivery—Demand—Possession of Crop.

1. Where in his answer in an action of claim and delivery, the defendant tenant denies that the crop, for the possession of which the action is brought, is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the commencement of the action.

2. Where, in a contract between the landlord and tenant, no time was fixed for the division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested.

CLAIM AND DELIVERY, tried before *Bryan, J.,* and a jury, at Spring Term, 1892, of FRANKLIN.

This action was commenced on 16 October, 1891, and claim and delivery proceedings taken out the same day, under which the crops were seized by the sheriff for the plaintiff the same day, but the defendant gave the undertaking and retained the crop. No demand (80) was made by the plaintiff upon the defendant for the crop, or any part thereof, or the payment of his account before the action was commenced. The crop was being gathered by the defendant at the time of the commencement of the action, but had not been prepared for market, except some tobacco, which the plaintiff sold and for which he accounted with the defendant. Only a portion of the cotton had been gathered from the patch, but none of it had been picked. After the commencement of the action, and before the trial thereof, the defendant, as he gathered the crop and prepared the same for market, delivered to the plaintiff the one-half thereof, which the plaintiff received in settlement of his share of the crop, but it was agreed that this should be without prejudice to this action, and the plaintiff and defendant together, out of the proceeds of the crop, should settle for the guano.

The contract between the parties is as follows:

Know all men by these presents that I, William Rich, of the first part, have bargained with Rufus Hobson, of the second part, for the year 1891, on the following terms: That he, the said Rufus Hobson, is to be as common tenant on halves for all the crops grown in the present year, and I, the said William Rich, am to furnish the said Rufus Hobson two plow horses or mules and one oxen, together with good tools, etc., and he is to furnish provisions to the amount of one hundred and fifty dollars; and I, the said Rufus Hobson, do hereby bind myself and pledge my word and honor to work to the best of my ability in all the crops, and to take care of all the teams and tools in my (81) care, or should I fail to do so the said William Rich shall have power to take charge of the crop and team and work to his advantage. We hereby both agree to comply with the above contract.

In testimony set our hands and seals, this 9 January, 1891.

RUFUS HOBSON.
WM. RICH.

Witness: A. HINTON.

The court submitted the following issues:

1. Is the plaintiff the owner and entitled to the possession of the crops made on plaintiff's land?

2. Did the defendant Hobson dispose of or consume any part of the crop raised on the land of plaintiff and in which plaintiff had an interest before the commencement of this action?

3. What was the value of the crop at the time of the commencement of this action?

4. What is the amount due the plaintiff on his account for supplies?

5. What damage has the defendant sustained by reason of the alleged failure of the plaintiff Rich to comply with his part of the contract?

The defendant admitted that the value of his share of the crop was equal to the amount of the account which the plaintiff claimed, so the third issue was not submitted to the jury. It was agreed that the answer to the fourth issue should be $140.04, with interest from 16 October, 1891, till paid, less $4.40. The court reserved the first issue and submitted to the jury the second and fifth issues. To the second issue the jury responded, "No," and to the fifth issue, "Seventy-five dollars." The court then answered the first issue "Yes," to which the defendant excepted, and then gave judgment for plaintiff, to which the

(82) defendant excepted and appealed.

F. S. Spruill and Batchelor & Devereux for plaintiff.

C. M. Cooke and W. M. Person for defendant.

BURWELL, J. The answer of the defendant expressly denied that the crop, for the possession of which this action is brought, was vested in the plaintiff. This denial avoided the necessity for any demand before the commencement of the action. Under the provisions of section 1754 of The Code a tenant holds the *actual* possession of a crop for and in behalf of the landlord in whom it is "deemed and held to be vested in possession" until all rents and advancements are paid. Hence, such being the relation of the parties, the denial by defendant of his landlord's title to the crop, as in cases where a principal sues his agent and the latter denies the agency, "raises a state of antagonism inconsistent with the purpose of a demand," and "is tantamount to saying that any demand would have been an idle ceremony." *Waddell v. Swann,* 91 N. C., 105; *Wiley v. Logan,* 95 N. C., 358.

It is further contended that this action cannot be maintained because when it was commenced only a portion of the crop had been gathered, and none of it had been disposed of or consumed, and, therefore, the plaintiff, though the owner of it according to the provisions of The Code (section 1754), was not entitled to the possession.

In the contract between the parties no time was fixed for the division of the crop. Hence the landlord was not obliged to wait till the whole crop was gathered. *Smith v. Tindall,* 107 N. C., 88. And besides, the defendant's denial of his landlord's right entitled the latter to

(83) maintain this action. *Livingston v. Farish,* 89 N. C., 140.

It is stated that the defendant excepted to the judgment rendered against him. No specific exception was filed, and the case does not point out the error complained of, and none was called to our attention on the argument.

NO ERROR.

Cited: Heath v. Morgan, 117 N. C., 508; *Moore v. Hurtt,* 124 N. C., 29.

J. C. FEREBEE ET AL. v. S. H. PRITCHARD ET AL.

Partition—Deed in Fraud of Marital Rights—Constructive Notice—New Trial.

1. A voluntary conveyance of her property by a woman in contemplation of marriage, which afterwards takes place, is a fraud upon her husband if he be not apprised of the existence of the deed.

2. Actual notice of a deed made after the marriage engagement and without the prospective husband's consent will not affect his rights; *a fortiori,* constructive notice arising from the registration of such a deed fourteen days before the marriage could not have that effect.

3. The fact that such deed is made for the benefit of children of a former marriage, who were innocent of the fraud, does not change the rule above noted.

4. The defendant, whose wife is dead and who seeks to avoid a deed made by her as a fraud upon his marital rights, is a competent witness to prove that the signature to a letter in which she promised to marry him was in her own handwriting, it not being a "transaction" with a deceased person within the meaning of section 590 of The Code.

5. This Court, in granting or refusing an application for a new trial, for newly discovered testimony, will do so without discussing the facts upon which the same is based.

PETITION for partition, commenced before the clerk and transferred for trial to the Superior Court of CURRITUCK, and tried before *Hoke, J.,* and a jury, at Fall Term, 1892.

Plaintiffs introduced deed from Mary J. Northern to her chil- (84) dren, W. D. Northern and others, and to such other child or children as she might have by any marriage thereafter, etc.

Feme plaintiff and the Northerns are the same parties named in the deed as the children of Mary J., and the defendants, other than E. W. Holt, are the children of Mary J. and her second husband, E. W. Holt.

At the time the deed was executed the children by said Holt were not *in esse;* Mary J. Northern and E. W. Holt were married 22 September, 1866; the deed was executed 27 August, 1866, and recorded 8 September, 1866. Holt and wife were actually possessed of land during coverture. The lands conveyed by the deed are the same as described in petition or complaint, and both plaintiffs and defendants (other than E. W. Holt) claim under the deed from Mary J. Northern.

Defendant, E. W. Holt, testified that he had no notice of the deed of Mary J. Northern until after the suit was brought; that he never consented to the same; that after the death of his wife, December, 1891, he might have written J. C. Ferebee that he was willing for the deed to stand as his wife had intended; that afterwards he offered plaintiffs, if they would allow his children by Mary J., his wife, to come in as tenants in common, he would be satisfied, but this was before he had consulted counsel or had any information as to his marital rights in the land mentioned in the deed. He then offered a letter from Mary J. Northern, whom he afterwards married, which was as follows:

20 October, 1865.

MR. HOLT:—I have made up my mind to marry you anyhow, don't matter what anybody says; I have made up my mind to that effect, they may say what they please.

Yours truly, MARY J. NORTHERN.

(85) Defendant testified that he knew the handwriting of his wife, and the letter and signature were in her own handwriting. Plaintiffs objected to the introduction of the paper, but it was allowed, and plaintiffs excepted.

A. J. Davis was introduced in behalf of defendant, E. W. Holt, and testified he visited Mary J. Northern during 1866, and E. W. Holt was there, and was employed by her to manage and superintend her farming; that he and she seemed to be intimate; that he visited Mary J. Northern until after July, 1866, and stopped because it was no use for him to continue.

The plaintiffs introduced J. C. Ferebee, who testified he went to see E. W. Holt shortly after the death of his wife; that he said to Holt, "I suppose you are aware your wife made a deed of all her lands to her children?" and he readily replied, "Yes"; that Holt told witness at Currituck courthouse he would be satisfied if his children were allowed to come in equally with plaintiffs; that the deed should remain as his wife desired; that the offer was not accepted by the plaintiffs, or by any one for them; that Holt wrote witness after above conversation that he was willing that the deed should remain as his wife made it, conveying the lands to all her children.

The issues agreed upon were as follows:

1. Are the defendants (children of Mary J. by E. W. Holt) tenants in common with the plaintiffs?

2. Was there a contract of marriage between Mary J. Northern and E. W. Holt on 27 August, 1886?

3. If so, did the defendant, E. W. Holt, marry Mary J. Northern without notice of the deed, etc.?

4. If so, did he consent to the said deed after his marriage with said Mary J. Northern?

The court charged the jury that upon all the evidence they (86) should answer the first issue "Yes"; that there was no evidence of defendant, E. W. Holt, consenting to the deed, and that the jury should answer the fourth issue "No."

The court on the second issue submitted to the jury the paper-writing introduced by defendant Holt, and evidence of A. J. Davis, and the other evidence *pertinent* offered by plaintiff and defendant, and charged the jury if they believed from the evidence the defendant Holt and Mary J. Northern were engaged to be married at the time the deed was executed they should answer the third issue, "Yes."

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

Grady & Aydlett for plaintiffs.
W. D. Pruden for defendants.

SHEPHERD, C. J. "It is now clearly settled in this State that a voluntary conveyance of her property by a woman in contemplation of a marriage which afterwards takes place is a fraud upon her husband, if he be not apprised of the existence of the deed." *Spencer v. Spencer,* 56 N. C., 404; *Logan v. Simmons,* 38 N. C., 487; *Tisdale v. Bailey,* 41 N. C., 358; *Poston v. Gillespie,* 58 N. C., 258; *Goodson v. Whitfield,* 40 N. C., 163; *Baker v. Jordan,* 73 N. C., 145. In the present case it is found by the jury that on 27 August, 1886 (the date of the execution of the deed from Mary J. Northern to her children by a former marriage), there was a subsisting contract of marriage between the said Mary and the defendant, E. W. Holt, which contract was consummated on the 22d of the following month. It is further found by the jury that the said Holt had no knowledge at the time of his marriage of the said deed, and that he has never assented to the same. Under these circumstances it would seem very plain that the deed is voidable (87) by the husband as a fraud upon his marital rights; but it is insisted that as it was registered some fourteen days before the marriage the husband was affected with constructive notice and that the principle

deducible from the foregoing authorities is therefore inapplicable. The plaintiff's counsel was unable to produce any authority to show that the doctrine of constructive notice has been extended to cases of this character. On the contrary, it has been decided by this Court (*Poston v. Gillespie, supra*) that even actual notice before the marriage will not affect the husband's rights provided the deed be made without his consent after the engagement. In this case the deed was executed after the engagement, and, as actual notice would not have prevented the husband from avoiding it, *a fortiori* constructive notice could not have that effect.

It is next insisted that there is a distinction in cases where the deed is made for the benefit of children by a former marriage who have no knowledge of the fraud. It is sufficient to say that this Court has repeatedly held the law to be otherwise. In *Tisdale v. Bailey, supra, Ruffin, C. J.,* in reference to this very question, remarked: "As to the idea that the children can hold under the deed upon the ground of their innocence of any fraud, it is altogether inadmissible. *Lord Chief Justice Wilmot* said, in *Bridgeman v. Greene* (Wilson's Notes, 64), that, though not a party to an imposition, whoever receives anything by means of it must take it tainted with the imposition: partitioning and cantoning it out among relatives and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, said he, if it comes through a polluted channel the obligation of restitution will follow it." *Goodson v. Whitfield* and *Logan v. Simmons, supra.*

(88) The exceptions to the charge of the court cannot be sustained. There was no evidence that the husband had notice of or consented to the execution of the deed before his marriage; nor does it appear that he has, since the death of his wife, ever unequivocally consented to the same or done any other act by which he is precluded from relief. We are also of the opinion that the testimony of A. J. Davis and the letter of Mrs. Northern to E. W. Holt were sufficient to warrant the jury in finding that there was a contract of marriage between the parties at the date of the execution of the deed. The objection that Holt was incompetent as a witness to prove that the signature to the letter in which Mrs. Northern promised to marry him was in her handwriting cannot be sustained. It was not a "transaction" with a deceased person within the meaning of section 590 of The Code. *Rush v. Steed,* 91 N. C., 226.

As to the motion for a new trial on the ground of newly discovered evidence, we have carefully examined the affidavit of the plaintiffs and after due consideration have concluded that it does not present a case which calls for the intervention of the Court. In *Brown v. Mitchell,*

102 N. C., 347, we stated "that this Court will, as a rule, in future grant or refuse such motions without discussing the facts embodied in the petitions or affidavits of the moving party, as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion in deciding questions raised by applications for new trials."

Upon an examination of the whole record we find

NO ERROR.

Cited: Bright v. Marcom, 121 N. C., 87; *Herndon v. R. R., ib.,* 499; *S. v. Council,* 129 N. C., 516; *McEwan v. Brown,* 176 N. C., 252.

(89)

E. C. WATERS ET AL. v. ANN B. MELSON, ADMINISTRATRIX OF J. A. MELSON ET ALS.

Clerk of Superior Court—Receiver—Liability of Sureties.

1. Where, in an order of court appointing "J. A. M., clerk of the Superior Court," receiver of infants' estate, the word "as" was omitted before the words "Clerk of the Superior Court": *Held,* that the intention of the court to appoint M. as receiver in his official capacity was sufficiently indicated.

2. Under Laws 1868, ch. 201 (Battle's Revisal, ch. 53, sec. 22), the court has authority to appoint a clerk of the Superior Court receiver of infants' estate, etc., and the sureties on his official bond are liable for any breach of his duties as such receiver.

3. The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands.

APPEAL from *Hoke, J.,* at Fall Term, 1892, of WASHINGTON.

The action was brought against the defendants as administratrix and sureties on the official bond of James A. Melson, clerk of the Superior Court, to recover $662.80, with interest from 17 February, 1873, which went into the hands of the said J. A. Melson under the order of court at Spring Term, 1873, appointing him receiver of the estate of the minor children of A. T. Waters, deceased. The appointment was made on the petition of J. J. Martin, solicitor (on presentment of grand jury), in behalf of the said minor children, who were without guardian, and was as follows:

"It appearing to the court that Ernest C. and W. J. Waters are minor heirs of A. T. Waters, residing in Washington County, and are without guardian, it is ordered that James A. Melson, clerk of the Superior Court of Washington County, be appointed receiver to and for the same Ernest C. and W. J. Waters, with power and authority to take into his possession all of the property and estate of the said Ernest C. and
(90) W. J. Waters, and report to the next term of this court, and invest the same in the meantime subject to the order of this court."

The complaint alleged also that the said Melson failed to invest the money as required by order of the court, and failed to pay over the same to plaintiffs, etc.

It was admitted by the defendants that the matters and things set forth in the complaint were true, except that Melson was appointed receiver in his capacity of clerk, or that he received the money shortly after his appointment, or that he could have by proper diligence invested it, and it was agreed that issues as to the date of the receipt of the money and as to Melson's ability to have invested it should be submitted to a jury, and that all other issues of law or fact, should such arise, should be passed upon by the judge.

The relators introduced testimony tending to show that James A. Melson, the intestate of the defendant, Ann B. Melson, received from an insurance company about 15 April, 1873, for the use of the relators, the sum of $662.80, and that said money was burnt or stolen when the court-house was burnt on 15 May of the same year.

The defendants introduced no testimony.

His Honor instructed the jury that if Melson had the money on hand as long as a month, or near that, and was under direction to invest it, and failed to do so before it was burnt or stolen, this would put on the defendants the burden of showing that he had made every proper effort to lend the money and failed. That the duty was placed upon the said Melson, to make diligent effort to lend the money, to use that diligence that a prudent, careful business man would in the management
(91) of his funds, and if he failed to make such effort the second issue should be answered "Yes"; but that if he used this diligence, and after proper effort failed to obtain proper security or to make a safe, desirable loan, the answer to the second issue should be "No."

The defendants contended and asked the court so to charge that under the petition of Martin, solicitor, and said order of the Superior Court the bond in suit was not liable for the money claimed, as above stated, because when the petition was filed and order was made, the court had no authority by law then in force to appoint the clerk receiver in his official capacity; and (2) if it did, the order appointing said Melson

receiver did not so appoint him in his aforesaid capacity "as clerk," but imposed merely an individual liability upon him, and that the relators in this case cannot recover in this action.

The court held otherwise, and defendants excepted. There was no further request made for instructions by defendants and no other exceptions taken to charge when made. The defendants, however, in the case on appeal, and within time allowed by law, excepted to charge of court, and assigned for error therein that the court charged the jury:

1. If the clerk had the money on hand as long as a month, or near that, and was under direction to invest the same and failed to do so before it was burnt or stolen, this would put on him and defendants the burden of showing that he had made every proper effort to lend the money and failed.

2. The duty was placed on the clerk to make diligent effort to lend the money, to use that diligence that a prudent, careful business man would exert in the management of his own funds, and if he failed to make such effort the second issue should be answered "Yes."

3. If, however, he used due diligence and after proper effort (92) made, failed to obtain proper security, or to make a safe, desirable loan, the answer to second issue should be "No."

The issues submitted and the responses were as follows:

1. At what time did the clerk receive the money under order of the court? Answer: "About 15 April."

2. Did the clerk fail and refuse to invest the money pursuant to the order of the court? Answer: "Yes."

Judgment for plaintiffs and appeal by defendants.

L. C. Latham for plaintiffs.

C. L. Pettigrew and A. O. Gaylord for defendants.

SHEPHERD, C. J. At the Spring Term, 1873, of the Superior Court of Washington County the relators were presented by the grand jury as infants without guardian, and upon the petition of the solicitor, the defendant Melson, the clerk of the said court, was appointed receiver of their estates. The question presented is whether the sureties on the official bond of the said clerk are responsible for his default as such receiver. The language of the order of the court is, "That James A. Melson, clerk of the Superior Court of Washington County, be appointed receiver," etc., and it is insisted by counsel that the omission of the word "as" before the words "clerk of the Superior Court" is fatal, and that a proper construction of the order is that the said Melson was appointed in his individual capacity only. The case of *Kerr v. Bran-*

don, 84 N. C., 128, cited by the defendants, is no authority for this contention, as the order in that case made no reference whatever to the official position of Brandon as clerk. We are very clearly of the opinion
that the terms of the order sufficiently indicate the intention of
(93) the court to appoint the said Melson as receiver in his official
capacity, and the only serious question, therefore, to be considered is whether the court had authority to appoint him as such, and thereby impose a liability upon the sureties to his official bond.

Laws 1868, ch. 201, which is applicable to this case, was brought forward and is to be found in chapter 53 of Battle's Revisal. In section 22 of the said chapter it is provided that the court, at the instance of the solicitor, may commit the estate of an infant having no guardian, or whose guardian has defaulted, "to some discreet person." In the Revised Code, ch. 54, sec. 15, the words employed in a similar provision are "the clerk and master or other discreet person"; and it is argued that by thus changing the phraseology the Legislature manifested its intention that such appointments should no longer be conferred upon the officers of the court, and that their sureties cannot therefore be held responsible. This very point was pressed with much ingenuity in the case of *Rogers v. Odom,* 86 N. C., 432, but the Court (*Ruffin, J.*), in order "to avoid any misunderstanding in the future," distinctly declared that it could not be sustained. The Court said: "In this view of counsel we cannot concur, but rather think that the discrepancy between the two statutes resulted from the fact that about that time the office of clerk and master was abolished, and hence all mention of it was omitted. The court cannot but take notice of the fact that since the new statute the court has been in the habit of bestowing such appointments upon their clerks, oftentimes against their will, and under the conviction that their bonds afforded protection for the funds and effects committed to them, and that according to the understanding of all parties, both before and
after the acceptance of the office of clerk, the courts had a right
(94) to do as they have done; hence we conclude that in such cases the
sureties are accountable, the office being taken *cum onere.*"

It is urged, however, that the decision in the above case is in conflict with the language we have quoted, but it is difficult to believe that a judge so distinguished for clearness of reasoning, as well as profound learning, should in the same opinion have committed such an error. There is really no such conflict as is supposed, and this is apparent from the fact that Odom, the defendant, was not appointed by virtue of the statutory provision (sections 21, 22, 46, 47, chapter 53, Bat. Rev.) which the learned Justice was discussing. These provisions relate to the appointment of a receiver, at the instance of the solicitor, where a

guardian has been removed (section 21), or, as in the case before us, where the grand jury have presented an infant without guardian (section 47).

In the case referred to, Odom was appointed by the judge at term, upon the simple petition of the infants, by their next friend, for the purpose of suing for and collecting insurance money from a foreign corporation which was beyond the jurisdiction of the court. Such a proceeding, if not irregular, was certainly novel, and it is plain that there could have been no presumption that the sureties knew that such appointments had been or would be made, and that they contracted with reference to such a liability. The appointment of Odom was assimilated by the court to the appointment of a receiver in ordinary actions, as the receivership of a railroad and the like, and it was because there had been no "habit of bestowing such appointments" upon the clerks in such cases that the Court held that the bond of the said Odom was not responsible. In the language of the Court, such an appointment "could never have been within the contemplation of the sureties when contracting for the fidelity of their principal in his capacity as clerk." (95)

We are, therefore, of the opinion that there is nothing in the decision in *Rogers v. Odom, supra,* which conflicts with the deliberate and emphatic declaration of the Court that in cases like the present the court has authority to appoint and that the sureties are liable. Neither is there anything in *Kerr v. Brandon, supra,* which militates against this view. Indeed, we are almost induced to infer, from the absolute silence of the court upon the subject, as well as the general tendency of the opinion, that had the clerk been appointed receiver in his official capacity, the Court would have reached a similar conclusion. The decision seems to have been based upon the form of the order, and not upon the absence of authority in the court (as indicated in the head-notes) to impose the duty upon the clerk in his official capacity.

In consideration of the views we have indicated, there was no error in the refusal of the court to instruct the jury as requested by the defendants. Neither do we see any error of which the defendants can complain in the charge of the court, for, conceding that the court should not have given the general instruction as to what a prudent man would have done under the circumstances (*Emry v. R. R.,* 109 N. C., 589), the defendants could not have been prejudiced, as the court properly ruled that the burden was upon them to show that they had used due diligence in investing the money, and upon this point there was no testimony.

NO ERROR.

Cited: Hannah v. Hyatt, 170 N. C., 638.

(96)

URIAH VAUGHAN v. JOSEPH PARKER ET AL.

Ejectment—Practice—Issues for the Jury—Defenses.

1. The only restriction upon the power of a judge below to settle the issues for the jury is that they shall be such as arise out of the pleadings—such that, upon the verdict, the court may proceed to judgment, and such as will allow the parties to present to the jury any material view of the law arising out of testimony which counsel may request the court to embody in its instructions; therefore, where a controversy as to the ownership of land was narrowed down to the single question of the date of delivery of a deed, it was not error for the judge to submit an issue as to such date instead of the usual one involving the title.

2. A deed is presumed to have been delivered at the time it bears date, but the presumption may be rebutted by evidence *aliunde*, in which case it becomes operative from the actual day of delivery.

3. Where, in an action for the recovery of land, the defendant, whether he might rightfully claim the relation to the plaintiff of lessee or tenant in common, waives his right and disregards his opportunity to admit by answer or disclaim the true interest of the plaintiff, he cannot, after disputing the plaintiff's title, fall back on a denial of the ouster when every other defense has failed him, nor, after failing to establish his ownership, can he by his pleadings make his occupancy adverse *ab initio*, so as to mature title against the plaintiff, when in fact he has held under the plaintiff or those under whom he claims.

4. The effect of discharging a debt secured by a first mortgage by surrender of the mortgage deed is to make a second mortgage on the same land a first lien, and the immediate execution by the mortgagor of a deed of bargain and sale to the one holding the first mortgage cannot operate to defeat the second mortgage.

ACTION for the title and possession of land, tried at Spring Term, 1891, of NORTHAMPTON, before *Connor, J.*

Both parties claimed title under Wiley Edwards. The plaintiff offered as evidence of title (1) a mortgage deed from Wiley Edwards to D. A. Barnes, dated 6 October, 1880; (2) proof of sale by said Barnes,
(97) 22 January, 1889, and of purchase at sale by Uriah Vaughan, and deed to Uriah Vaughan pursuant thereto.

The defendant Joseph Parker relied upon a deed from Wiley Edwards to him, dated 23 January, 1879, but which the plaintiff insisted was not executed and delivered until after the date of the mortgage deed to Barnes.

The deposition of the defendant Joseph Parker was read by plaintiff, the material parts of which are as follows:

"When the deed from Wiley Edwards and wife, dated 23 January, 1879, was delivered, J. H. Deberry was present; also Mollie and Mrs.

Edwards were present. Deberry took his private examination at that time. A black man was living on the land, but I do not know who put him there. I don't know how long I had the deed before it was recorded; think it was five or six years. I think the time stated by Deberry in his privy examination of Mrs. Edwards, which was 20 February, 1882, is correct. I surrendered at that time his note to Mr. Edwards. About twelve months before I got it, he (Edwards) had the deed some time. He brought it to me, signed by himself, and I told him to keep it and get Mrs. Edwards to sign, and I would give him up his note and mortgage. He told me that his wife had nothing to do with it. I went into possession of the land about twelve years ago, and have paid taxes on it for eleven years. I got possession of it in 1882. I had possession of it about three years before Mrs. Edwards signed the deed. I put Berry Taum in possession first. I gave Wiley Edwards his note for about $150, principal and interest, which was secured by a mortgage on another piece of land. I made an agreement to surrender said note and mortgage fourteen or fifteen years ago, and he then agreed to convey me this tract of land." (98)

Wiley Edwards was introduced, and testified to the same state of facts regarding the parol agreement, and that Joseph Parker had been in possession of said land ever since 1879.

Defendants introduced a mortgage, executed and recorded in 1875, from Wiley Edwards and wife to Joseph Parker to secure a note of $100.

Wiley Edwards testified that said note and the original mortgage had been delivered up to him by said Parker after the delivery of the deed of 23 January, 1879, to wit, on 20 February, 1882.

The defendants' counsel asked the court to submit the following issue: Is the plaintiff the owner and entitled to the possession of the land in controversy?

The court being of the opinion that, upon the pleadings, admissions and testimony, the only question involved in this controversy was the execution and delivery of the deed from Wiley Edwards to defendant, declined to submit said issue to the jury, and the defendant excepted. The testimony in regard to the date of delivery being conflicting, the court instructed the jury that they should, upon the consideration of the whole evidence, fix the date of said delivery.

The issues submitted, and the responses, are as follows:

1. When was the deed in question executed and delivered by Edwards and wife to the defendants? Answer: "20 February, 1882."

2. When was Edwards' homestead allotted? Answer: "14 January, 1876."

3. Is the land in question a part of said homestead? Answer: "Yes."

4. What is the rental value of said land per annum? Answer:
(99) "Twenty-five dollars."

Defendants moved for judgment *non obstante veredicto;* the motion was refused, and defendant excepted. Defendant moved for *venire de novo,* for error in refusing to submit the issues tendered. Motion was refused, and from the judgment for plaintiff defendant appealed.

B. B. Winborne and R. B. Peebles for plaintiff.
B. S. Gay for defendant.

AVERY, J. The refusal of the court to submit the usual issue involving the title, instead of the more specific inquiry as to the date of delivering the deed to the defendant Parker, is mainly relied upon as ground for new trial, though the denial of the motion for judgment upon the findings was not abandoned on the argument here. In the absence of an allegation of fraud, the controversy before the jury was narrowed down to a single question. As both parties claimed under Wiley Edwards, if he delivered the deed to Joseph Parker on 23 January, 1879, when it bears date, then he had an older and better title than the plaintiff, who claimed under the mortgage to David Barnes, executed 6 October, 1880. But if the deed to Parker was delivered after the execution of that to Barnes, as alleged, it took effect from its actual delivery. In the exercise of a sound discretion, it was the province of the judge below to determine whether he would submit the usual issue or another raised by the pleadings, since it was involved in the broader issue, in its stead. Doubtless, his Honor thought that the jury would more readily comprehend the question of fact upon which they were passing if their attention should be directed to it by the more specific inquiry. There is no restriction upon his power to settle the issues, except that they shall be such as arise out of the pleadings, such that upon the verdict the court may proceed to judgment, and such as
(100) to afford to the parties an opportunity to present to the jury any material view of the law arising out of the testimony which counsel may request the court to embody in the instructions. *McAdoo v. R. R.,* 105 N. C., 140; *Denmark v. R. R.,* 107 N. C., 185; *Boyer v. Teague,* 106 N. C., 576; *Bonds v. Smith,* 106 N. C., 553. It is familiar learning that a deed takes effect from the time of its delivery, not from its date. The law presumes, nothing further appearing, that a deed was delivered when it bears date, though it is not essential to its validity that it should contain a date at all, but the presumption may be rebutted

by evidence *aliunde,* in which case it becomes operative from the actual day of delivery. The whole controversy, therefore, depended upon the question whether the deed to Parker took effect before or after 6 October, 1880, when Edwards conveyed to Barnes, and the jury passed upon and settled that by finding the date of actual delivery to have been subsequent to that of the mortgage.

No other ground for the defendant's motion for judgment upon the verdict was suggested but that it does not appear from the admissions in the pleadings or the findings of the jury that the possession was demanded by the plaintiff and refused by the defendant. If the possession of Joseph Parker was adverse to plaintiff, no notice to quit was required. But if he wished to take advantage of the fact set forth in his deposition that he entered upon the land in 1879 under a verbal agreement with Wiley Edwards, and to insist that as the parol contract between them was void, he stood in the shoes of Edwards, the mortgagor, and was entitled to notice, he ought in his answer to have admitted the right of the plaintiff and pleaded the want of lawful notice. When a defendant, whether he might rightfully claim the relation to the plaintiff of lessee or tenant in common, "waives his right and disregards his opportunity to admit by answer or disclaimer the true interest of the (101) plaintiff," he cannot, after placing himself in a hostile attitude by disputing the plaintiff's title, fall back on a denial of the ouster, when every other defense has failed him. *Foust v. Trice,* 53 N. C., 490; *Allen v. Sallinger,* 103 N. C., 14, and *ib.,* 105 N. C., 333; *Whissenhunt v. Jones,* 78 N. C., 361; *Gilchrist v. Middleton,* 107 N. C., 663.

But while a defendant is not allowed to blow hot and cold by falling back upon his rights as a tenant, after he has failed to establish his claim of ownership, he cannot by his pleadings make his occupancy adverse *ab initio,* so as to mature title against the plaintiff, when in fact he has held under the plaintiff or those through whom he claims.

The defendant in his answer simply denies the allegations of the complaint. If he had any equitable right by virtue of his occupancy under a parol agreement in 1879, which is not conceded, he has failed to set it up as a defense, and cannot now insist upon it.

The effect of discharging the mortgage debt to Parker with the surrender of the deed was unquestionably to make the second mortgage a first lien, and to vest the legal estate in the grantee therein named. The immediate execution of another deed could not operate to defeat the mortgage to Barnes. We did not understand (as his Honor below did not) that the defendant claimed under that mortgage, but it was introduced and appears as evidence in support of his contention for judgment. Upon a review of the exceptions we discover

NO ERROR.

Cited: Paper Co. v. Chronicle, 115 N. C., 150; *Kendrick v. Dellinger,* 117 N. C., 493; *Tucker v. Satterthwaite,* 120 N. C., 122; *Falkner v. Pilcher,* 137 N. C., 451; *Ives v. Lumber Co.,* 147 N. C., 307; *Fortune v. Hunt,* 149 N. C., 362.

(102)

W. H. RUFFIN ET AL. v. JOHN K. RUFFIN, EXR. OF PENNIE W. RUFFIN.

Construction of Will—Furniture—Silverware—Instructions to Executor.

1. Where a testatrix bequeathed all her personal property to her husband, except such as was otherwise specifically disposed of in her will, and, after giving specific articles of silverware, etc., to certain persons, bequeathed to M. R. all the furniture in her homestead, and other furniture wherever it might be at her death: *Held,* that the "furniture" given to M. R. did not include silverware remaining after the specific bequests, or books or portraits, china or glassware, but did comprise carpets, cook stoves and utensils.

2. While this Court has no jurisdiction of a case submitted without action, under section 567 of the Code of Civil Procedure, where it does not appear by affidavit that a controversy is real; yet, where all the parties interested in the construction of a will (including the executor, who is a claimant and is in possession of the property concerning which the question arises), agree, as petitioners, to submit the question to the decision of a judge of the Superior Court: *Held,* that this Court will take cognizance of the case as an application by the executor for a construction of the will, so as to enable him to dispose of the fund in his hands.

CASE submitted to *Brown, J.,* at chambers, upon a petition and agreement, as follows:

Your petitioner respectfully represents to the court that he is desirous of a settlement of the estate of the said Pennie W. Ruffin, deceased, under the last will and testament, and prays that the court will construe the said last will and testament, and in particular item 2 of said will, in so far as it relates to a bequest of personal property to John K. Ruffin, and item 11 of said will, in so far as it relates to a bequest of personal property to Mary Tart Ruffin; whether, under said will,
(103) silverware not specifically bequeathed in other parts of the will, books, portraits, table and bed linen, mirrors and other personal property used in and about the house are the property of the said John K. Ruffin or the said Mary Tart Ruffin. To facilitate the immediate determination of this matter, we agree that his Honor, *George H.*

Brown, one of the judges of the Superior Court of North Carolina, appointed to hold the courts of the Third Judicial District, may hear and determine the same, at such time and place as he may determine after coming into the district; and the petitioner, William H. Ruffin, herewith files his power of attorney from Samuel Ruffin, guardian of Mary Tart Ruffin, and the certificate of the probate court of Choctaw County, Alabama, that Samuel Ruffin is the lawful guardian of the said Mary Tart Ruffin.

WILLIAM H. RUFFIN,
Petitioner and Attorney.
G. W. BLOUNT,
For the Executor.

Items 2 and 11 of Mrs. Ruffin's will were as follows:

"2. That it is my will and desire that my husband have and enjoy for the term of his natural life all of my lands in Franklin County, this State, and in Choctaw County, Alabama, using as he may see fit and to his own use and behoof the issues, rents and profits arising therefrom; and to him, my said husband, I bequeath all my personal property and estate not specifically disposed of by this will or which I may hereafter by memoranda, in the nature of a codicil, dispose of.

"11. I give and bequeath to Mary Tart Ruffin the furniture in homestead bequeathed to me by my mother, and other furniture, wherever it may be at the time of my death, belonging to me. I hereby nominate and appoint my husband, John K. Ruffin, executor of this my last will and testament, and nominate my nephew, William Ruffin, to (104) succeed him and fully administer my estate, after the death of my said husband; and I further provide that in case of the death of my niece, Mary Tart Ruffin, before mine, and without issue, W. Ruffin shall stand in her stead and take the estate devised and bequeathed to her in Franklin County, without reference to any deficiency on account of mortgage."

His Honor, *Brown, J.,* decided and, at October Term, 1892, of Wilson Superior Court, adjudged as follows: "The word 'furniture' is to be taken in the sense in which it is generally used and understood. I construe the word to include the entire household furniture of deceased, such as bedsteads and bedding, beds and mattresses, chairs and tables, bureaus, washstands, 'what-nots,' hat-racks, book-cases, sideboards, etc. I do not think the term embraces any silverware. That is not generally known as or denominated furniture. I am of opinion that the term does embrace sofas, chairs, mirrors, clocks, but not china, glassware or carpets, or books, or cook stoves and utensils, or portraits attached to the

wall. Those articles which I have designated as being embraced under the term 'furniture' I adjudge should be delivered by the executor to the guardian of said Mary T. Ruffin."

Defendant contended that the decision of his Honor was that of *arbitration,* and *final,* while plaintiff insisted that the submission was on a *case agreed,* and not to *arbitration,* and that in the decision and in the judgment subsequently entered at term his Honor erred, in that he did not include china, glassware, or carpets, or books, or cook stoves and utensils, or portraits attached to the walls, or silverware, and from such judgment appealed.

(105) *J. F. Bruton and W. H. Ruffin for plaintiff.*
Battle & Mordecai for defendant.

AVERY, J. The controlling object in seeking the proper interpretation of wills being to ascertain the intention of the testator, technical words are usually construed according to their legal signification, yet from a remote period even this rule has been modified by the courts to meet the purpose of a testator gathered from the whole instrument, on the ground that he is supposed to be *inops consilii* and incapable of expressing his wishes in apt legal terms. Where a word having no known technical meaning, like "furniture," is used as a designation of property bequeathed, the testator's purpose, disclosed from the context, may determine its meaning, and if his construction does not appear from other portions of the will, then it should be interpreted according to the signification ordinarily given to it as it is used in everyday life.

In item 2 the testatrix bequeathed to her husband, the defendant, who is also named as executor, all of her "personal property and estate not specifically disposed of by the will," which remained without alteration or modification by subsequent memorandum in the nature of a codicil, such as she reserved the right to make.

In another clause of the will, item 11, the bequest made to Mary Tart Ruffin, the plaintiff, is of "the *furniture* in homestead bequeathed to me by my mother, and *other furniture,* wherever it may be at the time of my death, belonging to me."

The question raised by the appeal is, whether the court below erred in holding that the bequest of furniture in item 11 did not embrace "silverware, china, glassware, carpets, books, portraits attached to the wall, or a cook stove and utensils." It is manifest that the testatrix did
(106) not intend to include silverware under that general designation, for the reason that she had given to her niece, Mrs. Mary Woodard, in item 8, her "silver pitcher, two silver goblets, and silver coffee pot marked 'W' "; and in item 10 she had given to the children of her

brother, Haywood Ruffin, and Mizelle Ruffin, "the silver service of Thomas Ruffin," her brother (which had passed in some way to her), and had, without excepting these articles, bequeathed all furniture, wherever found at the time of her death, to the plaintiff. Would she not have inserted, after furniture, "except the silver pitcher." etc., disposed of in the previous item, or some equivalent expression, if she had used the words in a sense so broad? It might be, where an elegantly appointed and furnished hotel is leased, with all of the furniture, that the silverware necessary to maintain the existing style would pass to the lessee, but in our case there is no devise of a house and no purpose to pass an entire outfit of an establishment, though the articles that had been transported from her mother's old homestead were designated, together with the other furniture, wherever found.

We concur with the judge who heard the case below in the opinion that the word should be construed according to its usual meaning, and we may add that an examination of the whole will shows rather an intent to restrict the ordinary definition than to give to it a more comprehensive signification. That which fits a house for use is its furniture, just as the lock, etc., of a musket, which enables one to use it, is designated in the same way. In its ordinary acceptation the word has not been understood to include silverware, china, glassware, books, or portraits attached to the wall, that are not generally essential to the comfort and convenience of housekeepers, but where, as in England, it was held generally to embrace plate, the case of a bequest of a part of the plate to another than the general legatee of furniture (107) was held an exception to the rule. *Franklin v. Earl of Barleigton,* P. Ch., 251. In most of the cases cited to sustain the plaintiff's claim that all of these articles are embraced, it appears from examination that the bequest was of "household furniture, goods and chattels" in a particular house, or "household goods and furniture." *Bunn v. Wenthrop,* 2 Johnson Ch., 329; *Manton v. Laboi,* 54 Law Journal (N. S. Ch. Div.), 1008. In *Kelly v. Powlett,* 2 Amb., 605, cited by counsel, where the legacy included plate, pictures hung up, linen, china, and household furniture, it was held not to embrace books. *Porter v. Pournay,* 3 Vesey, 310. We think it manifest that it was not the intent of the testatrix to give any silverware not mentioned to the plaintiff or any other person than the defendant, who is the legatee of all personal property not "specifically" disposed of, and, moreover, that neither books, portraits, nor silverware are embraced by the simple word, "furniture," as used in common parlance.

It is equally clear that carpets, cook stoves, and utensils are comprehended. China and glassware have been held to pass with a hotel or a house rented as a part of the household furniture, as did silverware, but

apart from such cases where, from the instrument, the nature of the property and the surrounding circumstances, it was manifestly the purpose of a testator or of contracting parties to give to the word the broader interpretation, it should be construed to include neither. In the case at bar the leading purpose of the testatrix seems to have been—while leaving certain mementoes, old family furniture and silver, to which they would attach peculiar value, to her nieces and nephews—to provide for the maintenance for life and comfort of her husband, to whom she devised a life estate in all her lands and all of her personal property not specifically mentioned. In view of the terms in
(108) which the bequest to the defendant is expressed, and the general purpose pervading the whole instrument, we readily understand how the learned judge below was led to limit the extent of the bequest still further, as he did.

It is not our intention to give a construction to the word "furniture" applicable to every instrument. On the contrary, it must be always construed after taking the surrounding circumstances into consideration, and if in a particular case we should so interpret the purpose of a testator or the intent of contracting parties, we would give to it the meaning which seemed from the context and the circumstances to have been in contemplation of the parties, whether broader or more restricted than the construction adopted here. 8 A. & E., 985, note 1; *Bell v. Golding,* 27 Ind., 173.

The defendant contends that the agreement signed was in effect a submission to *Judge Brown* as arbitrator, and that his decision is not subject to review. The plaintiff denominates this proceeding "a case submitted without action." This Court has no jurisdiction under section 567 of The Code, since it does not appear by affidavit that the controversy is real, etc. *Grant v. Newsome,* 81 N. C., 36. But it does appear with sufficient certainty that the personal property designated is in the possession of the executor, and that the articles mentioned must either be retained by the executor in his individual capacity as a legatee or delivered to the other petitioner as included in the bequest to her, according to the construction which the Court may place upon the will of the testatrix. By consent, the parties file the whole of the will, to be considered as a part of the petition, instead of the two clauses originally incorporated therein. As all of the parties interested in the decision of this question are petitioners, it seems that the Court may take
(109) cognizance of the case as an application by an executor for a construction of a will, so as to enable him to dispose of property or a fund in his hands. *Bullock v. Bullock,* 17 N. C., 307; *Perkins v. Caldwell,* 77 N. C., 433.

The judgment of the court must be so modified as to declare, and judge and decree that the carpets, cook stove and utensils pass by the will to Mary Tart Ruffin under the designation of furniture, and that the other articles of personal property mentioned in the petition are included in the bequest to John Ruffin.

MODIFIED AND AFFIRMED.

Cited: Capehart v. Burrus, 122 N. C., 124.

FRANCIS M. MULLEN v. THE NORFOLK AND NORTH CAROLINA CANAL COMPANY.

Practice—Motion to Dismiss—Appeal—Amendment.

1. An appeal does not lie from the refusal of a motion to dismiss an action upon the allegation of defective service or on any other ground. When such motion is refused, the defendant should make his exception and cause it to be noted, and then proceed regularly to answer or demur.

2. Where the affidavit for publication of summons was defective, it was proper for the judge to permit amendment and grant an *alias* order of publication instead of dismissing the action.

AT THE Fall Term, 1892, of CAMDEN, before *Hoke, J.,* the defendant entered special appearance and moved to dismiss the action, on the ground that the affidavit on which order of publication was based was defective. The court refused the motion and allowed the plaintiff to amend his affidavit, and granted an *alias* order of publication. (110) Defendant appealed.

Pruden & Vann and L. C. Latham for defendant.
No counsel contra.

CLARK, J. The defendant, appearing by counsel, who entered a special appearance, moved to dismiss the action. This motion was refused, and the defendant did not enter its exception and proceed to answer, but at once appealed. It has been often pointed out that such an appeal is premature and will be dismissed. *Guilford v. Georgia Co.,* 109 N. C., 310; *Sheldon v. Kivett,* 110 N. C., 408, and other cases which are cited in Clark's Code (2 Ed.), p. 559. If a defendant, by simply appearing specially and moving to dismiss the action upon the allegation of defective service or on any other ground, can appeal from a refusal of the

motion, it will add several months to the time required for the disposition of any cause which the defendant may wish to delay, and we know that a delay of justice is often a denial of justice. The presumption is always that the ruling below is correct. The proper course, therefore, when the motion to dismiss has been refused, is for the defendant to cause his exception to be noted in the record and to proceed regularly to file his answer or demurrer. If the final decision below is in favor of the defendant, he will not desire to appeal; if it is against him, his exception in the record for refusal to dismiss is not waived, and he will have the benefit of it on the appeal from the final judgment. The disadvantage, if any, is not with the appellant, but with the appellee, since, if he wrongfully insists on the refusal of such motion, instead of
(111) taking an amendment or *alias* summons, he will have his pains for his trouble and have the costs to pay besides.

If the affidavit for publication was defective, the court properly refused to dismiss on that ground, and granted leave to plaintiff to amend the affidavit and for an *alias* order of publication. *Branch v. Frank,* 81 N. C., 180; *Price v. Cox,* 83 N. C., 261. Besides, an appeal from the amendment did not lie. *Sinclair v. R. R.,* 111 N. C., 507.

APPEAL DISMISSED.

Cited: Joyner v. Roberts, post, 112; *Kellogg v. Mfg. Co., post,* 191; *Mullen v. Canal Co.,* 114 N. C., 410; *Best v. Mortgage Co.,* 128 N. C., 353; *Houston v. Lumber Co.,* 136 N. C., 329; *Williams v. Bailey,* 177 N. C., 40.

FOSTER JOYNER v. E. E. ROBERTS ET AL.

Action for Penalty—Jurisdiction—Practice—Appeal from Motion to Dismiss.

1. No appeal lies from refusal of a motion to dismiss an action. The remedy is to have an exception noted in the record.
2. A motion to dismiss an action for want of jurisdiction, or because the complaint does not state a cause of action, is not such a demurrer *ore tenus* as will permit an appeal from its refusal; for if such motion be frivolous, the court cannot proceed to judgment, as in case of a formal and frivolous demurrer.
3. Section 1883 of The Code makes an officer liable upon his bond "for the faithful discharge of all the duties of his office," and an action to recover a penalty of $200 for failure of a register of deeds to perform a duty required of him by section 1814 of The Code is properly brought on the official bond, and the Superior Court has jurisdiction.

4. In an action on an official bond to recover a penalty for breach of an officer's duty it is not necessary to allege that a judgment has been obtained against the officer and that he has failed to pay it.

5. *Quære*, whether a party suing the official bond, and not the officer alone, for a penalty, should not make himself a relator in an action in the name of the State?

ACTION to recover a penalty of $200, brought against the de- (112) fendant E. E. Roberts, register of deeds and his sureties on his official bond, and tried at Spring Term, 1891, of NORTHAMPTON, before *Connor, J.*

The breach of the bond complained of was the violation by the defendant of section 1814 of The Code, in regard to the issuance of license for the marriage of a girl under 18 years of age without consent of her father, the plaintiff.

Defendants answered, setting up defenses, but at the trial moved to dismiss the action:

1. For want of jurisdiction, in that the plaintiff is suing for a penalty of $200 for the failure of the defendant Roberts, register of deeds, to obtain the written consent of the father of one Ida Joyner, a woman under 18 years of age, to the marriage of said Ida to one Charles Lewis, before issuing license therefor.

2. For that the complaint fails to state a cause of action, in that it fails to allege that the relator of the plaintiff had previously obtained a judgment against the defendant Roberts, the register of deeds, for said penalty, and that he had failed to pay the same. His Honor refused the motion, and defendants appealed.

R. O. Burton and R. B. Peebles for plaintiff.
B. S. Gay for defendants.

CLARK, J. The defendants moved to dismiss, on the grounds, first, that the court did not have jurisdiction, and, second, because the complaint did not state a cause of action, and, the motion being refused, appealed from the refusal. It has been repeatedly held that no appeal lies from a refusal to dismiss an action, but that the remedy is to have an exception noted in the record. *Mullen v. Canal Co., ante,* 109, and cases there cited. (113)

It is contended, however, that this is, in effect, a demurrer *ore tenus,* and that therefore an appeal lies. From the overruling of a formal demurrer an appeal does lie. But there is this protection against abuse, that if the demurrer is frivolous, judgment is at once granted the plaintiff. The Code, sec. 388. But there is no such remedy on overruling this motion. The answer was filed (which fact of itself would

have overruled a demurrer), and the defendants, after the denial of the motion, were entitled to a trial upon the issues raised. They should have entered an exception and have proceeded. If an appeal lay in such cases, every defendant in every case could procure six or twelve months delay by simply objecting to the jurisdiction or to the sufficiency of the complaint, no matter how plain the case or how utterly unfounded the grounds of the objection, since, as has been already said, judgment cannot be entered as when a frivolous demurrer is filed. To rule that an appeal lay in such case would be simply to establish a "stay law." There is less excuse for an appeal in this particular respect, since the defendants cannot possibly be damaged by delaying the appeal till the final judgment, because, even though they should fail to note an exception, the objection to the jurisdiction and for failure of the complaint to state a cause of action can still be taken advantage of for the first time in this Court. Rule 27 of the Supreme Court. Those grounds of objection cannot be waived by proceeding to trial. *Tucker v. Baker,* 86 N. C., 1; *Hagins v. R. R.,* 106 N. C., 537. The hardship, if any, is on the other side, who may find (if he has not a cause of action or the court has not jurisdiction) that his victory is barren, and that he has the costs to pay for his bootless clamor. Indeed, among the numerous cases in which it has been held that no appeal lies from the refusal of a motion to dismiss, the following were instances in which the motion was made upon the ground of failure to state a cause of action or want of jurisdic-
(114) tion: *Wilson v. Lineberger,* 82 N. C., 412; *Mitchell v. Kilburn,* 74 N. C., 483; *McBryde v. Patterson,* 78 N. C., 412.

There are some questions which, by the reiterated and uniform adjudications in regard to them, should be deemed settled. This is one of them.

Though the appeal must be dismissed the Court in its discretion may consider the points raised. *S. v. Wylde,* 110 N. C., 500.

The first objection, which is to the jurisdiction because the action is for a penalty of $200, would have been good under the former statute and decisions, because the bond was not liable. *Holt v. McLean,* 75 N. C., 347. That case recommended a change in that regard in the statute, and, as has been pointed out in *Kivett v. Young,* 106 N. C., 567, the scope and purpose of official bonds have since been enlarged by The Code, sec. 1883, which makes the officer liable now upon his bond "for the faithful discharge of all the duties of his office." This action is for failure to perform the duty required by the register by The Code, sec. 1814, and for the penalty therefor prescribed by section 1816. The action is therefore for the amount of the bond ($10,000), to be discharged upon payment of $200, and the Superior Court had jurisdiction. *Fell v. Porter,* 69 N. C., 140; *Bryan v. Rousseau,* 71 N. C., 194;

Coggins v. Harrell, 86 N. C., 317. The plaintiff, who sues for the penalty given for failure to discharge an official duty, comes within the words "the party injured" who is authorized to sue the bond therefor under The Code, secs. 1883 and 1891.

In *Maggett v. Roberts,* 108 N. C., 174, the action was against the register alone, the sureties on the bond having been *nol prossed,* and it was held that the action, if for only one penalty of $200, must in such case be brought before a justice of the peace. *Fell v. Porter, supra.*

The second objection is that "the complaint does not state a cause of action because it fails to allege that a judgment has (115) been obtained against the defendant Roberts for the penalty and that he has failed to pay it." The law does not authorize such a provision in the bond, and if the bond is not expressed according to the statute "The Code, sec. 1891, cures any possible defect in such respect." *Kivette v. Young, supra.* That section provides that if there is "any variance in the penalty or conditions of the instrument from the provision prescribed by law," recovery shall be had "as if the conditions had conformed to the provisions of law."

There was no error in refusing to dismiss the action. It may be noted that *Maggett v. Roberts, supra,* was an action against the officer alone for the penalty, and the action was held properly brought in the name of the plaintiff. The present action is upon the official bond under The Code, sec. 1883, and the plaintiff may consider whether he should not ask an amendment below to make himself a relator in an action in the name of the State. *Wilson v. Pearson,* 102 N. C., 290. But we do not decide the question, which is not before us.

APPEAL DISMISSED.

Cited: Burrell v. Hughes, 116 N. C., 437; *Warren v. Boyd,* 120 N. C., 60; *Comrs. v. Sutton, ib.,* 301; *Darden v. Blount,* 126 N. C., 251; *R. R. v. Hardware Co.,* 135 N. C., 77; *Shelby v. R. R.,* 147 N. C., 539; *Chambers v. R. R.,* 172 N. C., 558; *Williams v. Bailey,* 177 N. C., 40.

CARRINGTON & CO. v. E. F. WAFF.

Contract—Failure of Consideration—Evidence.

1. While parol evidence of an alleged oral agreement contemporaneous with the execution of a note cannot be permitted to contradict or vary the absolute terms of the written contract, cases of fraud, illegality or *want of consideration* are exceptions to this rule; and where the maker of a note in an action by the payee offered oral testimony tending to show the want or failure of consideration, it was error to reject the same.

2. Where it was agreed that a manufacturing agent of plaintiffs should keep in stock an article which the defendant, as selling agent, agreed to sell, it was a sufficient compliance with such stipulation if the manufacturing agent was prepared with material, etc., to manufacture and furnish the article on demand of the agent, although the manufactured article itself was not always in stock.

3. A note and contemporaneous article of agreement are frequently taken together as one agreement, the terms of the agreement expounding and limiting those of the note; therefore, where, by an agreement contemporaneous with a promissory note, it appeared that the note was given to secure to plaintiffs one-half of the commissions to which the defendant, maker of the note, would be entitled on the sale of a certain quantity of an article which he bound himself to use his best endeavors to sell, but of which he never sold any and therefore never became entitled to any commissions: *Held*, that no cause of action accrued to the plaintiff payees of the note.

(116) ACTION tried before *Shuford, J.*, at Spring Term, 1892, of CHOWAN, on appeal from justice's court.

Plaintiffs introduced and proved the execution of defendant's promissory note for $125, payable to them, and rested.

Defendant introduced a contract, the execution of which by him as party of the second part, and by the plaintiffs as parties of the first part, was admitted. The contract bore same date as the note sued on, and provided as follows:

"That the said parties of the first part, having established a permanent industry in Edenton, county of Chowan, for the purpose of manufacturing and selling the Champion Combination Slat and Wire Fence, do hereby make and constitute the party of the second part a lawful agent, with power to contract or sell the manufactured fence in the township of Edenton, county of Chowan, State of North Carolina.

"The manufactured fence to be kept in stock by the manufacturing agent, D. W. Raper & Co., at Edenton, county of Chowan, State of North Carolina, and at all times to be furnished to the second party at factory prices, fifty cents per rod for six-wire fence, fifty-five

cents per rod for eight-wire fence, and sixty cents per rod for (117) ten-wire fence. All fence to be composed of No. 12 annealed and galvanized steel wire. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and on all sales made by him or at the factory to credit the township agent wherein the fence goes with twenty-five cents per rod. The party of the second part, for and in consideration of the rights and privileges herein granted, does hereby agree to use his endeavors to sell the fence in the above-named territory, and pay the first parties five cents per rod of the commission after he has sold 1,000 rods of fence and received all of the commission, $250; as he has this day secured to be paid $125 by execution of his note, being one-half of the commission on the first 1,000 rods of fence sold, and if 500 rods of fence have not been sold at the end of six months by the said second party, then said company or their authorized representatives are fully empowered to cancel said agency and appoint another agent in his stead; but if they decide to cancel said agency, which shall be at their option, they shall surrender said note after first being paid one-half of the commission on the fence sold during the said six months.

"The second party has also the right to use on all his own land the fencing at factory prices, and the exclusive management of the business in territory assigned him."

Defendant testified that the note sued on was the note referred to in the contract, and that the note and contract were executed and delivered at the same time; that Raper & Co. had never had on hand any of the manufactured fence, except a small sample; that he made no sales and therefore did not call on Raper & Co. for any of the fence; that the agent who made the contract for the plaintiffs told him that the plaintiffs wanted him, the defendant, to sign the note simply (118) to show that he owed them in case he, the defendant, made sales, and that if he did not sell as much as 500 rods the note would be surrendered and payment would be required only for what was sold.

Plaintiffs objected to foregoing testimony as to the representations of the agent on the ground that it added to the written contract. The objection was sustained, and defendant excepted.

D. W. Raper, for the defendant, testified that he received the machinery for making the fence and the same was put up and the mode of operating it explained by the plaintiffs' agent; that he, the witness, had material on hand out of which to make the fence, but never had any of the manufactured fence in stock except a small sample; that his contract with plaintiffs was that he should have thirty or forty days after receiving first order for fence before he was to manufacture any of it, and after that he was to keep it in stock.

Defendant contended that there was evidence to show that plaintiffs had not complied with their agreement, and hence asked the court to instruct the jury that plaintiffs could not recover. This the court refused, and defendant again excepted.

The court then stated that in no view of the case, according to the evidence of the plaintiffs, or of all the evidence introduced, was there any defense to the action, and instructed the jury that if they believed the evidence they should find for plaintiffs according to the face of the note. To this instruction the defendant excepted. There was judgment for the plaintiffs upon the verdict, and defendant appealed.

Pruden & Vann and Bond for defendant.
No counsel contra.

(119) MACRAE, J. Plaintiffs brought their action upon a promissory note, negotiable on its face, but which had not been assigned and was in the hands of the original payees, and therefore subject to any defenses which the maker might have against it.

The action being before a justice of the peace, the pleadings were in the short form used in such courts and the answer simply denied that defendant was indebted to the plaintiffs, or that they were entitled to judgment against him.

On the trial in the Superior Court the defendant relied upon the contemporaneous agreement (set out in the case as "Exhibit B") and offered testimony tending to prove that the note referred to in said agreement was the same note which is now sued on, and further that none of the fence referred to in "Exhibit B" had yet been sold in the territory in which defendant was to sell it. He proposed also to prove that the plaintiffs' agent, who made the contract with defendant, told him that the plaintiffs wanted him to sign the note simply to show that he owed them in case he made sales of the fence, and that if he did not sell five hundred rods of the fence the note would be given back to him and he would only have to pay for what he had sold.

The first exception is sustained: while "it is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or endorsing of a bill or note, cannot be permitted to vary, qualify or contradict, add to or subtract from the absolute terms of the written contract, the exceptions to this rule are cases of fraud, illegality or want of consideration." 2 Parsons Notes and Bills, 501. The rejected testimony was competent under the exception. The defendant might, if he could, have shown by oral testimony the want of failure of consideration.

We do not think that there was evidence to show that the (120) plaintiffs had not complied with their agreement, as the defendant requested his Honor to charge, the refusal of which request constitutes the ground of the second exception. It is true that by this agreement the manufactured fence was to be kept in stock by the manufacturing agents, Raper & Co. It appears, however, by the testimony that the said agents had the materials and machinery for making the fence, and that the defendant had not made any sales or called upon the agents to furnish any of the fence. It would seem that, up to the time referred to, it was a sufficient compliance with the stipulations if the agents were prepared with material, machinery, and sample to manufacture and furnish the article upon demand of defendant. At least the defendant had no cause of complaint of breach of agreement until a demand and failure on the part of the manufacturing agents to furnish it.

But we think there was error in the instruction of his Honor that, in no view of the case, according to the evidence of the plaintiffs, or of all the evidence introduced, was there any defense to the action. The defense set up was the contemporaneous agreement by which it appears that this note for $125 was given by defendant to secure to plaintiffs one-half of the commissions on the sales of the first 1,000 rods of fence sold, to which defendant would be entitled, and the fact alleged that none of the fence had yet been sold, and the consequent want of consideration. The defendant bound himself to use his endeavors to sell the fence which was to be furnished by plaintiffs through their agents, Raper & Co.; the said agents were also to sell said fence, and defendant was to have a commission upon his own sales and upon those of Raper & Co., the manufacturing agents of the plaintiffs. It was stipulated in the agreement between the parties that the defendant was to pay certain of his commissions to the plaintiffs, and that the note for $125 was given to secure to plaintiffs one-half of defendant's (121) commissions on the first 1,000 rods of fence sold in his territory.

While it is settled, as we have seen, that parol evidence of an oral agreement will not be permitted to change the terms of a note or other written contract, it is equally well established that "a note and a contemporaneous article of agreement are frequently taken together as one agreement; the terms of the agreement expounding and limiting those of the note."

Of course it will be understood that such agreement can only affect and bind those who are parties to it or have notice thereof. The principles which govern negotiable paper, assigned before maturity and without notice, can have no application to this case, because the note is still in the hands of the payees. 2 Parsons, *supra,* 534. The case of

Farthing v. Dark is in many respects similar to the present one, and on the first hearing, as reported in 109 N. C., 291, it was considered that there was sufficient testimony of notice, or of facts calculated to put an assignee for value before maturity upon inquiry, that he would be affected by the equities existing between the original parties; but upon a more careful review of the testimony in that case, upon the rehearing, 111 N. C., 243, out of careful regard for the important principles affecting the transfer of commercial paper before maturity, it was held there was not testimony sufficient of facts to put the assignee upon inquiry, and therefore that it was error to have admitted testimony as to defenses which plainly would have been competent between the original parties.

Upon the issue submitted—"Is the defendant indebted to the plaintiffs?"—it would have been proper for his Honor to have instructed the jury that if there was such a contemporaneous written agree-
(122) ment as the defendant offered, and if defendant had never sold 1,000 rods of the fence, or if the same had not been sold by the manufacturing agents, Raper & Co., in the territory covered by the said agreement, so that the defendant had never received or become entitled to receive the commissions provided for in said agreement, the plaintiffs' cause of action had not accrued, and the response to the issue should be in the negative. There is

ERROR.

Cited: Bresee v. Crumpton, 121 N. C., 125; *Myers v. Petty,* 153 N. C., 468; *Martin v. Mask,* 158 N. C., 444; *Farrington v. McNeill,* 174 N. C., 422; *Hunter v. Sherron,* 176 N. C., 228.

W. S. FORBES ET AL. v. JOHN B. WIGGINS.

Records of Court—Impeachment by Parol Testimony.

1. The records of a court, professing to state judicial transactions of the court itself, cannot be impeached collaterally by parol testimony or otherwise, but must stand until attacked in a proper proceeding for the purpose and reformed by the court which made them. Therefore, in an action for damages, in which the title to land came in question, parol testimony, offered to disprove the correctness of a petition for partition and report of a commissioner who sold the land, was properly excluded.

2. It is not the province of or allowable for the jury to compare handwriting to determine whether an alteration has been made in an instrument or

record, and therefore, where no evidence had been offered to show that a description of land in a petition had been altered, the court properly refused to allow the jury to take the paper and compare an interlineation with the body of the petition to ascertain whether the description had been wrongfully changed.

ACTION to recover damages for trespass on lands and for perpetual injunction, tried at Fall Term, 1891, of GATES, before *Brown, J.*, and a jury.

The case hinged upon the title to "a tract of land covered by (123) the water of the Whitmel Stallings mill-pond," and whether it passed out of the heirs of Whitmel Stallings to defendant by proceedings for partition and sale thereunder, made in 1860, or to the plaintiff by subsequent proceedings in 1888 for same purpose, among the alleged heirs of Stallings, and sale thereunder in 1889. The petition in the proceedings of 1860 described the property as "a tract of land covered by water with a water-mill thereon," and the report of the commissioner recites the sale of "the mill and appurtenances described in the petition." The plaintiffs claimed under deed which describes the land as a tract "covering entire swamp except two acres belonging to mill," and insisted that only the mill and two acres passed to defendant by his deed. It was admitted that the mill-pond and the land covered by the water of the mill-pond was the only land in dispute.

In the course of the trial plaintiff offered to prove by a witness that he was present at the sale by the clerk and master in equity in 1860, and that a tract of land covered by water was not sold, but only the mill and two acres of land. This testimony was excluded on objection by the defendant that the proceedings in equity showing what was sold could not be impeached or contradicted collaterally in this action, and plaintiff excepted.

W. H. Manning, who, as clerk and master in equity, made the sale in 1860, was a witness for defendant, and upon cross-examination by plaintiff he stated:

"When I sold the land I sold a tract of land covered by water, with mill, and an acre of land at each end of the dam. I conformed to the language of the petition in describing the land. At the time of the sale the land comprising the mill-pond was covered with water."

To contradict this statement plaintiff offered an affidavit made (124) by Manning in 1890 as to what he sold as clerk:

"That he sold, on 17 May, 1860, as C. M. E., a certain water-mill, with two acres of land attached thereto, for partition among the heirs-at-law of Whitmel Stallings, and that Thomas J. Barnes became the purchaser at the sum of $330. He further deposed that said land was situated as follows, to wit, one acre at each end of the mill-dam."

This was excluded, and plaintiff excepted.

After the evidence was closed the plaintiff's counsel contended that the petition in equity of 1860 had been interlined wrongfully as to the description of the land, and that the interlineation was in a different handwriting from the body of the petition, and that the jury should take the petition and compare the handwriting of the interlineation with the body of the petition.

The court held that there was no evidence introduced that the description in the petition had been wrongfully altered, and declined to submit the petition to the jury (*Fuller v. Fox,* 101 N. C., 119). Exception by plaintiff.

At the conclusion of the testimony the court intimated that the jury would be instructed that, if they believed the defendant's evidence, the title which descended to Whitmel Stallings' heirs had been divested, and that the plaintiff could not recover, and that the jury should find the issues for the defendant.

The boundaries in the complaint cover more than the mill-pond, and the court considered that the title to the mill-pond had been divested.

Upon this intimation the plaintiff excepted, submitted to a nonsuit, and appealed.

Pruden & Vann and St. Leon Scull for plaintiff.
L. L. Smith for defendant.

(125) MACRAE, J. It seems to have been conceded that the question in this case was whether title to the land covered by the water of the Stallings mill-pond passed out of the heirs of Stallings by virtue of the proceedings for partition in the Court of Equity of Gates County in 1860 and the sale thereunder; for that if it did not so pass, the plaintiffs had acquired title to the same by subsequent proceedings and deed.

The first exception was to the refusal of his Honor to admit parol testimony to show that only the mill and two acres were sold, and not the tract of land covered by water, known as the mill-pond. The petition for partition, filed in 1860, describes the property as a tract of land covered by water, with a water-mill thereon, and the report of W. H. Manning, clerk and master to the court at the succeeding term, recites the sale by him of the mill and appurtenances *described in the petition.* Neither the deed nor any other part of the record than the petition and report, was sent up with the case on appeal, but no objection was made by the plaintiff to the want of the rest of the record. Taking that portion of the record, to which we have referred, as all that the parties desired us to examine, it could not be impeached in

this proceeding by parol testimony or otherwise. It must stand until attacked in a proper proceeding and reformed by the court which made it. *Reid v. Kelly,* 12 N. C., 313. Plaintiff's counsel in his brief, recognizing this principle, contends that while the record cannot be thus impeached, yet it may be explained. But it has been often said that a record speaks for itself; it cannot be explained. *Wade v. Odeneal,* 14 N. C., 423; *Kerr v. Brandon,* 84 N. C., 128; *Hopper v. Justice,* 111 N. C. 418.

This does not bring us in conflict with the principle stated in *Smith v. Low,* 27 N. C., 197, and the later cases upon the same line, such as *Walters v. Moore,* 90 N. C., 41, and *Curlee v. Smith,* 91 N. C., 172, where it is held that "the records of a court professing to (126) state the judicial transactions of the court itself cannot be contradicted by parol evidence or any other proof, for they import verity in themselves. But the acts and doings out of court of a ministerial officer, as the clerk in issuing writs, constables and sheriffs in making returns on warrants, writs, etc., although required by law to be returned into a court of record, are only *prima facie* to be taken as true, and are not conclusive evidence of the things they write; they may be contradicted by any evidence and shown to be false, antedated," etc. It was not contended, and it could not be successfully maintained, that the report of a commissioner to make sale under direction of the court, and which was necessary to be passed upon and confirmed by the court in order to give effect to the sale after the same had been filed and confirmed and made a part of the record, would be upon the same footing as the returns of sheriffs and constables, which need no order of confirmation to give them validity.

The second exception would seem to lose force for the same reason, as an attempt to vary the record by parol testimony.

We concur with his Honor upon the third exception. It might have been competent, as contended by the learned counsel for the plaintiff, to show that this was not the record of the court by proving an interlineation fraudulently made which constituted no part of the record; but it could not be done by simply handing the paper to the jury for them to compare the handwriting of the interlined words with that of the body of the petition. Such comparison of handwriting is not permitted to be done by the jury in the courts of this State. *Fuller v. Fox,* 101 N. C., 119.

AFFIRMED.

(127)

M. V. NORWOOD v. C. G. O'NEAL.

Distributive Share—Wrongful Payment by Administrator—Action for Money Had and Received.

Where money was paid by an administrator to one supposed to be entitled as a distributee "in full of his distributive share" and on his promise to refund "should any lawful claim come against the estate," no cause of action accrued to those who were rightly entitled, and the money can only be recovered by the administrator to whom the promise was made.

ACTION to recover money had and received to use of plaintiffs, heard before *Connor, J.,* at February Term, 1892, of WAKE, on appeal from the court of a justice of the peace. From the judgment defendant appealed.

Geo. H. Snow for plaintiff.
W. N. Jones for defendant.

BURWELL, J. It appears from the case on appeal that the administrator of one Elizabeth Perry paid to the defendant a certain sum of money, on 27 December, 1867, thinking that he was entitled to receive it as a distributee of that estate. His wife, a daughter of Elizabeth Perry, had died before the death of her mother, and the plaintiffs are his children.

When the defendant received this money he gave the administrator a receipt for the same "in full of his interest in said estate," in which he stipulated that "should any lawful claim come against said estate," he would "refund his proportionate part of said lawful claim." The promise of the defendant was to the administrator of Elizabeth (128) Perry, and no one but him or his successor can enforce that promise. The money was not received by defendant under any agreement, express or implied, that he would hold it for the plaintiffs. On the contrary, it was received expressly for his own use. And, whatever may be the rights of the plaintiffs against the administrator who has failed to pay to them the money they may be entitled to from their grandmother's estate, it seems very clear that they have no cause of action against the defendant, and his Honor should have charged the jury, as requested, that upon the evidence and the admissions the plaintiffs could not recover.

ERROR.

DAVIS & GREGORY AND N. A. GREGORY AND WIFE v. R. W. LASSITER, RECEIVER OF BANK OF OXFORD.

Injunction—Restraining Sale of Land—Exoneration of Surety's Land—Cancellation of Deed.

1. A *feme covert* who puts a lien on her land to secure the debt of another becomes a surety to the extent of the property so encumbered; but if the creditor agrees that funds belonging to the principal and coming to his, the creditor's, hands, shall be applied to the payment of the secured debt, but applies such funds in excess of the secured debt to the credit of other notes of the principal debtor, her land will be exonerated, and she will be entitled to have the deed canceled.

2. Where, in an action brought to cancel a deed of trust, an application was made on behalf of such a surety for an injunction restraining the sale of her land, and a well-defined issue was raised by the affidavits and counter affidavits involving the equity for exoneration and cancellation: *Held*, that it was proper for the judge before whom the motion was made to continue the injunction to the hearing.

ACTION by W. A. Davis and N. A. Gregory, trading as Davis (129) & Company, and N. A. Gregory and wife, against R. W. Lassiter, receiver of the Bank of Oxford, and B. P. Thorp, trustee, to cancel a deed of trust, and to restrain a sale of the land embraced therein, heard before *Connor, J.*, at Weldon, on motion for an injunction.

Davis & Gregory, in the course of their business as tobacco dealers, borrowed $5,000 from the Bank of Oxford, and the wife of Gregory conveyed her land in Northampton County to the defendant, B. P. Thorp, Trustee, to secure the payment of the note. Davis & Gregory were largely indebted otherwise to the bank and had consignments of tobacco with Arrington & Scott, of Richmond, who remitted to the Bank of Oxford, which, together with other payments made by W. H. Davis, the managing partner, were credited on the unsecured debts of Davis & Gregory. The plaintiffs allege that, at the time of the execution of the trust deed by Mrs. Gregory, it was agreed that the funds coming to the bank from the sales of tobacco in the hands of Arrington & Scott should be first applied to the payment of the debt secured by her land. This agreement the defendant receiver and the former president and cashier of the bank deny, and they allege that whenever remittances were made by Arrington & Scott, or other payments made by W. A. Davis, they were applied—sometimes in the presence and always with the knowledge and consent of said Davis—to the other and unsecured debts of Davis & Gregory.

The bank of Oxford was, by proper proceedings in Wake Superior Court, in 1892, placed in the hands of the defendant, Lassiter, as re-

ceiver, who in the course of collecting its assets, required the defendant, Thorp, to sell the land of the *feme* plaintiff which had been conveyed to secure the $5,000 note. A restraining order was granted at the instance of plaintiffs, and, on hearing the motion at Weldon on
(130) the affidavits and exhibits, the injunction was continued to the hearing, and defendants appealed.

A. W. Graham and R. B. Peebles for plaintiffs.
T. N. Hill and A. J. Reid for defendant.

BURWELL, J. The *feme* plaintiff, having put a lien on her land to secure a debt due from the firm of Davis & Gregory to the bank of Oxford, thereby became in effect a surety for the payment of said debt to the extent of the property so encumbered by her. *Shinn v. Smith,* 79 N. C., 310. It is distinctly alleged in her behalf that, at the time she imposed this burden on her separate estate, it was agreed between all the parties that the proceeds of the sale of certain tobacco (the property of Davis & Gregory) should be paid to the bank, and should be applied by it to the debt for which she had made her land liable, as above stated. It is not denied that the bank received these funds, and they were sufficient to pay off the debt. But the defendant produces evidence tending to show that there was no agreement on the part of the bank that these funds should be applied as the *feme* plaintiff insists they should have been, and says that they were rightfully applied on other indebtedness of the firm to the bank.

It thus appears that there is a *serious* issue of fact between the parties. If that issue is, upon the trial, found in favor of the plaintiffs, her land will be exonerated and she will be entitled to have the deed in trust canceled. So this case is brought clearly within the principle established by *Whitaker v. Hill,* 96 N. C., 2; *Harrison v. Bray,* 92 N. C., 488, and *Caldwell v. Stirewalt,* 100 N. C., 201, and the cases there cited.

NO ERROR.

Cited: Meroney v. B. & L. Assn., post, 845; *Weil v. Thomas,* 114 N. C., 201; *Harrington v. Rawls,* 136 N. C., 67; *Long v. Guaranty Co.,* 178 N. C., 509.

(131)

BARHAM & OWENS v. J. E. C. BELL.

Contract—Principal and Agent—Relation of States to Each Other.

1. Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party.

2. Even if it were settled (which is not the case) that an undisclosed foreign principal cannot maintain an action on a contract made by his agent with another, this rule would not apply where the parties are residents of different States of the American Union, for they are not foreign to each other in such a sense as to permit the operation of the rule stated.

APPEAL from *Shuford, J.*, at Spring Term, 1892, of CURRITUCK.

The plaintiffs, residents of the State of Virginia, brought their action for damages for breach of contract by the defendant, who as alleged, contracted to sell and deliver to them 2,000 bushels of corn at Gregory and Snowden stations, on the Norfolk and Southern Railroad, but delivered only about 500 bushels.

G. E. Stevenson, for the plaintiffs, testified on the trial that he was agent of the plaintiffs at the time of the contract, to buy corn for them in North Carolina, and that in March, 1891, he purchased from defendant 2,000 bushels of corn at 58 cents per bushel, 1,500 bushels to be delivered at Gregory's siding and 500 bushels to be delivered at Snowden's Station, on the Norfolk and Southern Railroad; that defendant agreed to deliver the corn in reasonable time and when plaintiffs could get cars for shipping it; he was to pay for the corn after it was put in the cars and before it left the stations; that defendant (132) delivered 512 bushels of corn at Snowden's Station, but failed to deliver the 1,500 bushels, or any part thereof, at Gregory's siding, though the plaintiffs twice had cars and bags and an agent at Gregory's siding to receive it, and had notified the defendant that the cars and bags were there; that the plaintiffs were anxious for the corn and were able, willing and ready to comply with their part of the contract, and that defendant knew for whom the witness was buying the corn at the time the contract was made.

On cross-examination, witness stated that he thought he told the defendant that he was buying for plaintiffs; that he was buying corn for himself, the plaintiffs and others before and after the time of the contract with defendant; that he paid the defendant for the corn delivered at Snowden's Station, and that he had made arrangements to pay for the corn to be delivered at Gregory by a draft on plaintiffs.

The defendant testified that he never sold plaintiffs any corn, but did sell to Stevenson corn to be delivered in the quantities and at the places stated by Stevenson, whom he told that the corn was not his own but belonged to other parties; that he sold the corn for those parties and notified them of the fact; that Stevenson did not inform him that he was buying for plaintiffs until some time after the sale, and that he, the defendant, told one of the plaintiffs in Norfolk that the corn did not belong to him, the defendant, but that he would do all he could to get the owner of the corn to deliver it; that he, the defendant, did not deliver the corn because it did not belong to him and the owners would not comply with the contract.

The court charged the jury: "That although G. E. Stevenson may have been the agent of the plaintiffs to buy corn for them, and may, in fact, have purchased the corn in controversy for them, yet if (133) he contracted on his own account and in his own name, and did not disclose his agency, nor the fact that he was contracting as an agent, and his agency was unknown to the defendant, the transaction was not binding on the defendant as a contract with the plaintiffs, but with G. E. Stevenson, and the plaintiffs cannot recover damages for a breach of the same, and if the jury find the facts so to be, they should answer the first issue in the negative, which was, 'Did defendant contract to sell plaintiff 2,000 bushels of corn?' "

To this charge plaintiffs excepted.

The court further charged the jury that "if defendant did not undertake to sell the corn as principal, or on his own account, but as the agent of others, the transaction would not be binding on him as a contract between him and the plaintiffs, but would be binding on his principals, and if his principals refused to comply with the same, they would be liable in damages for a breach of it, but he would not be liable, and the plaintiffs could not maintain an action against him, provided he had authority to make the contract, and if the jury find the facts so to be, they should answer the first issue in the negative."

Grandy & Aydlett for plaintiffs.
Pruden & Vann for defendant.

SHEPHERD, C. J. "It is a well established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party." Ewell's Evans on Agency, 379; Story Agency, 420; Wharton Agency and Agents, 403; 1 A. & E., 425.

It is manifest from the foregoing authorities that his Honor (134) erred in charging the jury that the plaintiffs could not sue upon the contract made by their agent, Stevenson, with the defendant. It is insisted, however, that inasmuch as the plaintiffs were residents of the State of Virginia, they were foreign principals and therefore not within the principle above mentioned. We do not regard it as entirely settled that a foreign principal cannot maintain an action upon such a contract; but, however this may be, it seems clear that, while the States of the American Union are in some senses foreign to each other, yet so far as concerns the reason of the rule asserted by the defendant, "they do not bear the same reciprocal relations as does one of these States to a transatlantic country." Wharton, *supra,* 793; *Taintor v. Pendergrast,* 3 Hill, 72; *Barry v. Page,* 10 Gray, 398. There must be a

NEW TRIAL.

Cited: Nicholson v. Dover, 145 N. C., 20; *Winslow v. Staton,* 150 N. C., 267; *Peanut Co. v. R. R.,* 155 N. C., 151; *Woodard v. Stieff,* 171 N. C., 83; *Williams v. Honeycutt,* 176 N. C., 103.

PHAMIE A. TAYLOR v. THOMAS W. TAYLOR.

Ejectment—Divorce a mensa et thoro—Tenant by the Curtesy Initiate—Effect of Act of 1848 (section 1840 of The Code).

1. Neither the act of 1848 (section 1840 of The Code) nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since the said act of 1848, such tenancy confers no rights which the husband can assert against the wife as respects her real estate acquired after that act took effect—the intention and effect of the act being to provide for the wife a home which she cannot be deprived of either by her husband or his creditors.

2. Where a wife has obtained a divorce *a mensa et thoro,* whatever rights the husband had in her lands are suspended until a reconciliation shall be effected, or until by her death he may become tenant by the curtesy consummate, and therefore she is entitled to recover from him the possession and use of her lands.

ACTION by plaintiff, who had obtained a divorce *a mensa et* (135) *thoro* against her husband, the defendant, to recover possession of her real estate and for an injunction restraining her husband from interference with her exclusive control and enjoyment of the same, tried before *Brown J.,* at Fall Term, 1892, of NASH.

From a judgment and decree in favor of plaintiff, defendant appealed. The facts are sufficiently stated in the opinion of the Court.

E. C. Smith for plaintiff.
F. A. Woodard, G. W. Blount and B. F. Taylor for defendant.

SHEPHERD, C. J. The plaintiff obtained a divorce *a mensa et thoro* on the ground that the defendant, her husband, was an habitual drunkard and had offered such indignities to her person as to render her condition intolerable and her life burdensome. The Code, sec. 1286. The defendant has no income out of which alimony can be granted, and he denies the right of the plaintiff to recover and enjoy the possession of her own land except upon the condition that she return to his conjugal embraces.

It is insisted by the defendant, that as the marriage and acquisition of the land were before 1868, the law in force at that time is alone applicable in determining his rights, and that these rights, having vested, cannot be disturbed by subsequent legislation. Granting this to be true, let us inquire into the interest of the husband in the wife's lands under the common law, as modified by the act of 1848, Rev. Code, ch. 56, sec. 1. At common law the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their (136) joint lives; but until the birth of issue both husband and wife must have done homage to the lord. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy *initiate,* and did homage alone. Coke Lit., 67 A. This estate, if he survived his wife, was called tenancy by the curtesy *consummate,* and inured to his benefit for life. Either as tenant by marital right or as tenant by curtesy *initiate,* the husband was entitled to the rents and profits and might lease or convey his estate, and it might be sold under execution against him. It was in reference to decisions made under the common law, as thus stated, that some of the language, which we find rather indiscriminately quoted in several of our later cases, was used; and in reading the decisions of the Court it is, therefore, important to keep in mind the very radical changes effected by the act of 1848. The act is entitled "An act making better and more suitable provisions for *femes covert,*" and was construed in the case of *Houston v. Brown,* 52 N. C., 161.

The Court said (*Pearson, C. J.*) that "its purpose was to adopt to a partial extent the principle of a homestead law and provide a *home* for the wife, leaving the rights of the husband unimpaired and unrestricted after her death. To this end the husband is not allowed to sell the land, or even to make a lease for years in her lifetime without her con-

sent, authenticated by deed and privy examination. Nor can his estate in the land be sold under execution. To this extent the power of the husband is restricted, but no further; and after her death there is no intimation of an intention to interfere with his rights according to the common law. . . . The sole object was to provide a home for her, of which she could not be deprived, either by the husband or by his creditors."

It has been intimated that the effect of the act was to destroy (137) the tenancy by curtesy *initiate* (*Jones v. Carter,* 73 N. C., 148), and in *Cecil v. Smith,* 81 N. C., 285, the Court, after speaking of the Constitution of 1868 and the case of *Manning v. Manning,* 79 N. C., 293, refers to the act and seems to treat the estate of the wife, under both laws, as a "separate estate" and the interest of the husband during coverture as "a mere occupancy with the wife."

In *Jones v. Carter, supra,* the Court inclined to the opinion that by depriving the husband of the right to dispose of the land for his life the act necessarily operated so as to prevent his acquiring an estate for life as tenant by the curtesy initiate; but it has been finally decided that neither the said act nor the Constitution of 1868 destroyed such tenancy, although the husband was stripped almost entirely of his common-law rights therein during the coverture. *Walker v. Long,* 109 N. C., 510.

In the case just cited the Court said: "By virtue of the act of 1848 and the further modification made by the Constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes till there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning, supra*) and the right to the curtesy consummate contingent upon his surviving her. . . . The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. . . . He has by the curtesy initiate a freehold interest, but not an estate in the property."

In *Jones v. Coffey,* 109 N. C., 515, a construction of the act of 1848 was essential to the decision of the case, and the Court said that "whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife as tenant by the curtesy (138) initiate which is subject to execution, and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land except as her properly constituted agent."

It is urged that this view is in conflict with *Morris v. Morris,* 94 N. C., 613, and *Walker v. Long,* 109 N. C., 510, and the cases cited

therein. These cases do but at the most decide that where the husband and wife are living together the former, after issue born, may sue alone for the possession of the wife's land (*Wilson v. Arentz,* 70 N. C., 670), or for the rents and profits thereof; and that the latter, in the absence of any claim on the part of the wife, is the owner of the same. *Morris v. Morris, supra.* No case has been decided under the act of 1848 to the effect that the husband, after compelling his wife by his misconduct to obtain a divorce *a mensa et thoro,* and being unable to pay alimony, has a right to the possession of the wife's land during the existence of the coverture; and it is to be observed that in the cases cited in the decisions referred to, as authority for the principle of the absolute ownership of the husband, the rights were acquired before the act of 1848. See *Williams v. Lanier,* 44 N. C., 30; *Halford v. Tetherow,* 47 N. C., 393; *Childers v. Bumgarner,* 53 N. C., 297. The other cases relate to the competency of the husband to serve as a juror (*S. v. Mills,* 91 N. C., 581), the rights of the husband after discoverture, his right to convey his interest during coverture (*McGlennery v. Miller,* 90 N. C., 215), and other questions not directly affecting the present controversy. In all of these cases the actual *decision* (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent ruling of this Court in *Jones v. Coffey, supra,* that under the act the husband has no right which he can assert *against* the wife in her real property. This appears to be in accord with the
(139) early declaration of the Court that "the sole object of the act was to provide for her a *home,* of which she could not be deprived either by the husband or by his creditors." *Houston v. Brown, supra.* Indeed, it would seem but reasonable that, if he is without power to lease the land even for a single day without her consent, he should not be permitted to deprive her of its possession by such violence or other misconduct as may render it impossible in the eye of the law for her to live with him in safety or comfort.

Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for admitting that a divorse *a mensa et thoro* cannot, as it is claimed, affect the property rights of the parties (*Taylor v. Taylor,* 93 N. C., 418), the defendant as against the wife had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture, or until a reconciliation, by his own misconduct.

Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848. As to

the ownership of her personal property, the right to reduce her choses in action to possession and his right to curtesy after her death, all of these remain as at common law; but we are of the opinion that whatever interest he may have had in the lands were, under a proper construction of the act, suspended as soon as by his misconduct he became unfit to associate with his wife. It was her land, and the object of the statute was to preserve it as "her home." At the time of his marriage he knew that if he offered her such indignities as to render (140) her condition intolerable and her life burdensome (Rev. Code, ch. 39, sec. 3) she would be entitled to a divorce *a mensa et thoro,* and he must be deemed to have contracted with reference to the law in this respect. He has forfeited his right to live with her, and it would be a strange construction of a statute designed for the preservation of her home that the misconduct of her husband can have the effect of turning her out of doors without alimony, and conferring upon him the exclusive possession of her land, unless she returns and submits to the same treatment, which a court has declared to be such as to entitle her to live separate and apart from him. Neither the case of *Taylor v. Taylor, supra,* nor any other that we can find in our Reports, has passed upon this question, and we are very sure that the view we have taken is in harmony with the spirit and reason of the act as well as the principles of humanity. We see no force in the argument founded upon section 13, chapter 39, of the Revised Code. According to this provision the wife, who is divorced from bed and board, is enabled to acquire, retain and dispose of all property she may thereafter acquire, whether real or personal, but it cannot have the effect of depriving her of land which she has previously acquired and which is protected by the statute.

So, taking either view of the law which we have presented, we are of the opinion that the plaintiff is entitled to the possession of the land exclusive of the husband until a reconciliation has been effected.

AFFIRMED.

Cited: S. v. Jones, 132 N. C., 1046; *Richardson v. Richardson,* 150 N. C., 554; *Joyner v. Joyner,* 151 N. C., 183.

(141)
BRADLEY FERTILIZER COMPANY v. JAMES A. TAYLOR.

Discovery—Disclosure Before Trial—Examination of Party—Attachment for Contempt—Commitment—Appeal.

1. A party to an action, by waiving objection to the time or place of making it, may give validity to an order that would otherwise be void, provided the court has general jurisdiction of the controversy; therefore, where a defendant, after assenting to an order made by a judge in a county other than that in which the action was pending but within the same judicial district, directing him to appear before a commissioner for examination, under sections 580 and 581 of The Code, appeared before such commissioner in obedience to the requirements of the order: *Held*, that it was too late to withdraw his assent voluntarily given to every part of the order when first made and by refusing to answer pertinent questions he made himself amenable, as for contempt, and liable to be attached and punished.

2. The power to commit to the common jail a person refusing to testify before a commissioner, as provided for in section 1362 of The Code, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment, and whose authority is defied.

3. The proceeding for the examination of a party to an action under sections 580 and 581 of The Code, being ancillary to the main action, the court has authority without his consent to make an order in a county other than that in which the action is pending, but within the district, committing him for contempt.

4. Where the judge directed the sheriff to commit one refusing to answer questions propounded to him in such examination to the common jail until he should be willing to answer: *Held*, to be error since it was an attempted delegation of judicial power to an executive officer, and allowed the sheriff to determine how his prisoner should sufficiently demonstrate his willingness to testify or what was such a compliance with the order as to justify his release.

5. In such case the order should direct the issuing of a *capias*, or that defendant be arrested and brought before the court to answer as for contempt.

6. An appeal from an order of commitment before trial of the main action will not be dismissed as premature.

(142) ACTION brought to and complaint filed at August Term, 1892, of HARNETT.

The pleadings show that in January, 1891, and again in January, 1892, the defendant signed contracts by which he was to receive from plaintiff "Sea Fowl" guano at a certain price, f. o. b. cars, Dunn, N. C., and on receipt of goods and invoice, or not later than 1 May of said year, the defendant Taylor contracted to execute to plaintiff his notes payable on 15 November and December of said years, and on 1 January

of the succeeding years. In each of said contracts it is provided that these notes are not to be considered as a settlement, but as an evidence of defendant's responsibility for the goods. In said contracts is also the following clause: "It is understood and agreed that said fertilizers, and the specific cash, checks, notes, accounts and all the proceeds from the same are held by you (defendant) in trust for us (plaintiff) as our (plaintiff's) property until all your notes given to us are paid in full." The plaintiff sues for $766.67, represented by the defendant's note payable 1 January, 1892, and given for goods obtained of plaintiff during 1891; also for $230 for goods obtained of plaintiff during 1892 by defendant, for which no note was given. The sworn complaint, after alleging defendant Taylor's indebtedness, recites that demand had been made upon him, as the trustee for plaintiff, for any of the fertilizers obtained from plaintiff in his possession or under his control, and the specific cash, checks, notes, accounts and all the proceeds from same which may have come into his hands or control by sales made of plaintiff's fertilizers since 29 January, 1891; that said demand had been ignored by defendant, and that plaintiff believes defendant still holds at least a portion of the fertilizers, or the cash, notes, etc., representing the proceeds of sales of same, though no information could be obtained in regard to same from said trustee, Taylor.

Among other things, plaintiff prayed that defendant be de- (143) clared trustee for it; that he be enjoined from disposing of the notes, securities, etc., which he held in trust; that the remainder on account, and that the proceeds of all notes, etc., when collected, be applied as credits on plaintiff's claim.

Upon hearing the sworn complaint used as an affidavit, the *Hon. H. R. Bryan, Judge,* issued an order on 10 August, returnable at chambers in Goldsboro on 29 August, restraining defendant from disposing of any of plaintiff's fertilizers or any of the proceeds of same, etc., and requiring defendant Taylor to file at the hearing a sworn statement of account as to his dealings in connection with all fertilizers received from plaintiff since 25 January, 1891 (date of contract of 1891). The hearing and restraints were continued by the court until 14 September, at Goldsboro, when and where the defendant appeared in person and by counsel. After hearing the affidavits and argument an injunction was granted, a receiver was appointed, and by *consent* and for the convenience of parties, plaintiff and defendant, James Pearsall, in lieu of the court, was appointed a commissioner to take in Harnett County the examination under oath of the defendant, James A. Taylor, and cause the said James A. Taylor to sign the same, and transmit, with all accounts, . . . to the clerk of Harnett Superior Court . . . before the Fall Term, 1892, said examination to begin on 22 September, etc.

The receiver was agreed upon between plaintiff and defendant, and it was further agreed that he should not be required to give bond. At the hearing the court did not require defendant to produce any account. There was no appeal from the order of 14 September, 1892. On 22 September, and again on 26 September, defendant appeared before Commissioner Pearsall, and was examined by plaintiff's counsel, when (144) defendant answered certain questions but refused to answer others, though the commissioner overruled his objections except one. The commissioner having transmitted to *Judge Bryan* all the questions asked and answers made, and reported the defendant's refusal to answer, and it further appearing by affidavits in behalf of the plaintiff that defendant had refused to answer questions and had not delivered to the receiver at least a portion of the property, as required to do by the order of 14 September, the court, on ..... October, 1892, issued an order requiring the defendant, James A. Taylor, to answer the said questions, and transfer to the receiver aforesaid the said mortgages and notes, or show cause before him at Goldsboro, on Tuesday, 18 October, 1892, at 12 o'clock m., why he should not be attached for contempt. This order was served on 10 October. Defendant still refused to deliver to the receiver the notes, etc., as specified in the orders, and did not answer the questions, and upon his failure to show cause for not so doing, the court, after reciting the facts, issued an order requiring the sheriff of Harnett County to arrest the defendant and commit him to jail, and there detain him until he complied with the order of the court by answering the questions and by delivering to the receiver the trust property or (suggested by counsel for defendant) a bond in lieu of said property.

From this judgment the defendant appealed.

H. McD. Robinson for plaintiff.
F. P. Jones for defendant.

AVERY, J. The statute (The Code, secs. 580 and 581) permits either plaintiff or defendant, upon notice, to subject the adversary party or person adversely interested in the action to examination before the clerk or judge, or a commissioner appointed by the court for the pur- (145) pose of eliciting evidence in support of his contention in the controversy. *LaFontaine v. Underwriters' Assn.*, 83 N. C., 132; *Vann v. Lawrence,* 111 N. C., 32; *Helms v. Green,* 105 N. C., 251. The parties to an action, by waiving objection to the time or place of making it, may give validity to an order that would otherwise be void if the court has general jurisdiction of the controversy. But consent will not

confer jurisdiction over the subject-matter of the suit upon a court forbidden or not empowered by law to take cognizance. *Harrell v. Peebles,* 79 N. C., 26; *Shackelford v. Miller,* 91 N. C., 181; *Harvey v. Edmunds,* 68 N. C., 243; *McNeill v. Hodges,* 99 N. C., 248. After assenting to the order made at Goldsboro the defendant appeared before the referee in obedience to its requirements at the place designated and the hour specified. It was too late then to withdraw his assent, voluntarily given to every part of it when first made. So that the result must be the same, were we to concede that but for such assent it might have been necessary to apply to the clerk or await the coming of the judge into the county. *Skinner v. Terry,* 107 N. C., 103; *Godwin v. Monds,* 101 N. C., 354.

If the commissioner had been appointed by the judge while sitting at chambers in Harnett County it would have been proper to have directed him to return the examination and papers under his hand and seal to the clerk of the Superior Court of that county before the next term of the court. The assent of the defendant to a change of *venue* did not otherwise change the nature of the proceeding, or dispense with the necessity for its return in the prescribed way to the proper court. Assigning for his refusal only the insufficient reason that the proceeding was to be so certified to the clerk, the defendant declined to answer in whole or in part many questions propounded with the palpable purpose of eliciting information, which, according to the appar- (146) ently correct construction of the contract contended for by the plaintiff company, might manifestly become indispensable in filing the pleadings or prosecuting the action. The notes and mortgages executed to secure the guano sold and the books showing accounts of sales were presumably in the possession of the defendant, and yet, if the parties had not, as the plaintiff insisted, abrogated the original contract, a just settlement could not be had until these papers should be produced, nor could the plaintiff know precisely what amount was due from defendant without access to them. The plaintiff had unquestionably the right to the aid of the court in compelling the production of all documentary evidence necessary or pertinent in the preparation of the complaint or the development of the case on the trial. *Comrs. v. Lemly,* 85 N. C., 341; *Austin v. Secrest,* 91 N. C., 214; *McLeod v. Bullard,* 84 N. C., 515. By declining to answer a series of questions, calculated and intended to elicit information that seemed essential to the prosecution of the suit, and which was nevertheless within his own exclusive knowledge, and failing to assign a more substantial reason than that given for his refusal, the defendant made himself amenable, as for contempt, and liable to be attached and punished, and the judge not only had the power

but it was his duty to maintain the authority of the court by compelling a compliance with its lawful orders. *LaFontaine v. Underwriters' Assn., supra.*

The commissioner was acting for the court and it was the duty of the defendant to answer proper questions propounded by him, just as though the examination had been conducted before the judge or clerk. The Code, sec. 1362, provides that "Commissioners to take depositions appointed by the courts of this State or by the courts of the States
(147) and Territories of the United States, arbitrators, referees and all persons acting under a commission issuing from any court of record of this State are hereby empowered to issue subpœnas, etc., and to administer oaths to said witnesses to the end that they may give their testimony, . . . and any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto, shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence." Whether the person (Pearsall) before whom the examination was had, had the authority to commit the defendant or not, it is certain that the power, if it existed, was not exclusive. The section quoted was in any view only directory, and the commissioner might invoke the power of the judge, whose authority had been defied when the witness declined to submit to an examination which had been ordered, even though, under the statute, he was himself clothed with concurrent authority to compel the witness to answer.

In *Comrs. v. Lemly, supra,* the clerk of the court issued a summons to the defendant to appear before him and produce certain books and papers, and though he, under the statute (C. C. P., 334; The Code, sec. 581), was clothed with precisely the same authority as the judge, yet, declining to exercise it, he allowed an appeal from his order overruling the defendant's objections, and left the court in term time to deal with the question of contempt. The order of the clerk was affirmed in the Superior Court, but no motion was made to attach the defendant. On appeal *Chief Justice Smith,* for the Court, said: "We should have some hesitancy in sustaining the appeal, but that the plaintiffs are deprived of important evidence to sustain their action and the cause may still
(148) proceed in making full preparations for the trial notwithstanding the appeal." In *S. v. Wylde,* 110 N. C., 500, the appeal was dismissed for a fatal defect in the prosecution bond, and the point really involved in *Vann v. Lawrence,* 111 N. C., 32, if the appellant had had a status in this Court, would have been whether it was necessary to obtain leave of court below to take the examination of an adverse party previous to the trial and before the clerk.

In the case of *Comrs. v. Lemly, supra,* the jurisdiction of this Court to review the order of the court below depending upon precisely the same question that is involved in that at bar, was drawn in question. The defendant had appealed from the order of the person before whom the examination was had, overruling his objection to producing the papers and making the disclosures required. The opinion in *Vann's case* must not be misunderstood as overruling *Lemly's case.* In *Guilford County v. The Georgia Company,* 109 N. C., 310, the appeal was from a ruling that the summons was not properly served, and the case is no more analogous to ours than *Vann v. Lawrence, supra.* In *Vann's case* the Court suggest a criterion for testing the question whether an appeal lies from any interlocutory order, which is perhaps the safest that we can adopt. It is involved in the question whether the delay in reviewing the ruling excepted to, till after final judgment, would probably subject either of the parties to irreparable loss by depriving him of protection to his rights, which a subsequent appeal could not afford. 1 Freeman Judgment, sec. 35. If a plaintiff is put to a disadvantage in the prosecution of a suit for want of information within the exclusive knowledge of the defendant and which he had a right to elicit, by the refusal of the latter to answer on examination, a ruling upon his exception at the close of a long contest conducted in the dark, that he can begin *de novo* and get the information essential to his success, is only less satisfactory than that of a defendant who has been sub- (149) jected to criminal punishment by reason of his own enforced disclosures on such examination before the appellate court informs him of his right to withhold them. We do not think it necessary to overrule the decision in *Comrs. v. Lemly,* which involved the precise point raised in this case, by dismissing the appeal as premature. It is unsafe to forecast future developments and declare that a question involving the most vital rights of parties may not arise on an inquisitorial examination, allowed before the enactment of The Code only in Courts of Equity and there guarded by well-defined rules limiting the scope of the interrogation for the protection of the rights of the person subjected to it.

While, therefore, as a general rule, this Court discountenances fragmentary appeals, yet, where the issue involved is whether a plaintiff shall compel a discovery of information peculiarly within the knowledge of the defendant and essential to the successful prosecution of a suit, in which he showed an apparent right to recover, as well as where the party being examined is about to be compelled to give evidence that will expose him to prosecution for crime or to allow the plaintiff to pry into his defense by eliciting information in no way essential to the support of his own cause, the ruling of the court below is always subject to

review, because it involves a substantial right. Cooley Const. Lim., marg. p. 374; Adams' Eq., pp. 2 to 4; Thompson on Trials, sec. 744; 1 Pom. Eq. Jur., sec. 201.

The commissioner, upon the refusal of the defendant to answer, sent the proceedings before him to the judge of the district at chambers, who at first returned them without action. Whereupon the plaintiff obtained an order that the defendant appear before the judge at chambers in Goldsboro and show cause why he should not be attached. On
(150) failure of the defendant to appear in obedience to this order, it was adjudged by the court at chambers that the defendant turn over the notes, etc., received for guano sold for the plaintiff company, and that the sheriff arrest the said defendant and commit him to jail till he comply with the order of the court.

Being brought in the prescribed mode before the commissioner, the defendant in refusing to answer unquestionably rendered himself liable to be punished as for contempt under the express provision of the statute. The Code, sec. 654 (4). But, if the subsection referred to had been omitted, courts of record are empowered by another subsection, section 654 (7), to punish as for contempt "in all other cases where attachments and proceedings as for contempt have been heretofore (before 1868) adopted and practiced in courts of record in this State, to enforce the civil remedies or protect the rights of any party to an action." Before that, either the Superior Court or a commissioner appointed by it, could punish for contempt a witness who declined to answer a proper question propounded to him on examination before the latter. Rev. Code, ch. 31, sec. 64; The Code, sec. 1362. The old statute is still unrepealed and in no wise conflicts with the later enactment. The power given carries with it, by necessary implication, authority to pursue the practice adopted before 1868, in so far as it had not been abolished by the Constitution or statutes, if necessary to the enforcement of the remedies and the protection of the rights relating to the conduct of the action. As we have shown, it was impossible to afford adequate redress or such relief as would have been given by a Court of Equity, on a bill of discovery in aid of another action at law, to the plaintiff without compelling the defendant to make disclosures of his dealing, as agent or trustee for the plaintiff, promptly, so as to subserve the purpose of shaping his pleadings and aiding in the preparation for trial. The
(151) cases (*Bynum v. Powe,* 97 N. C., 374, and *McNeill v. Hodges,* 99 N. C., 248), cited by counsel to sustain his contention that the order to attach for contempt was void, if made outside of Harnett County (where the action was pending), though within the judicial district, have no application to the point presented here. Admitting

that the authority of the judges to make interlocutory orders, outside of such county and without consent of parties, is restricted to cases where they derive their power from some provision of our statutes, it is nevertheless a well-established principle that a statutory provision, clothing a court with certain authority, implies a grant of power, in exercising it, to compel obedience to its decrees by promptly resorting to attachment, if necessary to do so, in order that the ends of justice may not be defeated by the delay incident to such defiance. If we concede the general rule, cases where the authority to make interlocutory orders is conferred by necessary implication as incident to the exercise of powers given, as well as where it is granted in express terms, constitute exceptions to it. *Parker v. McPhail, post,* 502; *Young v. Rollins,* 90 N. C., 125; *Pain v. Pain,* 80 N. C., 322. In substituting an examination for a bill of discovery the Legislature intended to expedite trials by allowing the plaintiff to acquire information in vacation, and prepare his pleadings in advance of an approaching term. The proceeding is ancillary to the main action, and, therefore, the spirit of The Code as well as the letter of the rule prescribed in *Parker v. McPhail* warranted the judge in making a proper order at Goldsboro within the district.

It was error, however, to direct the sheriff to commit the defendant to jail till he should be willing to answer, leaving him to determine how his prisoner should sufficiently demonstrate his willingness, or what was such a compliance with the order as to justify his release.
Such an order involved necessarily an attempted delegation of (152) judicial power to the executive officer of the court, and to that extent was void. *Strickland v. Cox,* 102 N. C., 411; *In re Deaton,* 105 N. C., 59. When the defendant refused to appear upon notice that he was required to show cause, he was in contempt and the order should have directed the issuing of a *capias,* which was the process issued by the Court of Equity under such circumstances (3 Blk., marg. pp. 443, 444), or, in consonance with the spirit of The Code, he could have made an order that Taylor be arrested and brought before him to answer as for contempt.

The judgement, therefore, should be so modified as to direct the sheriff to arrest the defendant, and him safely keep, so that he have him before the judge at chambers at a time and place specified, or before the court at next term, to answer as for contempt in disobeying the order. The defendant must pay the costs of the appeal.

JUDGMENT MODIFIED.

Cited: Harper v. Pinkston, post, 304; *Holt v. Warehouse Co.,* 116 N. C., 488, 490; *Bank v. Gilmer,* 118 N. C., 670; *Ledbetter v. Pinner,*

120 N. C., 457; *Herring v. Pugh,* 126 N. C., 860; *Moore v. Moore,* 130 N. C., 334; *Bank v. Peregoy,* 147 N. C., 297; *Cahoon v. Brinkley,* 176 N. C., 7; *Smith v. Wooding,* 177 N. C., 548.

(153)

*GRAY J. TOOLE v. LAURA TOOLE.

Divorce—Evidence—Admissibility of Declarations of Paramour.

1. The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce *a vinculo matrimonii,* tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to the declarations are admissible as evidence, and do not come within the prohibition of section 1288 of The Code.

2. A declaration made by a husband to his wife as follows: "Laura, I have told you before, and I tell you again, I don't want to catch Palmer at my house any more," made in the presence of a witness who testified to witnessing improper and suspicious conduct between the *feme* defendant and Palmer, the alleged paramour, was not such a confidential communication between husband and wife as is privileged, but a command uttered in the presence of another, and was competent testimony when offered by a third party in connection with testimony concerning the *feme* defendant's improper conduct.

3. In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the costs of a criminal prosecution against her alleged paramour was competent, not in any sense as a confession of her guilt, but as tending to show interest in and association with him, and as corroborating other testimony as to adulterous intercourse between the parties.

4. Error in admitting incompetent testimony is cured when the judge withdraws it from the jury and enjoins them not to consider it in making up their verdict.

*BURWELL, J., having been of counsel, did not sit.

ACTION for divorce, tried at February Term, 1892, of MECKLENBURG, before *Bynum, J.*

In connection with other testimony tending to prove directly criminal intercourse, as charged in the complaint, between one Palmer and the defendant, as well as their association under suspicious circumstances on other occasions, a witness, Laura Webb, was allowed to testify, defendant objecting, to a conversation between Palmer and defendant, in

which Palmer said: "When I was in Florida you sent for me to come back; now you have gone back on me for another man; you have something of mine that cost five dollars, and I want it." To which defendant (putting her head out of the window) answered: "I have misplaced it; go away." Whereupon Palmer replied: "You are a . . . lie; it is in that house and I want it; you have gone back on me for another man." She further stated that Palmer was in the street and defendant was in the house while they were talking. To the ruling that the testimony was competent defendant excepted. (154)

The witness Webb was allowed to testify (defendant objecting and excepting) as to what defendant swore on a trial against Lillie Graham for slander.

After the evidence was all in, and after the argument of counsel was concluded, one of plaintiff's counsel having insisted in argument that the fact that the defendant had, on the trial of the slander suit, first denied that she was in the cemetery with Palmer, and then admitted it, was a circumstance tending strongly to show that defendant's association with Palmer was not a proper one, his Honor proceeded to instruct the jury, and in doing so called their attention to the fact that he had admitted the evidence of what occurred at the trial of the slander suit, but upon further consideration he had concluded it was incompetent, and he now excluded it from the case. He further told the jury that they must not consider it, or allow it to have influence upon their minds or in any way to affect their verdict, and if they were not satisfied by a preponderance of the evidence, other than the evidence of what occurred at that trial, now ruled out, that the defendant had committed adultery with Henry Palmer, as alleged, it would be their duty to answer each of the issues "No."

Morris said he knew Palmer; had not seen him for three years; arrested him for stealing coal, and he got away. After this, defendant came to his house. (Plaintiff proposed to show by this witness what defendant said about Palmer. Defendant objected; objection sustained; objection withdrawn.) Witness stated defendant asked him if she could not pay the costs against Palmer and get the matter fixed up. She said something about this case between her and her husband; could not say she said she wanted Palmer for a witness.

The testimony that gives rise to the other exception is set forth in the opinion. (155)

From the judgment dissolving the bonds of matrimony, founded on verdict for the plaintiff, defendant appealed.

P. D. Walker for plaintiff.
Jones & Tillett for defendant.

AVERY, J., after stating the facts: On the trial of actions for divorce *a vinculo matrimonii* the adultery alleged cannot be shown either by the direct testimony of the parties or confession of husband or wife made to each other, or admissions in the pleadings. The Code, sec. 1288; *Steel v. Steel,* 104 N. C., 631. But the declarations of an alleged paramour, made to or in the presence of the *feme* defendant, indicating that improper familiarities had been or were about to be indulged in between them, and her reply to such declarations, fall neither within the prohibition of the statute nor the reason of the rule, and are therefore clearly incompetent. *Hansley v. Hansley,* 32 N. C., 506; Brown on Divorce, 59; *Pond v. Pond,* 132 Mass., 219; 2 Bishop Mar. & Div., 1417. The conversation between Palmer and the defendant, from its very nature, precluded the possibility that it was conceived in any collusive arrangement between the parties; and "the policy of the law, as affirmed in the express provision of the statute, is to exclude confidential communications between husband and wife, as privileged, and any declaration by either that apparently may have originated in a conspiracy between them to manufacture or furnish evidence sufficient to warrant a decree of divorce." *Perkins v. Perkins,* 88 N. C., 41. But where there is no danger of opening the door for collusive testimony, such suspicious conversations with an alleged paramour are clearly competent, especially in corroboration of other circumstantial testimony, or in connec-
(156) tion with other direct evidence tending to prove adulterous intercourse with the paramour. The unwarranted familiarity between the defendant and Palmer, which is shown by the conversation, tends to prove that improper relations had existed between them, and to corroborate other testimony as to criminal intercourse. 2 Bishop Mar. & Div., sec. 1374.

Confidential communications between husband and wife are privileged, and neither is compelled to divulge them upon the witness stand; but the testimony of Lillie Graham that she saw Palmer in the bedroom of the defendant, and at the trestle, in company with her, was competent in itself, and when considered in connection with the previous declaration of the plaintiff, made to defendant in presence of the witness, her disregard of his express wishes becomes material, because it makes her conduct appear much more suspicious. The language used by the husband about a week before, viz., "Laura, I have told you before, and tell you again, I don't want to catch Palmer at my house any more," was not a confidential communication between husband and wife, but a command, uttered in the presence of another, the disregard of which tended to prove her infatuation for Palmer. If, then, we should concede that confidential communications between husband and wife are not simply privileged as to them, but cannot be proven even by a third

person, and though neither husband nor wife is competent or compellable to testify directly as to the adulterous acts charged, according to a proper interpretation of the statute (The Code, sec. 588), this was not such a communication, and, being offered in connection with her conduct, and proven by a third person, was competent. But similar testimony was declared, when this case was heard on the former appeal (*Toole v. Toole,* 109 N. C., 615), to be competent as tending to show adulterous intercourse, as well as for the purpose of contradicting the witness, who testified that plaintiff had employed Palmer to stay with his family. It is therefore needless to discuss this point at greater (157) length.

If the testimony of Webb was incompetent, the error in admitting it was cured by withdrawing it from the jury and giving them the proper caution not to be influenced by it in making up their verdict. *Gilbert v. James,* 86 N. C., 244; *McAllister v. McAllister,* 34 N. C., 184; *Osborne v. Wilkes,* 108 N. C., 651. From the statement of the case on appeal it appears that the objection to the testimony of Morris was withdrawn, though the exception to its admission seems to have been assigned and to be now insisted on as error. It is not material, however, whether it can be insisted on or not. The request of the defendant to be allowed to pay the costs of a prosecution against Palmer was in no sense a confession of her guilt. It was but a circumstance tending to show interest in him and association with him, and to corroborate other testimony as to adulterous intercourse between the parties. *Hansley v. Hansley, supra.*

The statute protects the sanctity of the relation by preventing the disclosure of confidential communications between husband and wife, and all confessions of guilt by the parties are looked upon with suspicion, because of the temptation to resort to collusion, when, as is frequently the case, both parties desire to be released from the contract. But a different question is presented when the declaration of a *particeps criminis* to the accused party, and the conversation growing out of it, though amounting to an admission of criminality, is offered, or when a command of a husband to a wife is proved by a third party in connection with evidence of her disregard of such command at the instance of an alleged paramour. Whether under our statutes now in force admissions of guilt by either husband or wife, made to a third person, and under such circumstances as to preclude the suspicion of collu- (158) sion, would in any case be competent when disconnected with other evidence of familiarity or improper association, it is not necessary to determine.

For the reasons given, we think that there was

NO ERROR.

Cited: Kinney v. Kinney, 149 N. C., 326; *S. v. Randall,* 170 N. C., 761; *S. v. Walton,* 172 N. C., 932; *Stephenson v. Raleigh,* 178 N. C., 170.

EASTERN CAROLINA LAND, LUMBER AND MANUFACTURING COMPANY v. GEORGE H. FREY.

Injunction—Description of Land—Exceptions in Deed.

1. Where, in a patent to B., setting out the boundaries of a grant of land in the year 1795, there is an exception as follows: "within which boundaries there hath been heretofore granted 22,633 acres," the exception is not void for uncertainty if it can be shown what land was included in the excepted grant.

2. Where it is found as a fact that defendant's land, claimed under a patent to R., issued in 1716, is within the outer boundaries of the patent to B., under which plaintiff claims, and that plaintiff has never been in possession of any part of defendant's land, but has occupied certain portions of the land covered by the B. patent: *Held,* that the plaintiff's possession is constructive only up to the boundaries of the R. patent.

PROCEEDINGS for injunction, removed from Hertford and heard before *Hoke, J.,* at Fall Term, 1892, of DARE.

The court found the facts and rendered judgment as follows:

1. That plaintiffs are the owners of the lands known as the John Gray Blount patent, dated 7 September, 1795, in which said patent appears the following exceptions: "within which bounds there (159) hath been heretofore granted 22,633 acres, and is now surveyed to be granted to Mr. George Pollock, 9,600 acres, which begins at Samuel Jackson's northeast corner of 2,000-acre grant on Mill Tail Creek, and runs south and east for complement, as by the plat hereunto annexed doth appear, together with all woods, waters, mines, hereditaments and appurtenances to the said land belonging or appertaining." And such exceptions also appear in all the deeds by which plaintiffs claim and hold the lands included in said patent.

2. That defendants introduced and claim under a patent to William Rayfield, bearing date 19 October, 1716, which said land is in the outer boundaries of the Blount patent, and shows a line of deeds, beginning by deed of Evan Jones to Joseph Alexander, bearing date 15 December, 1766, and from said Alexander to defendants. The deed from Evan Jones to Joseph Alexander recites that he conveys the Rayfield patent lands to Joseph Alexander, but there is no deed from Rayfield to Jones exhibited.

3. That plaintiffs have occupied and possessed certain portions of the lands covered by the John Gray Blount patent continuously since 1873, but have had no possession or occupation of the lands covered by the Rayfield patent.

4. That in the last month, to wit, about 17 October, 1892, defendants, under their claims, have entered upon and cut timber on the Rayfield patent, and not elsewhere, and do not intend to cut or trespass on lands not included in the Rayfield patent, or not included in other patents older than the John Gray Blount patent, and of which plaintiffs have not had possession.

5. The court finds as conclusion of law that the plaintiffs have shown no title, real or apparent, to the lands of the Rayfield patent, or other patents in the outer boundaries of the Blount patent which antedate said Blount patent, and it is therefore adjudged that the restraining order heretofore issued be and the same is hereby dissolved (160) as to said lands included in the Rayfield patent and other patents included in the outer boundaries of the John Gray Blount patent, and which antedate said Blount patent, and as to the lands included in said Blount patent, and not included in said older patents, the restraining order is continued to the hearing of the cause.

From this judgment plaintiff appealed.

Busbee & Busbee for plaintiff.
Grandy & Aydlett for defendant.

CLARK, J. We concur with the court below that "the plaintiff has shown no title, real or apparent, to the land covered by the Rayfield patent, which antedated the Blount patent." The plaintiff claims under a patent issued to John Gray Blount in 1795, which contains this exception, "within which bounds there hath been heretofore granted 22,360 acres." The same exception appears in all the deeds which make up the plaintiff's chain of title.

The defendants claim under a patent for 480 acres issued to one Rayfield in 1716. It is found as a fact that the Rayfield land is within the outer boundaries of the Blount patent, and that the plaintiff has never been in possession of any part of the Rayfield land, though it has been in possession since 1873 of certain portions of the land covered by the Blount patent.

The possession by the plaintiff of any land embraced in its deed was constructive possession up to the boundaries thereof. But this deed had inside as well as outside boundaries. It expressly excepted and did not convey land within the outside boundaries which had already been granted when the Blount patent issued. The Rayfield patent had

(161) been granted previously, and though not expressly named in the Blount patent, *id certum est, quod certum reddi potest.* This case differs from *Waugh v. Richardson,* 30 N. C., 470, where an exception simply "of 5,000 acres" was held void for uncertainty. In *McCormick v. Monroe,* 46 N. C., 13, an exception, like the present, of "250 acres previously granted," failed, because such prior grant was not offered in evidence. But it was held it would have been good if such grant had been produced. *Melton v. Monday,* 64 N. C., 295. Here the prior grant to Rayfield was in evidence. Nor is it material that there is a link broken in the defendant's chain of title. The plaintiff has failed to show either possession of, or any title or color of title to, the *locus in quo.* It has no right to ask that the defendants be restrained from cutting timber thereon.

Nor can we give any weight to the suggestion that it will be difficult now to locate the lines of the Rayfield patent. It is found that the defendants have not cut and do not intend to cut or trespass on lands outside of said patent. The restraining order was sought to prevent cutting on the Rayfield land, and was dissolved so as to permit the defendants to cut thereon. If they cut over the line, they will do so at their peril, of course.

AFFIRMED.

Cited: Basnight v. Smith, post, 232; *Hemphill v. Annis,* 119 N. C., 518; *Lumber Co. v. Cedar Co.,* 142 N. C., 413, 422; *Bowser v. Wescott,* 145 N. C., 66.

(162)

M. W. BUFFKINS v. D. EASON AND WIFE.

Claim and Delivery—Title to Personal Property—Demand.

1. Where E. bought the interest of his partner, B., in a crop, and agreed that the title to the crop should be in B. until the purchase-money, expenses, etc., should be paid by the purchaser: *Held,* that the effect of the contract was to place the title to the entire crop in B. until the amount therein specified was paid, and hence that claim and delivery would lie.

2. The denial by answer of title alleged in the complaint dispenses with the necessity of proof of demand before action brought, and it was not error in the court below to withdraw, as immaterial, an issue previously submitted to the jury concerning such demand.

APPEAL at Fall Term, 1892, of PASQUOTANK, from *Hoke, J.*

The plaintiff and defendant were partners as farmers and stock raisers for the year 1890, upon terms set out in articles of partnership. In August of that year the defendant bought out the interest of the plaintiff in the crop and executed to him the following instrument:

I, D. Eason, do hereby agree to pay M. W. Buffkins or his heirs, on or before 1 January, 1891, two hundred dollars for his entire interest in all the crops which I, the said Eason, have raised on the Carver farm in the year 1890, except the grass and clover patch on house side; and the said Eason further agrees to pay all expenses for working said crop, and to pay all bills and accounts for which the said M. W. Buffkins may be bound for in the working said crop of 1890; and I further agree that the title to the said crop shall be in the said M. W. Buffkins until said purchase-money, expense bills and accounts are paid by the said Eason. Given under my hand and seal, this 28 August, 1890. (163)

D. EASON. [SEAL]

The purchase-money not having been paid, the plaintiff brought claim and delivery for the corn raised on the farm. The defendant denied the plaintiff's title and contended that he and plaintiff were tenants in common of the corn, and that claim and delivery would not lie.

Verdict and judgment for plaintiff. Appeal by defendant.

Grandy & Aydlett for defendant.
No counsel contra.

CLARK, J. We concur with his Honor that the force and effect of the contract set out was to place the title to the entire crop in the plaintiff until the amount therein specified was paid, and hence that claim and delivery would lie. The words, "I further agree that the title to the said crop shall be in the said Buffkins until," etc., admit of no other construction. They were so construed when the case was here before (110 N. C., 264). The case then went back because it did not appear that the execution of the contract of sale was proved. On this trial its execution was admitted by the defendant.

The allegation in the complaint of title to the corn was denied by the answer. The court, therefore, properly held that no demand was necessary, and committed no error in withdrawing an issue previously submitted as to whether or not there had been a demand made before action brought. *Vincent v. Corbin,* 85 N. C., 108; *Waddell v. Swann,* 91 N. C., 108; *Wiley v. Logan,* 95 N. C., 358.

NO ERROR.

Cited: Moore v. Hurtt, 124 N. C., 29; *Satterthwaite v. Ellis,* 129 N. C., 71; *Smith v. French,* 141 N. C., 4; *Shuford v. Cook,* 164 N. C., 48.

(164)

W. C. MARRINER & BRO. v. THE JOHN L. ROPER COMPANY.

Merchandise Orders—Rights of Assignees—Interpretation of Statute—"Face Value," Meaning of.

1. The act of 1889, ch. 280, which forbids the issuance of "nontransferable" tickets or scrip to laborers by their employers and requires all tickets or scrip issued to laborers for labor done to be "paid to the person holding the same *their face value* by the person, etc., issuing the same," does not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise.
2. The "value" of a thing is its general power of purchasing, the command which its possession gives over purchasable commodities in general, and "face value" is the value expressed on the face of the writing in the commodity in which it is payable.
3. Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed.

ACTION tried at Special Term, 1892, of WASHINGTON, before *Hoke, J.*, on appeal from a justice of the peace, before whom the plaintiffs, as transferees of the payees, brought their action to recover in money the aggregate value of certain orders issued since April, 1891, by the defendant corporation to the plaintiff's transferers for labor done and payable "in merchandise."

At the trial in the court below everything was admitted, necessary to bring before the court the construction of Laws 1889, ch. 280. It was in evidence that the plaintiffs had demanded the payment of said orders in money, but not in merchandise; and further, that the defendant had always been and at the trial was ready and willing to pay the orders in merchandise as called for, which plaintiffs refused to accept.

Upon an intimation by his Honor that plaintiffs were not (165) entitled to recover, the plaintiffs submitted to nonsuit and appealed.

L. C. Latham for plaintiffs.
C. L. Pettigrew for defendant.

MACRAE, J. Everything is admitted in this case to bring before the Court the question of the construction of Laws 1889, ch. 280, whether the assignee of the order or "scrip" issued by defendant, payable in merchandise, is entitled to require of defendant payment of the face value of the same in money instead of in merchandise. The language of the first section of the statute is as follows:

"That it shall be unlawful for any person or persons, firm or corporation, who employ laborers by the day, week or month, to issue in payment for such labor any ticket or tickets or other scrip bearing upon their face the words 'non-transferable,' or to issue tickets or scrip in any form that would render them void by transfer from the person or persons to whom issued, but all tickets or scrip issued to laborers for labor done shall be paid to the person holding the same their face value by the person or persons, firm or corporation issuing the same."

The operation of this statute was confined to certain counties named. By Laws 1891, ch. 370, its provisions were extended to the county of Washington and subsequently, as we are informed, made general.

It will not be necessary for us to address ourselves to the very serious constitutional question how far it is in the power of the Legislature to abridge the contractual rights of persons *sui juris,* or attempt to mark the lines of public policy by which personal liberties may be restricted. These questions arise in the consideration of particular cases, and must be met only when they are presented, and then with the mind of the Court disposed to uphold the legislation, unless it plainly (166) appears to be in disregard of the principles of liberty guaranteed in the Constitution and in natural right.

In the case before us it is simply a matter of interpretation of the meaning of words where there is little room for construction. It is fully admitted that the orders in question are transferable, and that the assignee has all the rights of the original holder or payee. The difficulty has arisen in the construction of the words, "shall be paid to the person holding the same *their face value.*"

If we may look to the caption of the act it reads: "An act to prevent manufacturers and others from issuing non-transferable tickets or other scrip in payment for labor done." The language of the act itself is large enough to relieve it from objections which would apply to class legislation, for it bears upon all persons, firms and corporations employing laborers. What is the meaning of "shall be paid . . . *their* face value?" Admitting the liberty of all persons *sui juris* to make contracts within the bounds of public policy, and therefore the right of the employee to accept and of the employer to give an order payable in merchandise for labor done, and the right of the payee to transfer and assign the same, do the words above quoted change the contract and authorize the assignee to demand and receive payment in money instead of in merchandise?

There is nothing in our view which would permit us to place the narrow construction contended for by the plaintiffs upon this statute so as to restrict the payment to money. The word "pay," while often in commercial transactions meaning satisfaction in money, has a much

wider significance in its ordinary usage, and includes satisfaction, discharge, compensation. The only meaning of "face value" which occurs to us is the value expressed on the face of the writing. This
(167) word "value" is a word more comprehensive than *price*. "By price of a thing, therefore, we shall henceforth understand its *value* in money; by the value or exchange value of a thing, its general power of purchasing, the command which its possession gives over purchasable commodities in general." These are definitions given by Mill in his Political Economy. The word is used in many senses which might be illustrated had we the time, but would serve no good purpose here.

If it had been the intention of the act to confine it to money it would have been easy so to express it. In a statute of the same character in West Virginia the words used are "face value in lawful money of the United States." Other words would have expressed the plain meaning of the Legislature if such had been its intention. We are not at liberty to supply words unless they are clearly necessary to carry out the spirit and intent of the statute.

In this instance the face value is that which is expressed on the face of a paper—so many dollars in merchandise. To this the transferee is entitled, and in case of refusal on the part of the drawer or maker so to pay, the damage is measured in money. *Hamilton v. Eller,* 33 N. C., 276; *Lackey v. Miller,* 61 N. C., 26. But *this,* according to the admissions, the defendants are ready to pay, and the plaintiffs refuse to accept. The contract, made between parties "able to contract," constitutes an agreement that the obligation may be discharged in merchandise, and the assignee, by force of the statute, is in no better position than the original payee. It will be observed that this statute is not only in derogation of common right, but it is highly penal in its nature, the second section making it a misdemeanor to violate its provisions. By all rules we must apply to it a strict construction.

Every man of full age and sound mind is at liberty to make
(168) contracts, and if made upon good consideration and without fraud he must be bound by them, unless by statutory provision he is disabled. And disabling statutes of that nature should be construed strictly for, though founded in policy and a just regard to the public welfare, they are in derogation of private rights. *Smith v. Spooner,* 3 Pick., 229. We refer to the above case, not because we have no authorities of our own to the same effect, but simply to use the language which is so obviously appropriate to the matter before us.

AFFIRMED.

J. L. WARD AND WIFE v. THE ALBEMARLE AND RALEIGH RAILROAD COMPANY.

Practice—Issues—Request for Special Instructions to Jury—When Not in Apt Time.

1. Where, in an action for damages caused by diversion of water from its regular channel, the plaintiffs expressly abandoned all claim for injury arising from the diversion and direction of surface water upon their land, and where the response to issues already submitted would necessarily negative the idea of damage by "surface water," it was not error for the judge to refuse to submit an issue presenting the question whether the water diverted (if any) was rain or surface water.

2. Requests for special instructions to the jury, as well as a request that the judge shall put his charge in writing, should be made at or before the close of the testimony. This is the limit of "apt time," as settled by established practice, and any relaxation of the rule is in the discretion of the trial judge.

3. A general exception to a charge as given by the judge below cannot be considered in this Court.

4. Damages caused by diversion of water are not covered by the statute (section 1943 *et seq.* of The Code), providing for the acquirement of rights of way by railroad companies.

ACTION tried before *Bryan, J.*, and a jury, at March Term, (169) 1892, of PITT, for damages alleged to have been sustained by the diversion of water on plaintiffs' land by the negligent construction of defendant company's roadbed.

Plaintiff, J. L. Ward, testified as follows in reference to the watercourses on his land, and the ponding of the water thereon by the embankment constructed by defendant, and the damages resulting therefrom: "Live in Bethel, Pitt County, on north side of Albemarle and Raleigh Railroad Company; runs through my farm; it was completed in 1882. My drainway was Sugg's branch. Before railroad built, water went right away—no trouble. Head of it 'Howell Thicks.' This is the source of the branch (objected to by defendant); it is several miles long; it is one and a half miles from my land. The branch empties into Grindall Creek one and a half miles below my land. Sugg's branch average width over 200 yards; clear open run all the way. Before railroad the water run in branch half the year. Depth of water, average, one foot, two feet or two and a half feet. Portion of branch canaled before war. Before railroad built, all canaled. Right at railroad eight feet wide; five feet above railroad. Through my land it was cut before railroad built; since then channeled out. Low grounds of Sugg's branch

200 yards wide. The land upon which I live extends above railroad along the branch half a mile; low grounds 200 yards wide; railroad embankment across low grounds about three feet high. Opening in embankment for water is nine feet. Before railroad built, the land overflowed hardly ever, and then it would run right off; would run off in twenty-four hours. Character of land along canal good land; before railroad, has made eight to nine barrels to acre. Some cleared two years before, worth forty dollars per acre; since railroad, has been overflowed in ordinary rains. The land is abandoned now. Thirty
(170) acres finally ruined. Thirteen acres badly damaged. Before railroad, Sharper's branch emptied below railroad and below my land into Sugg's branch; now empties above embankment 400 yards, half between my house and railroad. The course of branch changed by railroad. The waters of Sharper's branch, biggest part, right through my field. Have known Sugg's branch forty years. Half as much comes down railroad as comes down Sugg's branch. Mighty nigh as much from Sharper's branch comes down railroad as used to come down Sugg's; it overflows everything. Three years prior to 1889 the water overflowed embankment several times; one time washed. Water was twenty-four inches higher above railroad than below in 1886 and 1887. The land has been overflowed sometimes three times in one month. July and August the water is held up four, five and six days. Have seen it several times high enough for me to swim in and not touch bottom. Have lived on it forty years. The forty-three acres, real good land, average five barrels to acre above and below. . . . The land has been damaged twenty or twenty-five dollars per acre; now not worth over one dollar per acre. In 1882 they closed the gaps in the embankment, except the culvert. I complained to section master. He said he would report and have it attended to. The water ponded because culvert is not large enough. I know where Sharper's branch is. The railroad runs across it, and in some places runs up to it. It is called Sharper's branch and pocosin. It runs part of the time; no well-defined banks. The water that runs in Sharper's branch is rain water, it springs up out of the earth. It has two prongs; prong on south side don't reach railroad. Canal in Sugg's branch was finished up a few years before railroad built. I have seen canal overflow, but would run right off.

I think the culvert is the same size as canal. The culvert is but
(171) nine feet. I had no trouble from Sharper's branch before railroad was built. They cut a ditch and throwed the water right down on my field from Sharper's branch. I don't know that railroad cut any ditch or hauled any dirt outside of their right of way. They cut into my ditch. They cut nothing outside of one hundred feet from center of roadbed. Railroad runs through my land about 500 yards."

The defendant introduced no testimony. The evidence in the case was closed about 5 o'clock Thursday afternoon, 31 March, the counsel for the defendant asking the court to take a recess until morning, 1 April, so that they might prepare for the argument. Court then adjourned until 9:30 o'clock Friday morning, 1 April. Some time during the day Thursday the judge asked the attorneys on both sides to hand him their prayers for special instructions, if they intended to ask any, during the evening.

The defendant on Friday morning, just before the argument commenced, made a request of the court to put the charge in writing, and after one of the counsel for the defendant had spoken and one of the counsel for the plaintiffs had been speaking some time, handed up a request for twenty-five special instructions. The judge remarked that the request was not in apt time. The instructions were refused.

After the jury was empaneled and before the testimony began, upon motion of defendant to dismiss the second and third causes of action stated in amended complaint for noncompliance with "Rule 24" of the Supreme Court, in regard to the alleging of two or more causes of action, the plaintiffs were allowed to reform their complaint by writing out their allegations referred to in said causes of action by sections. After the testimony was closed the plaintiffs took a nonsuit as to third cause of action stated in the complaint, and asked the (172) court to withdraw the sixth issue, as originally proposed, from the jury, which was done. Exception by defendant.

The issues which were tendered by the plaintiffs and submitted to the jury by the court, with the exception of the sixth, which was withdrawn under exception by the defendant, were as follows:

1. Are the plaintiffs the owners of the land described in the complaint?

2. Is Sugg branch a natural course?

3. Is Sugg branch an artificial drainway for the plaintiffs' land?

4. Did the defendant company negligently construct its road across Sugg branch so as to cause the waters thereof to pond back upon the lands of the plaintiffs?

5. Did the defendant company negligently divert watercourses and turn the same upon the plaintiffs' land?

6. Did the defendant company negligently divert surface water and turn the same upon plaintiffs' land?

7. Were the embankments and drains, as constructed by defendant, necessary and proper for the safe transportation of passengers and freight?

8. Were the plaintiffs guilty of contributory negligence?

9. What damage, if any, have the plaintiffs sustained?

The defendant tendered the following issue: Was the water diverted by the defendant, if any, rain or surface water? Which issue the court declined to submit.

The defendant excepted to the issues as submitted and to the refusal of his Honor to submit the issues tendered by the defendant.

The judge charged the jury as follows, in writing, he having been requested by defendant to put his charge in writing:

If you believe the evidence you will answer the first issue
(173) "Yes."

A watercourse is a stream of water, including banks, bed and water. It is not necessary to prove that water flows continuously. It may be dry at certain seasons of the year, but at some period of the year must be a stream flowing in a well-defined channel. If the jury believe from the evidence that Sugg's branch at some season of the year had a well-defined existence as a stream by nature, and not by artificial means, and there was water to run in it, although it might be dry in a dry time, it would be a natural watercourse, and you should answer the second issue "Yes"; otherwise, "No."

Occasionally sudden and temporary outbursts of water in time of heavy showers and freshets, filling up low places and overflowing adjoining lands, would not be a watercourse unless such water flows off through a well-defined channel which it has worn for itself.

If the jury believe from the evidence that a canal or ditch has been dug so as to collect the waters of Sugg's branch and carry them off of the plaintiffs' land, thereby draining the same, you will answer this issue "Yes"; but if this water is not carried off by means of some ditch, canal or drain constructed by man, then it is not an artificial drainway, and you will answer the third issue "No."

As to the fourth issue, and the main one in the case, it is admitted that the road embankment was there and that a culvert was constructed; defendant says it was sufficient and that it did all the law requires.

Now what is the truth of the matter? The court instructs you that it was the duty of the defendant to have constructed its culvert so that it would carry off the water under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as
(174) are ordinarily expected. If the defendant so constructed its culvert that it was not sufficient to carry off the waters having a natural outlet there, and such as was brought down by defendant's ditches under ordinary circumstances, that is, the usual rainfall, even such rains as are occasional, and if by reason of the insufficient culvert the plaintiffs' land was overflowed or the water ponded back on it, you should answer this issue "Yes."

If the jury believe from the evidence that the culvert is sufficient to carry off all of the water having a natural outlet there, and such as was brought down there by the defendant's ditches, except in cases of extraordinary and unusual rainfall, then the defendant was not negligent, and if the overflow was the result of extraordinary rainfall you should answer this issue "No." How this may be is a question for you.

We now come to the fifth issue. If the jury believe from the evidence that the defendant diverted watercourses (the legal definition has been given you), that is, turned them from their natural course without providing sufficient canals or ditches to take the water off, and the same was thrown upon the land of the plaintiff, you will answer the issue "Yes."

But if defendant did divert watercourses and at the same time provided sufficient canals or ditches upon its right of way, or elsewhere, to take all the water from such watercourses except that from an extraordinary and unusual rainfall, then you must answer this issue "No."

As to the damages of the ninth issue, the party suing for an injury received can only recover such damages as naturally flow from and are the immediate result of the act complained of. The jury should be governed by the evidence before them, and they have no right to indulge in conjectures or speculations not supported by the evidence; as to the damages the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in (175) connection with their own knowledge, observation and experience in the business affairs of life, say what the damage is to the land.

Damage to the land may be estimated by comparing the productiveness when flooded with its productiveness when not flooded, the loss of the crop may be considered, etc. . . .

The burden of the seventh and eighth issues is upon the defendant, and the court instructs you that there is no evidence to sustain them.

The sixth issue having been withdrawn, all the evidence bearing upon it you will disregard.

To which charge the defendant excepted.

The jury returned a verdict finding the first, second, third, fourth and fifth issues in the affirmative, and the seventh and eighth in the negative, and assessed the plaintiffs' damage at $860, for which amount, together with costs, the court gave judgment. From this judgment the defendant appealed.

Don Gilliam for plaintiffs.

John L. Bridgers and James E. Moore for defendant.

MACRAE, J. "The defendant excepts to the issues as submitted and to the refusal of his Honor to submit the issue tendered by the defendant." The only issue tendered by the defendant which appears in the case is, "Was the water diverted by the defendant, if any, rain or surface water?" The sixth issue, which was withdrawn when the plaintiff took a nonsuit upon his third cause of action, was, "Did the defendant company negligently divert surface water and turn the same upon
(176) plaintiffs' land?" The plaintiffs had abandoned all claim for damages by reason of the diversion and direction of surface water upon their land.

His Honor, in his charge upon the second and fifth issues, carefully defined "a watercourse" and directed the attention of the jury to the difference between it and mere surface water; he repeatedly used the word "watercourse" and excluded all idea of surface drainage or extraordinary rainfall. It would not have simplified the matter for the jury if he had presented the question in the alternative by submitting another issue, when the response to those already submitted necessarily negatived the idea of damage by surface water.

The second prayer of defendant was given in substance and nearly in words, and expressly excluded surface drainage, and the fifth prayer, which was given likewise, excluded drainage caused by excessive rainfall. His Honor might have confined the issues to the fourth, fifth, eighth and ninth, as they comprehended all the others. We have examined them all under the defendant's exception. They presented every phase of the mutual altercation between the parties with great particularity, and with the instructions upon them an ordinary juror could not fail to understand the matters in dispute.

The testimony was concluded on Thursday evening, and on Friday morning just before the argument began the defendant's counsel requested his Honor to put his charge in writing. By a reasonable construction of section 414 of The Code the judge was entitled to have this request made at the close of the testimony on the preceding evening, and if it had then been made he would have had the opportunity to prepare his charge during the recess of the previous night. By the statute this request should be made at or before the close of the
(177) evidence. In order to comply with the request, as he did, it must have been necessary for the judge to write out his charge, in which every word must have been carefully weighed, during the progress of the argument, at which time he ought to have been free to listen to the counsel in order that he might, upon the better reason, have been able to make such change as he deemed proper in the prepared instructions before delivery. But after one counsel for defendant had spoken, and while counsel for plaintiffs was in the midst of his remarks,

the counsel for defendant handed up a request in writing for twenty-five special instructions, some of them long and most of them requiring careful consideration. It will be remembered that some time during Thursday the judge asked the attorneys on both sides to hand him their prayers for special instructions, if they intended to ask any, during the evening, not confining them to the strict rule to prevent them from doing so at or before the close of the evidence. Let us consider, and we trust that it will be accepted by the profession as final, whether these prayers were presented in apt time.

The statute (The Code, sec. 415) is silent as to the time when they should be presented. "Counsel praying of the judge instructions to the jury shall put their requests in writing, entitled of the cause, and sign them." Early after the adoption of the Code of Civil Procedure it became necessary to consider this section with relation to the time at which prayers for special instructions should be presented, and in *Powell v. Railroad,* 68 N. C., 395, it was intimated that at the close of the evidence was the proper time, in order that the judge might consider them while arranging or preparing his charge; and at the same time it was said that this Court did not mean to be understood that counsel should be prohibited, even after the judge had finished his instructions, from calling his attention to any point which he had (178) inadvertently omitted, or his instructions as to which were not well understood. These suggestions have been generally followed in their spirit, though not in the strict letter thereof, until they have become a recognized rule of practice in our courts. "It was evidently intended that the judge should have time to consider and prepare his instructions, and it is unjust and unfair to him to present a prayer for special instructions at so late a period in the trial as to leave him insufficient time to consider them." *S. v. Rowe,* 98 N. C., 629.

In *S. v. Barbee,* 92 N. C., 820, specially relied upon by defendant's counsel, where the counsel presented a written prayer after the case had been given to the jury, with the request to the judge that if the jury should return and ask for further instructions he would give this as prayed, it was said: "In the order of procedure in the trial the defendant had the right and the reasonable opportunity to ask the court to give such instructions before the issue was given to the jury; after that the court might in its discretion give or decline to give them. . . . The defendant must ask for special instructions, as of right, in apt time in the progress of the trial, else the court may decline to give them."

The reason for the adoption of this time—the close of the evidence—as the limit of apt time is so clearly stated by *Mr. Justice Clark* in *Posey v. Patton,* 109 N. C., 455, and in *Merrill v. Whitmire,* 110 N. C., 367, where all the cases bearing upon it are cited, that we might well have

contented ourselves with a simple reference to the last-named cases. But in deference to the earnest argument of the learned counsl we have deemed it proper to say this much. It should now be considered that in justice to the trial judge the practice in this respect is settled and left in his hands. Administered as our Superior Courts are, there is
(179) no danger of too strict an adherence to the rule; the inclination is in a liberal spirit to give to counsel every opportunity consistent with the business principles upon which our system of procedure is based, but there must of necessity be some recognized general rule of practice as to apt time by which the profession may understand their rights and duties in the premises.

It has also been repeatedly declared by this Court that a general exception to the charge as given cannot be considered. *McKinnon v. Morrison,* 104 N. C., 354; *Hopkins v. Bowers,* 111 N. C., 175, and the numerous cases there cited. There was no exception to the charge of his Honor upon the first issue, "Are the plaintiffs the owners?" etc., and there was no exception to the evidence offered upon this issue. We think his Honor was warranted in giving the instruction.

We did not understand the question of jurisdiction to have been seriously pressed by the learned counsel for defendant in his argument. We are of the opinion that the damages here claimed are not covered by the statute providing for the acquirement of rights of way by railroad companies (section 1943 *et seq.* of The Code). There is

NO ERROR.

Cited: Craddock v. Barnes, 142 N. C., 99.

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(180)

*E. M. NADAL ET AL. V. E. E. BRITTON, ADMR. OF R. W. KING, ET AL.

DEFENDANTS' APPEAL

Fraudulent Conveyance—Participation in by Beneficiary—Evidence.

1. Where, in an action to set aside a conveyance made by a deceased husband to a trustee to secure a debt due to his wife, the validity of the debt was not attacked, but it appeared that, at the time of the execution of the deed, the husband was embarrassed by debt and had little or no property except that so conveyed, and that creditors other than she knew nothing of the debt due from the trustor to his wife or of

*SHEPHERD, C. J., did not sit on the hearing of this case.

the deed in trust to secure the debt: *Held*, that these facts constituted no evidence of a fraudulent intent on the part of the trustor or knowledge of such intent on the part of the wife.

2. Where the *bona fides* of a debt was admitted, and the execution and delivery of a deed of trust to secure the same were established, and there was no evidence that the beneficiary withheld the deed from registration to bolster the credit of the trustor, the fact that such deed was not registered for nearly four years after its execution and delivery was no evidence that the beneficiary, the wife of the trustor, had any knowledge of the fraudulent intent of her husband in making such conveyance.

3. In such case (the principal consideration for the execution of the deed being money then loaned by the wife to the husband) the burden was upon the plaintiffs to prove not only the fraudulent intent of the grantor, but also the fact that his wife, the secured creditor, had knowledge of that intent and participated in it.

4. While a statement made to two of the plaintiffs by the wife, during her husband's last illness, that he owed nothing and that, therefore, it would not be necessary to sell the house and lot, which she wished her daughters to have, might perhaps, tend to show that her debt was fictitious, yet, the debt being admitted, it did not tend to show that she had knowledge that her husband, when he borrowed her money and secured its repayment by a deed in trust, was contriving to hinder or delay his creditors, present or future.

5. Where the jury found that a debtor with the intent to hinder and delay his creditors, conveyed land to a trustor to secure a debt due to his wife in part for money then borrowed from her, but did not find that the wife had knowledge of such fraudulent intent, it was error to render judgment setting aside the conveyance and against the wife for costs.

*SHEPHERD, C. J., did not sit on the hearing of this case.

ACTION tried at February Term, 1892, of WILSON, before (181) *Bryan, J.*, and a jury.

It was in the nature of a creditors' bill against the administrator of Dr. R. W. King, deceased, Peter Hines, trustee in a deed of trust, and Mrs. King, the widow of the deceased, and sought to set aside the deed of trust made by the decedent in February, 1887, and recorded (after his death) in January, 1891, to secure a debt due from the decedent to his wife.

The issues submitted to the jury were as follows:

1. Was the trust deed executed and delivered?

2. Was said deed made with intent to hinder, delay or defraud creditors?

To each of the issues the response was "Yes."

Among the allegations of the complaint filed by plaintiffs was one which stated that the defendant, Carrie J. King, wife of the decedent, "holds a note against her deceased husband dated 15 February, 1887, for $2,500, with 8 per cent interest from date."

The validity of the said debt was not attacked, but it was alleged that the deed to secure the same was not delivered to the trustee or recorded until after the death of Dr. King, and that the trustee had no knowledge of its existence, and that if ever made it was made with the intent to hinder, delay and defraud the creditors of Dr. King, it being his purpose, understood by the wife, to retain possession of the property as a basis of future or continuing credit; that the failure for nearly four years to record the deed, the secrecy of the transaction, the lack of the knowledge of its nature by the subscribing witness and the trustee, the embarrassed circumstances of the trustor, who owned little or no
(182) other property, his remaining in possession and holding himself forth to the world as the owner of the property, free from encumbrances, and incurring debts on the credit of such ownership, were all badges of fraud which raised a presumption of fraudulent intent, etc.

For the plaintiffs, S. M. Warren, register of deeds of Wilson County, testified as follows: "I am register of deeds of Wilson County. I registered the trust deed in controversy in book 29, at page 256. This deed was brought to my office at first by Mrs. Britton, daughter of the defendant, Mrs. King, and the intestate, 21 January, 1891. Dr. King, the intestate, died 19 January, 1891. I did not record the deed when Mrs. Britton brought it to me, but she took it off with her, and in about one hour Mr. Peter Hines, the trustee therein named, brought it back, and I thereupon recorded it. He waited for me to record it and took it with him."

For the plaintiffs, Dr. C. E. Moore testified: "I was a partner of Dr. King (the intestate). The partnership continued for three years, ceasing in January, 1889. I am subscribing witness to the instrument. I did not know anything about its existence until after his death I was called upon to prove it. I must have signed it as attesting witness, for the signature shown me is in my handwriting."

Several of the plaintiff's creditors testified that they knew nothing of the deed of trust until after the death of Dr. King.

The defendants introduced by consent a written statement from Dr. J. N. Bynum to the effect that he, as executor of Fannie Hines, paid to Mrs. King, shortly before the execution of the trust deed, the sum of $2,061.10 and several notes, particularly one against Dr. King himself for $306.

(183) Mrs. Carrie J. King, a witness for the defendants, testified as follows:

"I am Dr. King's widow. I knew of the deed of trust. In December, 1886, the doctor seemed to be worried one night. I asked him what was the matter and he said that he owed money for the building of the house we lived in. I told him I would loan him the money when Dr. Bynum

paid it to me, provided he (my husband) would give me a mortgage to secure it. I turned over to him something over $2,000 in cash, and the note that Mrs. Hines had against him and that had been turned over to me by Dr. Bynum. I also canceled a note that I held against him for something over $300. Dr. King asked me whom I preferred to write the mortgage, and I told him Mr. William Dortch, of Goldsboro, N. C., and that I wanted Uncle Peter Hines for trustee. Mr. Dortch wrote the mortgage and came to the house with the doctor. Mr. Dortch handed me the mortgage and said, 'This is your property.' I said, 'I suppose I must now have this registered.' He said, 'Just as you please; it is good for ten years without registration unless you sign another, which is registered first.' Supposing from what he said that the deed was good without registration I did not have it registered. Mr. Dortch took the mortgage and said he wanted to see Mr. Hines, the trustee, and that he (Mr. Dortch) would send the mortgage back to me. I received the mortgage a few days after that from Mr. Dortch through the mail. I put it in a tin box with my private papers and kept it there ever afterwards. The morning after Dr. King's death Mr. Britton, who knew of the existence of the mortgage, came after the mortgage to have it registered. Mr. Britton saw it next day; I gave it to him. Mrs. Britton brought it back to me. I did not keep the mortgage unregistered to enable him to defraud creditors. I heard the testimony of Mr. Rowland and Mr. Oettinger. The time was in 1885. I did not tell them that Dr. King owed nothing. Since the execu- (184) tion of the trust deed I never told them that Dr. King owed nothing. Mr. Rowland was there in his last sickness, not Mr. Oettinger. I never told any one that Dr. King owed me nothing."

Cross-examination: "I was married 8 November, 1859. He bought the place during the war. I don't know when he started to rebuild. I let him have $325, and he said that would do. He said, 'Here is $5,000 in accounts, and I don't expect to collect $500.' He owed, he said, about $3,000. After the doctor went to the Legislature his practice fell off. He was not able to do much. He went to the Legislature two years before he died; he said he wrote prescriptions but did not furnish much medicine."

Defendants here tendered to the plaintiffs for cross-examination Mr. Britton, Mrs. Britton, Mrs. Breeden and Mrs. Carraway.

Mr. Britton was alone cross-examined as follows: "I am a son-in-law of Mrs. King. I told her the mortgage must be recorded. I was looking among Dr. King's papers. I knew it ought to be recorded, and my counsel told me it ought to be recorded. As for Dr. King's personal estate his accounts amount to about $17,000. Some of them are good; I should think I ought to collect twenty per cent. I am Dr. King's

administrator. I had a number of claims presented to me. I neither assented nor objected to them. I have not filed any inventory. I filed a petition to sell land to make assets."

Upon cross-examination witness said: "I looked among Dr. King's papers for the insurance policy. We found it on top of his desk. Mrs. King said she had the last receipt on the policy. Looking among her papers she said, 'Here is my mortgage.' I told her that it ought to be registered, and that my attorney had so advised. She said she
(185) could see no use in registering it; that Mr. Dortch said any time in ten years would do."

Upon the verdict the court rendered judgment against the defendant, Carrie J. King, for the costs of the action, and ordered the deed of trust to be delivered up and canceled and the land to be sold, etc., from which judgment the defendants appealed.

J. E. Woodard, G. W. Blount, Batchelor & Devereux and Jacob Battle for plaintiffs.

T. W. Strange for defendants.

BURWELL, J. The plaintiffs are creditors of R. W. King, deceased. The defendants are his administrator and his widow. The object of this action is to have declared fraudulent and void a deed in trust made in February, 1887, by R. W. King to Peter Hines, to secure a debt of $2,500 due from him to his wife. This deed was not registered till January, 1891, a few days after the death of King.

Two issues were submitted to the jury (neither party objecting thereto) as follows:

1. Was the trust deed executed and delivered?

2. Was said deed made with intent to hinder, delay ar defraud creditors?

His Honor instructed the jury to answer the first issue in the affirmative. To this the plaintiffs did not except.

The fact that R. W. King was justly indebted to his wife at the date of the execution and delivery of this deed, to the amount thereby secured to her, does not seem to have been controverted. Indeed, the amended complaint makes no allegation that the debt was not a just one and avers that "the defendant, Carrie J. King, holds a note against her deceased husband, dated 15 February, 1887, for $2,500." The *bona fides*
(186) of the debt and the execution and delivery of the trust deed are thus established.

His Honor was asked to charge the jury that there was no evidence upon which they could find that the deed was made by King with intent to hinder, delay or defraud creditors. This he refused to do, and the defendants excepted. In this we think he erred.

When the indebtedness was admitted or uncontroverted proof thereof was produced, the burden rested on the plaintiffs to prove the fraud that they alleged. *Hodges v. Lassiter,* 96 N. C., 351; *Brown v. Mitchell,* 102 N. C., 347. And it was incumbent upon them to prove not only the fraudulent intent of the grantor, but also the fact that the defendant (Mrs. King) had knowledge of that intent and participated in it, and his Honor so told the jury. We do not think there was any evidence from which the jury could have inferred either that King's intent was fraudulent or that his wife had knowledge of such intent, if it existed.

If it is true that the husband was embarrassed by debt at the time of the execution of the note and the deed in trust to secure it, and that he had little or no property except the house and lot conveyed, these facts, far from establishing any wicked or fraudulent intent on his part, seem rather to show that he was acting most proper and commendably when he delivered to his wife this security for the repayment of the money he then borrowed from her. If the debt was an honest one, as is conceded, the securing of it under the circumstances was most commendable.

Nor does the fact that the other creditors of King, witnesses on the trial, knew nothing of the debt due from him to his wife, and of the deed in trust to secure that debt, tend at all to establish the fraudulent intent or the guilty knowledge. It was no part of their duty to tell to others their resources or liabilities.

Nor can the withholding of the deed from registration, from (187) its date in 1887 to 1891, be considered as evidence of a fraudulent intent under the circumstances of this case. The *bona fides* of the debt being admitted, and the execution and delivery of the deed in trust being established, this fact lost its significance. From the circumstance that the deed was not registered when it was executed, nor for so long a time afterwards, the jury might have inferred, if that question had been before them, that the debt was fictitious. But, in the absence of any allegation to that effect, and after the execution of the deed had been fully proved, the failure to promptly register her deed was of no importance in this controversy, as there was no evidence at all that, while so withholding her deed from registration, she induced any one to give credit to her husband upon the faith of his being the absolute owner of the property on which she now claims her lien. Indeed, it seems from the testimony of two of the plaintiffs that she did not know that her husband owed any debts, for she told them, when they visited him in his last illness, that he owned nothing, and therefore it would not be necessary to sell the house and lot which she wished her daughters to have. This expression might perhaps tend to show that her debt was fictitious, but the debt being admitted it certainly does not tend to show

that she had knowledge that her husband, when he borrowed her money and secured its repayment by a deed in trust, was contriving to hinder, delay or defraud his creditors, present or future.

But the jury have only found that the deed was made with intent to hinder, delay or defraud creditors; they have not found that Mrs. King had knowledge of that fraudulent intent. Without such a finding by the jury no judgment should have been rendered against her.

NEW TRIAL.

Cited: Howard v. Early, 126 N. C., 175; *Smith v. Moore,* 142 N. C., 298.

(188)

*E. M. NADAL ET AL. V. E. E. BRITTON, ADMINISTRATOR OF R. W. KING, DECEASED, ET AL.

PLAINTIFFS' APPEAL

Fraudulent Conveyance—Decree Setting Aside, and Ordering Sale—Right of Holder of Bona Fide Debt to Share in Proceeds of Sale.

Upon the setting aside as fraudulent and void, a deed in trust made by a decedent to secure a debt due to his wife, the land therein described will be sold and the proceeds will constitute assets for payment of debts, under section 1446 of The Code, and if the wife is a creditor she will be entitled to her share of the same. In such case it was not error to provide for her claim (which was not attacked) in the decree setting aside the conveyance and establishing the claims of the attacking creditors.

* SHEPHERD, C. J., did not sit on the hearing of this case.

ACTION tried at February Term, 1892, of WILSON, before *Bryan, J.,* and a jury.

The action was in the nature of a creditors' bill against the defendant Britton, as administrator of Dr. R. W. King, Peter Hines, trustee, and Carrie J. King, widow of the decedent and the holder of the note secured by the deed of trust, and sought to set aside the deed as fraudulent.

Upon issues submitted to the jury they found that the deed of trust was made by the decedent to hinder, delay and defraud his creditors. Judgment was rendered for the cancellation of the deed and for a sale of the land. The *bona fides* of the debt secured by the deed not having been denied, it was admitted with the other debts proved against the decedent to share in the proceeds of the sale. From the judgment in this respect the plaintiffs appealed.

For a full statement of the nature of the action, evidence, etc., (189) see report of case between same parties, *ante,* 180 (defendants' appeal).

J. E. Woodard, Batchelor & Devereux, G. W. Blount and Bunn & Battle for plaintiffs.

T. W. Strange for defendants.

BURWELL, J. We find no error in the ruling from which the plaintiffs have appealed. If the deed in trust made by Dr. King to secure the debt due to his wife is, at the instance of the plaintiffs, declared fraudulent and void, the real estate therein described will be sold and the proceeds will constitute assets for the payment of his debts. The Code, sec. 1446. If his wife is a creditor she will be entitled to her share of those and other assets.

NO ERROR.

D. J. AARON v. THE PIONEER LUMBER COMPANY.

Service of Summons on Corporation.

To make service of process on a corporation a copy of the same must be left with the officer of the company to whom it is delivered or read, as provided by sections 217 and 840 (Rule 15) of The Code.

ACTION begun before a justice of the peace for the recovery of $200 due by note from the defendant to the plaintiff. The constable in the township in which the defendant company had its principal place of business, and where its officers all resided, served the summons by handing it to the president and secretary and treasurer of the defendant company, which was read by them and returned to the con- (190) stable. These were the only officers of the company. There was no copy of the summons left with any officer or other person representing the company. On the return day of the summons the defendant did not appear, and on the hearing the justice rendered judgment against the defendant and in favor of the plaintiff for the sum of $200 and costs.

Two days after the rendition of the judgment the defendant, upon affidavit and notice to the plaintiff, moved the justice who rendered the judgment to set aside said judgment on the ground that there had been no service of the summons. On the hearing of said motion the justice refused to set aside the judgment, and the defendant appealed to the Superior Court, at the November Term, 1892, of WAYNE, *Bryan, J.,*

reversed the decision of the justice and set aside the judgment on the ground that there had been no service of the summons on the defendant, and rendered judgment against the plaintiff for costs. From which judgment and rulings the plaintiff appealed to the Supreme Court.

W. C. Munroe for plaintiff.
W. R. Allen for defendant.

Per Curiam. No copy of the summons having been delivered to the officer of the defendant corporation upon whom the constable attempted to make service of that process, no proper service was made, for The Code, sec. 217 provides that service of a summons on a corporation must be by delivering a copy, and by section 840 (Rule 15) this applies to the service of process issued from justice's courts.

AFFIRMED.

(191)

BESSIE W. KELLOGG v. THE GAY MANUFACTURING COMPANY.

Practice—Premature Appeal.

An appeal from a motion to dismiss an action is premature and will not be entertained.

MOTION to dismiss an action for want of service of summons, heard before *Brown, J.*, at Fall Term, 1891, of GATES.

Motion refused, and defendant appealed.

Pruden & Vann for plaintiff.
L. L. Smith for defendant.

Per Curiam. This is an appeal from the refusal of a motion to dismiss an action. The appeal is premature, and cannot be entertained. *Mullen v. Canal Company, ante,* 109.

APPEAL DISMISSED.

P. D. BROADWELL v. C. B. RAY.

Certiorari—Appeal—Dismissed

Where a *certiorari* has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the Superior Court returns that appellant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed.

ACTION by P. D. Broadwell against C. B. Ray. From the (192) judgment defendant appealed, and material evidence having been omitted from the case as settled, he was granted a *certorari* to complete the record. To this the clerk returns that defendant failed to perfect his appeal or to pay fees for a transcript of the record.

For prior report, see 111 N. C., 457.

W. H. Pace for petitioner.
S. G. Ryan for respondent.

Per Curiam. A *certiorari* was granted in this case, 111 N. C., 457. To this the clerk of Wake Superior Court returns that the defendant failed to perfect his appeal or to pay fees for a transcript of the record, though demanded.

The appeal must be dismissed. *Bailey v. Brown,* 105 N. C., 127; *S. v. Nash,* 109 N. C., 822.

APPEAL DISMISSED.

L. D. GULLEY v. W. J. Y. THURSTON.

Judgment Lien—Mortgage—Homestead.

The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtor's allotted homestead, and therefore, the proceeds of the sale of such land should be applied first to the payment of the judgment debt.

EXCEPTIONS to a homestead return, made upon executions issued upon certain judgments in favor of L. D. Gulley against W. J. Y. Thurston, heard at November Term, 1892, of JOHNSTON, before *Bryan, J.*

(193) When the case was called for hearing the defendant, W. J. Y. Thurston, did not insist upon his exception to the return that the homestead allotted to him was insufficient in value, and it was agreed that the allotment of the appraisers should stand as to the value of the real estate.

Upon its being made to appear to the court that Ashley Horne was a mortgage creditor of W. J. Y. Thurston to the amount of about fourteen hundred dollars ($1,400), and that the mortgage included all the homestead allotted to said Thurston (except a small tract of three acres of the value of one hundred and seventy-five dollars, concerning which no question arises), and also the excess of the homestead, amounting to eighty acres; and it being requested by the defendant, without objection by the plaintiff, that questions concerning the application of the proceeds of the execution sale of the excess should be determined by the court, so that the execution creditor or the mortgage creditor could safely bid at the execution sale, upon motion of the plaintiff and without objection, Ashley Horne was made a party defendant.

The following are the facts:

1. The plaintiff was the owner of three judgments against the defendant, W. J. Y. Thurston, amounting, with interest, to about nine hundred and forty ($940) dollars, which judgments were duly docketed in Johnston County in July, 1881, and upon the executions thereunder this proceeding issued. That upon such executions the homestead of said Thurston was allotted to him in one tract of land of three acres, valued at one hundred and seventy-five ($175) dollars, and about eighty acres parcel of another tract of about one hundred and sixty acres, which said eighty acres was valued at eight hundred and twenty-five ($825) dollars, leaving an excess above the homestead of about eighty acres.

(194) 2. That the land in which said homestead was allotted is situated in Johnston County; that after the docketing of said judgments as aforesaid, the said Thurston and wife executed a mortgage deed to the defendant, Ashley Horne, by which was conveyed the land embraced in the said homestead of about eighty acres and the said excess, the mortgage being executed to secure a debt therein named, now about $1,400, and which was duly registered in Johnston County in 1882, subsequently to the docketing of said judgments. That said excess is insufficient in value to pay said judgments and said mortgage debt.

Upon the foregoing facts the court declared and adjudged that in any sale of the excess under execution issued upon said Gulley judgments the proceeds of said sale, in excess of the expenses of sale, should be applied—

1. To the payment of the mortgage debt of the defendant, Horne, as far as the same would go in exoneration of the homestead of the defendant, Thurston, and that the remainder of such proceeds, if any, should be applied to the judgments of plaintiff, Gulley.

To so much of said order as decreed that the proceeds of sale under execution should be applied, first, to the payment of the mortgage of the defendant, Horne, the plaintiff, Gulley, excepted and appealed.

R. O. Burton for plaintiff.
F. H. Busbee for defendant.

BURWELL, J. The question presented to us by this appeal is *not* what distribution of a fund arising solely from a sale of the homestead land shall be made to a "homesteader," a judgment creditor, having a lien on the land allotted—the enforcement of which is by law postponed till the termination of the homestead rights—and a mortgagee, whose mortgage was registered after the docketing (195) of the judgment. That was the matter brought to the attention of this Court in *Leak v. Gay,* 107 N. C., 468-483, and the somewhat difficult problem of adjusting the rights of the claimants to the fund then in court was further complicated by the fact that the homestead land, sold, as it had been, so as to pass a good title thereto, had brought much more than one thousand dollars, the limit established by the Constitution, and that all parties seem to have agreed that the homesteader should have the present value of his homestead right absolutely in lieu of land or money to be *used* while his homestead rights continued, and when those rights ended to be applied to the liens thereon according to their priorities.

The question which *is* presented by this appeal is, Which has a superior lien on land of the debtor *outside of his allotted homestead,* his judgment creditor whose judgment has been duly docketed, or his mortgagee whose mortgage was executed and registered after the docketing of the judgment? A bare statement that under the law (The Code, sec. 435), the docketing of a judgment creates a lien on all the land of the debtor in the county where docketed from the date of the docketing, and that a mortgage is a lien only from the registration, would seem to be a sufficient answer to this question. It cannot be that the act of a debtor and a third party can impair or destroy the rights of the judgment creditor as to the excess over the homestead.

We will not feel called upon to discuss the case of *Leak v. Gay, supra,* as it was insisted by the counsel of the parties to this appeal that we should do, until we have again before us a controversy like that, over a fund arising from a sale of an allotted homestead. It should be borne

in mind, however, that expressions in the opinion filed in that case as to the right of a judgment creditor and a junior mortgagee are
(196) to be read and considered in the light of the *facts* of the case then to be determined.

The judgment of the court should have directed the sheriff to sell the excess over the homestead and apply the proceeds on the execution in his hands in favor of the plaintiff.

REVERSED.

Cited: Vanstory v. Thornton, post, 204; S. c., 114 N. C., 380; *Weil v. Casey,* 125 N. C., 361; *Clement v. King,* 152 N. C., 460.

(197)

C. P. VANSTORY v. A. G. THORNTON.

Evidence—Homestead, Assignability of—Lien of Docketed Judgment—Mortgage Lien—Priorities.

1. It is not error on the part of the judge below to refuse to submit an issue offered by a party upon whom the burden rests, where there is no evidence to support it.

2. In an action by one member of a firm against another, a receiver was appointed. He was directed to pay a judgment against the firm out of the partnership assets in his hands. He failed to do so: *Held,* that the judgment might be enforced against the individual property of the partner at whose instance the receiver was appointed, it not appearing that the failure of the receiver to satisfy the judgment was due to any act or default of the creditor.

3. A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which is pertains, and no act of the debtor can change or impair the creditor's rights under such lien.

4. The homestead right, estate, or "advantage" is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of an ordinary senior judgment creditor until that right, estate or "advantage" terminates.

5. A judgment debtor who, subsequent to the docketing of the judgment and with the joinder of his wife, if married, mortgages land, including his homestead, and fails to pay the judgment and mortgage debts, loses his land outside of the homestead because it must be devoted to the discharge

of the judgment lien; he also loses his right to use the homestead land, because by proper deed he has assigned it to the mortgagee who acquired all his rights to the homestead estate or "advantage."

6. Therefore, where, in an action to which a judgment creditor, junior mortgagees and the judgment debtor were all parties, and the purpose of which was to foreclose the mortgages as well as to reappraise and reallot the homestead by reason of improvements having been put thereon making it worth much in excess of $1,000, it was consented that the land should be sold and the fund distributed by the court according to the respective claims and liens of the parties, and it was further conceded that the land would sell for more than $1,000, and that the excess over that sum should represent what the land outside of the homestead would have brought if the homestead had been actually allotted and the excess sold: *Held*, (1) that such excess must be applied on the judgment, which was docketed prior to the registration of the mortgages; (2) that the sum of $1,000, which represents the newly allotted homestead, remains subject to the lien of so much of the judgment as may not be satisfied by the application of the excess over $1,000 of the proceeds of the sale, but it cannot be applied to the satisfaction of such lien until the termination of the debtor's exemption rights; (3) until such termination the fund representing the homestead will be invested under direction of the court, and the interest accruing thereon will be applied on the mortgage debts according to the priority of liens, and any remainder of the *corpus*, after paying off the judgment, will be used to pay off any balance remaining due on the mortgages. (CLARK, J., dissenting.)

7. The court having no rule by which to determine the present value in cash of exemption rights, the present division of a fund representing such exemption, if desired, must be attained by arbitration or agreement among the claimants.

APPEAL from *Winston, J.*, at November Term, 1892, of CUMBERLAND.

This is the same cause tried on demurrer, (110 N. C., 10). The demurrer having been overruled, the defendant put in an answer; and certain other persons, to wit, H. W. Lilly and R. T. Gray, executors of E. J. Lilly, W. P. Wemyess, H. W. Lilly and C. L. Bevil, (198) and W. A. Vanstory, all mentioned in the answer as mortgagees of defendant, Thornton's, homestead property, sought to be subjected to the plaintiff's debt, were, on their motion, allowed to come in and were made parties defendant, and adopted the answer of Thornton.

The following issues were submitted to the jury:

1. Is the plaintiff the owner of the debts sued on?

2. What is the value of the property sued for?

On submitting these issues his Honor remarked that if, in the progress of the trial, additional issues were deemed proper by the court, they also would be submitted.

Plaintiff's debt was a judgment rendered in his favor against J. A. Lambeth and A. G. Thornton, in an action brought by Thornton against Lambeth to close a partnership between them, and for an account and

settlement, in which action C. P. Vanstory, a creditor of the firm, was admitted to be made a party defendant, and recovered judgment for $978.20, with interest from 1 April, 1887, which was duly docketed 6 May, 1889, in Cumberland Superior Court. In the same action judgment was rendered in favor of Thornton against Lambeth for $595.56. Neill McQueen, sheriff of Cumberland County, had been appointed receiver in the cause, to take charge and collect the partnership effects—and in favor of Vanstory it was adjudged by the court:

"That C. P. Vanstory recover of said partnership of J. A. Lambeth and A. G. Thornton, trading as J. A. Lambeth, the sum of $978.20, with interest from 1 April, 1887. The receiver will pay over to C. P. Vanstory the sum of money in his hands not in excess of costs and expenses."

Thornton v. Lambeth, 103 N. C., 86.

(199) McQueen died in office without complying with the order of the court, so that Vanstory received no part of the partnership funds, neither has he realized anything under an execution issued upon his judgment.

A. G. Thornton, defendant in present case, during the progress of the trial offered evidence tending to prove that at the time of Sheriff McQueen's death there was in his hands, as receiver, after deducting all charges, the sum of $575.75 of partnership funds applicable to plaintiff's judgment, to which Vanstory was entitled under the order of the court, and the defendant A. G. Thornton asked his Honor to submit a third issue to the jury arising under the first article of the answer, viz.:

3. Whether the plaintiff's judgment was satisfied in whole or in part, and if in part, to what amount?

The contention of defendant was that, whether that sum was received or not by Vanstory, yet, being in the hands of the receiver, under the control of the court, and ordered to be paid upon the Vanstory judgment, there was a satisfaction of the judgment *pro tanto* and an exoneration of the defendant's homestead to that extent.

His Honor dissented from this view of the law, refused to submit the proposed issue, and excluded the evidence as immaterial.

Defendant A. G. Thornton excepted.

The jury responded to the first issue, "Yes," and to the second issue, *"More than the homestead."*

A new trial was asked for by the defendant Thornton on account of alleged error, as to which exception was taken and noted on the trial.

Motion for new trial refused. Judgment signed and entered of record, conforming to the precedent in *Leak v. Gay,* 107 N. C., 468. To this judgment the defendant Thornton excepted, claiming that after

(200) the payment of the costs and mortgage debts, no part of the

funds arising from the sale of his homestead should be paid to the plaintiff, but the balance should be paid to him. Exception overruled, and defendant Thornton appealed.

The plaintiff also excepted to the judgment, and appealed. His exception is set out in the opinion.

The following is the judgment appealed from:

This cause having been brought to a trial before the judge and a jury at the present term, and the jury having found that the house and lot in Fayetteville, claimed as a homestead by the defendant, is worth more than $1,000 in value:

It is considered and adjudged by the court that said property be exposed to public sale by commissioners hereinafter appointed by the court, for cash, the homesteader electing cash instead of land, after four weeks advertisement in the Fayetteville *Observer,* at the courthouse door in Fayetteville, who shall apply the proceeds of the sale to the payments of the debts of the defendant, A. G. Thornton, as mentioned in the pleadings, in the following order of priority, after paying—

First—The costs of this cause.

Second—The mortgage debt due the estate of E. J. Lilly, deceased, to his executors, R. T. Gray and W. H. Lilly, to secure note of A. G. Thornton, payable to E. J. Lilly, for $400, dated 30 September, 1889, payable sixty days after date.

Third—The mortgage debt due the estate of E. J. Lilly, deceased, to his said executors, to secure note of A. G. Thornton, payable to E. J. Lilly, for $100, with interest from 4 October, 1889, at eight per cent.

Fourth—The mortgage debt due the estate of E. J. Lilly, deceased, to his said executors, to secure note of A. G. Thornton, payable to E. J. Lilly, for $100, payable thirty days after date—3 September, 1889.

Fifth—The mortgage debt payable to W. P. Wemyess, transferred to H. W. Lilly, to secure note of A. G. Thornton, for $60, (201) dated 16 December, 1889, payable twenty-five days after date, secured by mortgage of same date by A. G. Thornton and wife, Elsie.

Sixth—The mortgage debt due to H. W. Lilly, to secure note of A. G. Thornton to H. W. Lilly for $625, dated 26 February, 1890, due twelve months after date, with interest after date at eight per cent. Mortgage executed by A. G. Thornton and wife, Elsie, 26 February, 1890. Proved and registered 27 February, 1890.

Seventh—The mortgage due to C. L. Bevil and W. A. Vanstory, to secure note of $311, dated 27 May, 1890, due 1 October, 1890.

Eighth—After payment of the foregoing mortgage debts the commissioners shall reserve for the defendant A. G. Thornton his homestead interest to the amount of $1,000, should there be so much left,

the annual interest upon which sum to be paid to him during life, and to his widow, should his wife survive him, during her life and the minority of their youngest child.

Ninth—The judgment of plaintiff against the defendant docketed 6 May, 1889, for $978.20, with interest from 1 April, 1887, and costs thereon, $14, should there be so much left.

Tenth—The residue, if any, to be paid to defendant.

R. P. Buxton and Thomas H. Sutton are appointed commissioners of sale. Commissions five per cent.

The respective parties are allowed to bid to the extent of their respective interests without paying cash, except so far as will meet the costs and prior claims in the order mentioned.

T. H. Sutton for plaintiff.
R. P. Buxton for defendant.

(202) BURWELL, J. This case comes to us upon the appeal of the plaintiff, who is the judgment creditor, and of the defendant Thornton, who is the judgment debtor. The mortgagees, who have come into the action of their own motion, since it was last before the Court (110 N. C., 10), and have been made defendants and have adopted the answer of the defendant Thornton, did not appeal.

We will first consider the refusal of his Honor to submit the issue tendered by Thornton relative to the alleged payment, in whole or part, of plaintiff's judgment.

This issue was tendered by him with the evidence which he insisted tended to establish that such payment had been made. He did not contend that he could produce other evidence bearing upon it. It would have been an idle thing to submit such an issue, the burden of which was upon defendant, and at the same time tell the jury that defendant had no evidence to support it.

And his Honor correctly decided that the facts put in evidence did not prove that any payment had been made on the judgment, or that it had been satisfied in whole or in part. There was no offer to prove that plaintiff had actually received from the receiver in *Thornton v. Lambeth* (103 N. C., 86) any money to be applied on this judgment, or that his failure to get it was due to his own fault or negligence. That receiver was appointed at the instance of the defendant to take charge of the partnership assets (*Thornton v. Lambeth, supra*), and if, without any neglect on his part, the plaintiff failed to get what the judgment of the court in that cause directed the receiver to pay him, the loss must fall on the defendant (the plaintiff there) whose duty it was to see that the money he owed was in fact paid.

The amount due to plaintiff on his judgment being thus fixed, we come to the consideration of his exception to the judgment, which is as follows: "To this judgment the plaintiff, C. P. Vanstory, excepted, claiming that after the payment of costs his judgment for $978.20, with interest from 1 April, 1887, docketed 6 May, 1889, (203) was entitled to priority over all the mortgage debts, being older, and should be paid in full before any of the proceeds of sale should be applied to any of said mortgages."

And in this connection we will also consider the defendant's exception to this judgment, "claiming that after the payment of the costs and mortgage debts, no part of the fund arising from the sale of his homestead should be paid to the plaintiff, but the balance should be paid to him."

The land, a sale of which is ordered by the judgment appealed from, was allotted to the defendant Thornton as his homestead in April, 1885. The relief which the plaintiff demands is that, for reasons set out in his complaint, there should be "a reappraisement and reallotment of the land and improvements of the defendant, to the end that the excess of the homestead, if any, be ascertained, and be subjected to the satisfaction of plaintiff's judgment."

It seems to have been conceded by the eminent counsel of the defendant that under the law as declared when this cause was here on demurrer (110 N. C., 10), and the allegation of the complaint and answer, and the findings of the jury, the plaintiff was entitled to have the reappraisement and reallotment demanded by him. We wish, however, to expressly exclude the conclusion that a reallotment should be decreed in suits like this one, upon the finding of the jury that the allotted land is worth "more than a homestead"; that is to say, more than one thousand dollars. To accomplish that result, much more must be established by the plaintiff, according to the opinion filed by the late *Chief Justice Merrimon* in this cause (*supra*), to which we adhere.

Assuming, then, that the parties to this action (which, by the presence of the defendant mortgagees, has become a suit to fore- (204) close their mortgages as well as to reappraise and reallot the homestead upon the demand of the plaintiff, and for the reasons set out in his complaint) have consented that a sale of the whole lot shall be made, the purchaser acquiring a title free from all of their claims or liens, and that their respective claims to the fund to be brought into court, the proceeds of the sale shall be measured and determined by their respective claims and liens on the land, we are required to determine how that fund shall be distributed.

This agreement, or concession, of the parties, that a sale of the whole lot shall be made without a reallotment of the homestead of Thornton,

involves, of course, the further concession or agreement that what the lot brings over one thousand dollars shall represent what the excess over the homestead would have brought if the homestead had been reallotted, and the excess had then been sold, and it also involves the further concession or agreement that the reallotted homestead would have sold for one thousand dollars.

If, therefore, after the payment of the costs (to the payment of which, first, no party excepts) there shall remain more than one thousand dollars, that excess will represent and stand in the place of the portion of the lot which, upon a reappraisement, would lie outside of the homestead boundaries, and this excess of the fund over one thousand dollars (the homestead) must be applied on the plaintiff's judgment, for it was docketed before any of the mortgages were registered, and it is a first lien on this excess (*Gulley v. Thurston, ante,* 192), enforceable now because of the reallotment of defendant's homestead. The statute (The Code, sec 435) makes a docketed judgment a lien on all the land of the debtor in the county where it is docketed from the date of the
(205) docketing, and the creditor may immediately enforce his lien so acquired on all the debtor's land outside of the boundaries of the homestead. Such are his rights. They are plain and unmistakable. No act of the debtor can change them, or in any degree impair them. To hold otherwise would be to displace, by our decision, a lien given by the statute, and to put it in the power of a judgment debtor to deprive his diligent creditor of the fruits of his diligence.

We hold, of course, that if, after the full payment of plaintiff's judgment, any part of this excess shall remain, it shall be applied on the mortgage debts according to their priorities.

This brings us to determine what disposition shall then be made of the homestead money, the sum which represents and stands in the place of the newly allotted homestead, and to which none of the parties waive any of their claims or modify in any degree their legal rights.

We must first discuss the relation of the plaintiff to this fund, for it may be that the excess over one thousand dollars will not be sufficient to pay all costs and his judgment.

In some States a docketed judgment creates no lien on the homestead land, but in this State such a judgment creates a lien on *all* the land of the debtor, both that outside of the homestead boundaries and that within those boundaries, the only difference being that the lien on that which is within the homestead boundaries is not enforceable by execution or other final process until there has come about in some way a termination of the debtor's constitutional exemption rights in this land, which rights, vested in him by the organic law, may be prolonged after his death for the benefit of his widow in some instances and in some for the

benefit of infant children. As we have said, he cannot now en- (206) force his lien on the homestead land, but his debtor cannot displace that lien by any act of his. It is fixed on the land by law, and this Court can only recognize and at the proper time enforce it.

We conclude, therefore, that the plaintiff has a lien on this fund ($1,000) for the payment of such part of his judgment as is not satisfied by the excess over the homestead money, but, if the other parties interested in this fund so insist, he must await the termination of Thornton's exemption rights in this fund before he can get for his own use any part of it. When those rights have terminated, such part of this principal fund as may be necessary will be applied to the satisfaction of the plaintiff's judgment. In the meantime it will be invested as the Superior Court of Cumberland County may direct, and the interest accruing thereon will be applied on the mortgage debts, paying the senior mortgage first and then the next oldest, and so on. Any remainder of the *corpus* after satisfaction of the judgment will be used to pay off any balance then due on the mortgage indebtedness. The defendant Thornton can have no part of this fund until both the judgment and the mortgages are paid off in full. He loses the land outside of his reallotted homestead, because it must be devoted to the discharge of the judgment lien thereon. He loses his right to use the homestead land or the money that stands in its place, because by proper deeds he and his wife have assigned that land to the mortgagees; thereby they acquired all his rights to this lot, his homestead estate therein, as it is sometimes called. *Adrian v. Shaw,* 82 N. C., 474; *Simpson v. Houston,* 97 N. C., 344. Therefore they take his place in relation to the fund ($1,000) which stands in lieu of the exempt land, and must be allowed to hold that place to the present exclusion of the judgment creditor.

We feel bound to follow the decisions cited above, and others of like import made by our distinguished predecessors, because rights have been acquired and contracts have been made on the faith of those adjudications. To disturb them at this late day would (207) bring about confusion and cause injustice in many instances. We prefer to recall the *dicta* in *Fleming v. Graham,* 110 N. C., 374, which seem in conflict with those older cases.

We are not unmindful of the fact that perplexing problems will arise in the adjudication of rights in and titles to lands, to which at one time or another there has attached that peculiar right called a "homestead," whether we adhere to the old rule laid down in *Adrian v. Shaw* and cases of like import or adopt the new rule foreshadowed in *Fleming v. Graham, supra.* One thing at least should be distinctly realized: The two rules, on principle, are in direct conflict one with the other. By the one the homestead right or estate, or exemption from execution,

or "advantage," call it by what name we will, is salable or assignable, and the purchaser can hold the land in which he has acquired this right or estate, or exemption from execution, or advantage, to the exclusion of the ordinary judgment creditor of his assignor or seller till that right or estate, or advantage, or exemption from execution, "is over." By virtue of the assignment (usually made in the form of a deed to the land itself, the greater including the less) he gets into the shoes of the homesteader, to use a homely expression. He has bought the privilege of so standing, the privilege of personating before the law and the judgment creditor the "homesteader" himself, *quoad* the homestead land. And we think that the assignability of this right, as contradistinguished from the land itself, has been distinctly recognized by all the decisions of this Court until that of *Fleming v. Graham.* It is true that there has been much discussion as to the name that should be applied to this new creation of the law. *Justice Dick* called it in *Poe v. Hardie,* 65 N. C., 447, "the estate in the homestead," "a determinable fee," (208) and called its counterpart "the reversionary interest," the two constituting all the estate of the owner of the land. *Chief Justice Pearson* called it "the homestead estate," and its counterpart "the reversion," and notably in *Jenkins v. Bobbitt,* 77 N. C., 385, though in *Littlejohn v. Egerton,* 77 N. C., at page 384, he had spoken of the "homestead right" as a quality annexed to land whereby an estate is exempted from sale under execution for debt. *Justice Bynum,* in *Bank v. Green,* 78 N. C., 247, defined it as "no new estate," but only "a determinable exemption from the payment of his debts in respect to the particular property allotted to him." And the same Court in *Hill v. Oxendine,* 79 N. C., 331, distinctly recognized the "homestead" as distinguished from the "reversionary interest," and with equal distinctness conceded the assignability of each of these rights or interests separately.

Smith, C. J., in *Markham v. Hicks,* 90 N. C., 204, approved the definition or description contained in *Bank v. Green, supra,* and called attention to the "inadvertent expressions" which had been used in defining the right under discussion; but there was no intimation from him in that case that it was not assignable.

Chief Justice Merrimon, in the case of *Jones v. Britton,* 102 N. C., 166 (on page 169), speaks of this quality of exemption as an "advantage" which can pass by proper deed from the homesteader to his vendee of the land, and in unmistakable language recognizes that this "advantage"—this exemption from sale, limited contingently—may be acquired and held by the vendee of the land to the postponement of the rights of the judgment creditor. He there emphatically approved the rule laid

down in *Adrian v. Shaw, supra,* by *Justice Ashe,* which had been approved with even greater emphasis by *Chief Justice Smith* on the rehearing of the latter case (84 N. C., 832).

And in *Lane v. Richardson,* 104 N. C., 642, it is said of home- (209) stead land that had been sold by the homesteader that it "retained the quality of the homestead exemption in the hands of the purchaser." In *Long v. Walker,* 105 N. C., 90, the cases of *Wyche v. Wyche,* 85 N. C., 96; *Barrett v. Richardson,* 76 N. C., 429, and *Lowdermilk v. Corpening,* 92 N. C., 333, are cited with approval, and the principle that in this State what is there again called the "reversionary interest" in the homestead land may be owned by one person while the homestead interest or estate is held by another, is distinctly recognized.

In Waples on Homestead and Exemption, p. 299, it is said: "There may be a suspended judgment lien on a homestead; as when the statute allows judgments to be docketed against it but prevents their enforcement during the time the homestead remains exempt, yet allows execution afterwards. Meanwhile, the exemptionist may sell the land on which the benefit rests, subject to the judgment, but also protected for the time being by the suspension of the lien. The purchaser acquires this protection with the land so far as the homestead extends with the land." In support of this the learned author cites *Jones v. Britton, supra; Rankin v. Shaw,* 94 N. C., 405; *Markham v. Hicks,* 90 N. C., 204; *Wilson v. Patton,* 87 N. C., 318, and *Hinson v. Adrian,* 86 N. C., 61.

It is not our privilege to consider the choice between these two rules (that of *Adrian v. Shaw* and *Jones v. Britton* establishing the assignability of the homestead estate or right, or advantage, and the one proposed in *Fleming v. Graham* denying that assignability) as a new question. If such was the case we might find much perplexity in the consideration of the Constitution, which seems to provide for a sale by the homesteader and his wife of the homestead lands, and the statute law, and the decisions of this Court, which beyond all question make a docketed judgment a lien on the homestead land, a pro- (210) vision that is in force in few of the States except this. It may be said in this connection, however, that it would be difficult for one to see what value or efficacy there would be in a power of sale, if the exercise of the power brought to the purchaser only the poor privilege of witnessing an execution sale of his newly acquired land. And in truth it matters not so much what we call as how we protect and enforce this "right" or "estate." It may be that inadvertent expressions have been used in the effort to adapt the nomenclature of the common law to a matter unknown to that system of jurisprudence. But through all the decisions of this Court down to the case of *Fleming v. Graham,*

supra, will be found, we think, upon careful examination, a clear recognition of the fact that this "advantage," as *Chief Justice Merrimon* aptly called it, is assignable, and that the purchaser of the land from the homesteader may hold that "advantage." Therefore when we affirm *Adrian v. Shaw, Simpson v. Houston,* and cases of like import, we are but affirming *Jones v. Britton,* decided so late as 1889, and, as we think, we go counter to no decision or *dictum* in the Reports of the decisions of this Court, except what is said in *Fleming v. Graham, supra.*

If there is to be any present division of this fund between the parties, it must be a matter of arbitration or agreement among themselves, for the courts have no rule by which to determine what exemption rights are worth in cash, their present value, the length of their duration depending on too many contingencies.

Leak v. Gay, 107 N. C., 468, so far as it decides or seems to decide that the lien of a docketed judgment on the debtor's land, whether on an allotted homestead or not, can be displaced by a junior mortgage, is overruled.

(211) The fund arising from a sale of the lot described in the pleadings must be disposed of in accordance with this opinion, unless otherwise agreed by all the parties in interest.

Judgment modified. In plaintiff's appeal there is error. In defendant's appeal there is no error.

CLARK, J., dissenting. There is a distinction between the homestead and the homestead right; the former is the lot of land exempted from sale; the latter is the right to have it exempted, to use and occupy it free from molestation. The former the Constitution permits to be conveyed, but only with the wife's assent and privy examination; the latter cannot be conveyed to another; it does not pass by a conveyance of the land; it is not property, but a personal privilege extending (in certain cases) to the minority of the children and the widow. An inadvertence of expression in some of the opinions as to this distinction has led to some confusion and misapprehension. It seems that North Carolina is the only State in which it has ever at any time been held that a conveyance by the debtor of the homestead carried with it an assignment of the homestead right. Waples on Homestead, 327, note 5, and 374, note 4; *Brame v. Craig,* 12 Bush., 404. And upon the plain language of the Constitution, upon the weight of our own later decisions and the reason of the thing, it is difficult to see how the assignability of the homestead right can be maintained here. Concurring as I do as to the rest of the opinion, I must, therefore, dissent from so much of it as holds that, as to the proceeds of the sale under a mortgage of the home-

stead, the lien of a prior docketed judgment is displaced in favor of the mortgagees under the subsequently executed mortgages, during the life of the homesteader.

The opinion of the Court in this case says, "The statute law (212) and the decisions of this Court, beyond all question, make a docketed judgment a lien on the homestead land." In *Jones v. Britton,* 102 N. C., 166, the opinion of the Court in chief (by *Merrimon, J.*) says, "Exemption from sale alone distinguishes the homestead lands from other lands of the debtor." It seems to me it inevitably follows that when by the mortgage and sale under it the "exemption from sale" is lost, the lien of the prior docketed judgment takes precedence in the proceeds over the subsequent mortgage, as would be the case with "the other lands of the debtor" from which it is no longer distinguished by an "exemption from sale."

To obtain a clear conception of the effect and extent of the homestead exemption in this State it is best to have the constitutional provision before us. It reads: "Every homestead, and the dwellings and buildings *used* therewith, *not exceeding in value one thousand dollars,* to be selected by the *owner* thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwellings and buildings used thereon, *owned and occupied by any resident of this State,* and not exceeding the value of one thousand dollars, shall be *exempt from sale* under execution, or other final process obtained on any debt." Constitution, Art. X, sec. 2.

An analysis of this clause will show, among others, the following requisites to the homestead claim:

1. The claimant must "own and occupy" it.
2. He must be a resident of the State.
3. The lot protected as a homestead, with buildings thereon, must not exceed in value one thousand dollars.
4. No estate in the homestead is granted, but the lot so set apart is merely *protected* for the time specified (during owner's life and until his youngest child becomes of age); *i. e.,* it "shall be exempt from sale under execution," nothing more.
5. By Article X, sec. 8, the homesteader is authorized to con- (213) vey the homestead with the privy examination of the wife.

Considering the whole of the provisions in Article II, *supra,* which creates the homestead, it is clear that the authority to convey the same is the authority to convey the lot over which the homestead exemption has been extended, and not the homestead exemption itself, which is a right personal to the debtor and not capable of alienation. The word "homestead" in section 8 is used in the same sense it bears when used as the first word in section 2; *i. e.,* the lot or home place, which is

authorized to be made exempt. When the homestead is conveyed, the grant is only of *the lot* which has been sheltered from execution so long as it was "owned and occupied" by him. It passes by his conveyance out from under such shelter and becomes liable to any lien which would have been enforced against it but for the exemption which he waived by the conveyance. The homesteader does not and cannot part with his constitutional right to claim a homestead exemption from execution. He can, immediately after the conveyance of the homestead lot, spread its protecting ægis over any other lot owned and occupied by him.

Whenever the claimant ceases to "own and occupy" a lot it ceases to be entitled to the exemption from execution. The constitutional requisite is gone. He may occupy it by a tenant, for the tenant's occupancy is his. But when by deed, with his wife's privy examination, he conveys it away, the grantee gets the grantor's whole interest subject to liens, but without exemption from execution, which exists only in favor of the *owner and occupier* of the lot. He does not "own and occupy" it after the conveyance to another. In like manner, should he
(214) cease to be a resident of the State, the right of exemption would cease (*Finley v. Sanders,* 98 N. C., 462), even when he leaves his wife and children here. *Baker v. Leggett, ib.,* 304; *Munds v. Cassidey, ib.,* 558, and *Lee v. Mosely,* 101 N. C., 311. So when, by reason of the improvements he shall place upon it, the value violates the Constitution by exceeding $1,000, the exemption ceases as to the excess, and there may be a reallotment, *Vanstory v. Thornton,* 110 N. C., 10. Now, also, by the recent act of the Legislature (of 1893) the exemption ceases as to the excess and there may be a reallotment, when for any cause there is a substantial enhancement of the value of the lot beyond the constitutional $1,000 limit.

It is true it was held in *Adrian v. Shaw,* 82 N. C., 474, and same case, 84 N. C., 832, that the homestead right was an estate in the lot, but that was not warranted by the Constitution which confers only "an exemption from sale under execution" (in favor of a resident owner and occupier), and has been in effect overruled in several cases. *Hughes v. Hodges* (*Avery, J.*), 102 N. C., 236; *Jones v. Britton, ib.,* 166; *Fleming v. Graham,* 110 N. C., 374, and virtually in divers cases. The main point in *Adrian v. Shaw* was that the homestead did not cease on removal from the State. The contrary is held in cases above cited.

In *Jones v. Britton, supra* (on p. 180), *Shepherd, J.,* says the homestead right is a mere "stay of execution, nothing more, nothing less." *Avery, J.,* in *Hughes v. Hodges, supra,* points out that *Littlejohn v. Egerton* had been misconceived, and that while the learned *Chief Justice* had there spoken of the homestead as a "quality annexed to the land," he had immediately explained it by saying, "whereby the estate is

exempted from sale under execution"; by "estate" meaning the debtor's whole interest. In *Jones v. Britton, supra, Merrimon, J.,* as quoted above, says that "exemption from sale alone distinguishes the homestead land from the other lands of the debtor; that the (215) homestead right creates no new estate, and adds no new right, but "merely suspends a sale." If the homestead right is a mere "stay of execution," "a suspension of a sale," it is a privilege, and cannot be assigned away to another.

Apart from the repeated decisions holding the homestead right not to be an estate in the land or a quality annexed to it, it is clearly not so:

1. The words of the Constitution can by no reasonable construction bear out that idea. Nothing in the land is given. The owner already has that in fee. The Constitution only gives him a right to own and occupy it "exempt from sale." It merely puts up a shelter over him and stays the sheriff's hand with a *"cessat executio."*

2. If the homestead right was an "estate" in the land, it would be valued accordingly, and to get the $1,000 the quantity of land allotted would depend upon the age, health, expectancy of life, etc., of the claimant, otherwise the homestead *estate* of some would be more valuable than that of others. But it is the lot and buildings over which the protection is spread, which are to be worth "not exceeding $1,000." This shows that the "homestead" right is the exemption extended as a shelter above the lot, and not an estate in the lot itself.

3. If the homesteader had an estate in the land for his life, the crops or other income from it would be his. But as he has no estate in it, and merely a right to "own and occupy" it free from the presence of the sheriff, the income and crops are liable to his creditors. *Bank v. Green,* 78 N. C., 247. The opinion in this case by *Mr. Justice Bynum* is one of very clear conception and one of the ablest discussions of the homestead ever made by the Court. It is well worth the fullest consideration. In it, it is said that the homestead creates no new right of property, but merely exempts $1,000 of it from sale; that it is "not a determinable fee, but a determinable right of exemption."

4. If the homestead right was an estate in the lot, whenever (216) it was once conveyed away it would be gone forever and the homesteader would henceforth be without right to any homestead. The law surely does not contemplate that, like Esau, he should part with his birthright, or that an unmarried man by sale of his allotted homestead shall deprive his future wife and children of a right to shelter, however much realty he may retain or subsequently acquire.

Being, however, as this Court has repeatedly held, not an estate but an exemption, the sale of the lot does not carry the exemption along with it. If it did, either—

1. The homesteader could forever thereafter claim no other exemption; or,

2. He could take another homestead lot and impart to that the exemption quality or estate and convey it together with the exemption tacked to it, and so on *ad infinitum.* Suppose in this way a debtor has successively taken and then conveyed away, say, a dozen homesteads; the day the homestead right determines by his death (or youngest child becoming of age after his death) $13,000 of real estate would become subject to sale under executions docketed prior to his successive conveyances. Thus, up to that event, $13,000 would be exempt from executions against him. Yet there is the constitutional provision, too plain to be misunderstood, that "not exceeding $1,000 shall be exempt from sale under execution."

This is not the argument *ab inconvenienti.* It is the plain, simple language of the Constitution, nothing added and nothing taken from it. The argument *ab inconvenienti* is made by the opposite side that it is hard to tie a man down to one homestead, and that he is merely taking the proceeds of the sale of one homestead with which to buy another, and so on down the line of successive homesteads. If this argument *ab inconvenienti* could be entertained against the express language of the Constitution, it may be observed—

(217) 1. The homesteader is not compelled to sell; he may rent out, and thus still "own and occupy," and with liberty to rent for himself another home.

2. The homestead, or life right, in a $1,000 lot will not bring him the $1,000 the fee simple is worth, and when he proceeds to take another $1,000 lot as a homestead, he is adding money due his creditors to the exemption allowed, and in several successive sales of a life right in one $1,000 lot and the purchase of the fee simple of another $1,000 lot, he will put in largely more than the "$1,000 exempt from execution," beyond which amount he is forbidden to go.

Besides, he can convey the homestead right (if it is true it can be conveyed) to his grantee in no better plight than he himself held it. If he puts improvements on the homestead, it is subject to revaluation. *Vanstory v. Thornton,* 110 N. C., 10. Will it not be subject to revaluation if his grantee puts improvements on it? He can convey no greater exemption right than he had. And it is surely not public policy that where a man has conveyed several successive homesteads each shall lie dead, deprived of improvements for fear of reallotment.

Again, while the homestead is in possession of the homesteader, the incoming crops are liable to his debts. He has only the right of use and occupancy. *Bank v. Green, supra.* As he can convey no greater exemption to his grantee than the law has given himself, it follows that

the crops and income from each of the successive homesteads is liable to the grantor's debts, and the temporary holders can only have the right to use and occupy.

And still again, under the late act of the Legislature the lots (218) protected from execution by right of the homestead are subject to revaluation whenever they "exceed $1,000." When there have been successive homesteads allotted the creditors can have them reallotted under the act, and if the aggregate amount "exempt from execution" exceeds $1,000, a reallotment would expose the excess to sale, leaving only the $1,000 then "owned and occupied" by him sheltered from the sheriff. He cannot give to the successive grantees an exemption of the crops, and from revaluation, which he himself does not possess.

The decision in *Adrian v. Shaw* ceased to have any logical force when the Court held, as it has since repeatedly done, *ut supra,* that the homestead right was not an estate in the land, but a mere exemption, or *cessat executio.* If so, it is personal to the debtor and he cannot convey it away. He can convey away the homestead land. If there are no judgments or other liens, he can give a clear title; if there are such liens, he can convey only his title, subject to the liens, since he waives, as he is empowered to do, his homestead right to protect that lot of land from sale, because ceasing by his deed, with his wife's assent, to "own" it. He can acquire as many successive homesteads as he pleases and protect them by the homestead right, but as to each the homestead right ceases when he ceases, respectively, to own them. He has but one homestead right. He can put that up over successive lots of $1,000, but he cannot alienate it or give any one else the benefit of it.

That the right is restricted to ownership of the lot is further shown by section 3 of Article X, which exempts the homestead "after death of the owner thereof, during minority of his children," and section 5 for the benefit of widow of "owner of a homestead," meaning the homestead of which he was owner at the time of his death. Both (219) these sections extend the exemption after the death of the owner of a homestead, showing that only one homestead is exempted longer, and that is the one he owns at his death. Certainly the conveyance of a homestead cannot possibly be construed to embrace the existence of the homestead right after the homesteader's death, for that contingent right is solely for shelter of his children or widow and is only given as to a homestead of which he is owner at the time of his death. The children can have it allotted if he has not done so. It is theirs, not his. Yet if one homestead right is not assignable by the homesteader, is there anything to indicate that the other is? As was noted in a former decision of this Court, the homestead having been introduced by the Consti-

tution of 1868, it was new to our courts and the construction given to it has not been uniform. In at least ten points the first view taken has been subsequently overruled.

1. The Court held the exemption applied to preëxisting debts, *Hill v. Kesler,* 63 N. C., 437, and numerous other cases. This has not been so since *Edwards v. Kearsey,* 96 U. S., 595.

2. It was held that the homesteader might be estopped to claim it by his declarations. *Mayho v. Cotten,* 69 N. C., 289. This was expressly overruled in *Hughes v. Hodges,* 102 N. C., 236, which affirms the contrary to be the law since *Lambert v. Kinnery,* 74 N. C., 348.

3. It was held that the homestead was a "determinable fee." *Poe v. Hardie,* 65 N. C., 447. This is overruled in *Bank v. Green,* 78 N. C., 247.

4. It was held not impeachable for waste because a determinable fee. *Poe v. Hardie, supra.* In *Jones v. Britton,* 102 N. C., 166, it is now held that the creditor can, by injunction, restrain waste.

(220) 5. It was held that the amount could be increased (though not diminished). *Martin v. Hughes,* 67 N. C., 293. In view not only of the constitutional provision that it "shall not exceed $1,000," but of the provision limiting the duration of the homestead exemption to the minority of the children, this was reversed in *Wharton v. Taylor,* 88 N. C., 230, and the act which had been passed prohibiting the lien of the docketed judgment on the lot sheltered by the homestead was repealed at the next session of the Legislature. Acts 1885, ch. 359.

6. It was held that the homestead was not absolutely void as to debts contracted prior to the Constitution, but only if it appeared there was not property sufficient outside of the homestead. *Albright v. Albright,* 88 N. C., 238; *Morrison v. Watts,* 101 N. C., 332. This was reversed in *Long v. Walker,* 105 N. C., 90.

7. In *Adrian v. Shaw, supra,* it was held that the homestead was not forfeited by the homesteader's removal from the State. It is held otherwise in *Finley v. Sanders,* 98 N. C., 462, and other cases *supra.*

8. It was held that once allotted the homestead could not be reallotted. *Gulley v. Cole,* 96 N. C., 447. This was in part reversed by *Vanstory v. Thornton,* 110 N. C., 10, and is now entirely changed by the act of 1893.

9. In *Adrian v. Shaw* it was held that the homestead was an estate in the land. In repeated decisions above cited that has been reversed, and it is held a mere exemption right.

10. In same case it was held the conveyance of the homestead land carried with it the homestead exemption of the debtor. This was denied in *Fleming v. Graham, supra.*

Reverting to the plain letter of the Constitution, and taking the (221) benefit of the "sober second thought" of the Court in each of the

above particulars, we are fortunate in finding the way cleared for us. Upon those decisions, as held in the overruling and later opinions in each particular, we should hold, first, that the homestead does not apply to debts existing prior to the Constitution; secondly, that the homesteader cannot be estopped to claim it; third, that it is a determinable exemption, not a determinable fee; fourth, that waste thereon can be restrained on application of a creditor; fifth, that it cannot be increased beyond $1,000, nor can the judgment creditor be deprived of his lien on it by any legislation; sixth, that it is void as to debts existing at the adoption of the Constitution whether there is enough other property or not to satisfy executions; seventh, that it is forfeited when claimant ceases to be a resident of the State; eighth, that when, by improvements placed upon it, or by enhancement of values, it exceeds the constitutional limit of one thousand dollars, it can be reallotted; ninth, that the homestead is not an estate in the land, but a mere exemption from sale, and tenth, the conveyance of the homestead land does not alienate or convey the homestead right therewith. *Fleming v. Graham,* 110 N. C., 374. The grantee gets the land subject to liens, and without benefit of the grantor's homestead right, which protected it only while owned by him.

Adhering to the law thus mapped out for us by the latest decision in each particular case recited, the road for the future would be free from embarrassments. We have but to march where the wisdom and experience of our predecessors have pointed out the road.

There are numerous decisions in other States confirmatory of these views. Waples on Homestead. But the constitutional provisions in different States as to the homestead are so variant it is doubtless better to place ourselves on the plain provisions of our own Constitution and avail ourselves of the latest and better opinion of the Court in construing each point above discussed. It may be objected that (222) it will work damage to hold as indicated in *Fleming v. Graham,* since land has been conveyed under the ruling in *Adrian v. Shaw.* But there cannot be many such conveyances, both because people are not prone to buy estates determinable on the death of another, and because *Adrian v. Shaw* has been shaken by so many decisions since. Were it otherwise, the Constitution is the sole creator of the homestead. *Edwards v. Kearsey, supra.* The Legislature (as has been held) itself cannot enlarge it, "nor can the courts do so by judicial legislation." *Smith, C. J.,* in *Jones v. Britton, supra.* When a mistake has been made the Court should conform its erroneous opinion to the Constitution, and not the Constitution to its erroneous ruling.

A difference should be noted between the homestead and the personal property exemption. The articles embraced in the latter are owned absolutely, and can be sold absolutely. No "exemption" is conveyed to

the purchaser. There can be no lien on them whose enforcement is prevented by the exemption. They stand just as the conveyance of the homestead when no lien has attached by a docketed judgment, when, of course, the grantee gets the full estate. *Hughes v. Hodges, supra; Scott v. Lane,* 107 N. C., 154. But as to the homestead, when there are docketed judgments, the debtor has only the privilege of "use and occupancy"; he can only convey it as he would any other land, *i. e.,* subject to such lien, and he cannot convey to the creditor his right to "use and occupy" it exempt from sale. The reason the Constitution gives the right to convey the homestead lot is not far to seek. In many States it had been held that an allotted homestead was inalienable. This clause was put in to prevent tying up land in that mode in this State.

(223) Upon reason and the above authorities the homestead right is a privilege of exempting $1,000 from sale. It is personal and cannot be alienated, but it may be waived as to any particular lot by ceasing to be a resident of the State, or by ceasing to own and occupy the lot.

It has been waived or lost as to this lot by the mortgage and sale under it, and the homesteader cannot give to his mortgagee a right to the use of the proceeds when he has himself lost the right to "use and occupy" the lot.

Cited: S. c., 114 N. C., 376, 378; *Gardner v. Batts, ib.,* 501, 504; *Stern v. Lee,* 115 N. C., 436; *Balsley v. Balsley,* 116 N. C., 480; *Thomas v. Fulford,* 117 N. C., 678, 681, 692; *Bevan v. Ellis,* 121 N. C., 233, 236; *Joyner v. Sugg,* 131 N. C., 334, 339, 349; *S. c.,* 132 N. C., 590; *Fidelity Assn. v. Lash,* 135 N. C., 408; *Sash Co. v. Parker,* 153 N. C., 134.

NOTE.—Laws 1905, ch. 111, now C. S. 729, provides that the exemption ceases upon the conveyance of the homestead.

F. M. SMITH AND WIFE v. ZACH ALLEN ET AL.

Color of Title—Evidence—Lost Record.

1. A deed duly executed, probated and recorded by an attorney in fact is sufficient to show color of title, though the power of attorney be not produced.

2. Where the original papers in a cause have been burned or lost, the minutes of the court in which they were filed are admissible in evidence to establish the validity of the proceedings.

3. A deed to a person as trustee, who signs the same, if probated and registered as the deed of the grantor, is color of title, though not probated as to the trustee, the presumption being that it was accepted by the grantee therein.

4. A deed of a trustee, although the privy examination of the *cestui que trust* was not taken, is good as color of title, even if the *cestui que trust* was a *feme covert.*

ACTION for trespass, tried at March Term, 1892, of PITT, before *Bryan, J.,* and a jury.

The following issues were submitted to the jury:

1. Are the plaintiffs the owners and in possession of the land in controversy?

2. Have the defendants trespassed on the land of the plaintiffs? (224)

3. What damages have the plaintiffs sustained?

The jury responded "Yes" to the first and second issues, and "Nineteen dollars" to the third.

The plaintiffs offered, for the purpose of showing color of title, a deed from Richard E. W. Tyson, by his attorney in fact, Allen Tyson, to Lemuel Tyson, dated 22 August, 1836, which deed had been duly probated and recorded. Defendants objected to the introduction of this deed on the ground that no power of attorney from grantor to Allen Tyson had been shown. His Honor held the deed to be sufficient for the purpose for which it was offered, and overruled the objection. Defendants excepted.

The plaintiffs for a similar purpose next offered a deed from Lewis Hilliard, Clerk and Master in Equity, to Sherrod Tyson, dated 22 June, 1866. They also introduced the trial and minute dockets of the Court of Equity of Pitt County, from which it appeared that a petition for the sale of the lands of Lemuel Tyson had been filed and docketed; that a decree of sale had been made; that a report of sale had also been made to the court, showing Sherrod Tyson to be the purchaser, and that a decree had been made and duly recorded in the minutes of said court confirming said sale and directing said clerk and master to make title to the purchaser.

E. A. Moye, the clerk of the Superior Court, was introduced, who testified that after diligent search in his office he had been unable to find the equity papers filed for the sale of said tract of land by said clerk and master; that he had searched all packages, bundles, boxes and papers, except the old papers marked "State cases"; these he did not search, and that he had been unable to find the original papers, and he was satisfied they were not in his office.

(225) Defendants objected to the introduction of the deed from Lewis Hilliard, and to the introduction of the dockets of the Court of Equity, in the absence of the original papers; objection overruled, and the defendants excepted.

Plaintiffs then offered a deed from Sherrod Tyson to W. A. Cherry, trustee, dated 9 June, 1866.

To this deed the defendants objected, because it had not been probated as to W. A. Cherry, the grantee therein, who, it seems, had signed said deed. Objection overruled, and defendants excepted.

Plaintiffs then offered a deed from W. A. Cherry, trustee of Sophia Paul, to Thomas E. Randolph, dated January, 1868. To the introduction of this deed defendants objected, because it had not been probated as to Sophia Paul, by taking her privy examination. Objection overruled, and defendants excepted, his Honor holding that, in any view of the case, the foregoing deeds were sufficient to show color of title, that being the purpose for which they were offered.

Verdict and judgment for plaintiffs, and appeal by defendants.

T. J. Jarvis for plaintiffs.
C. M. Bernard for defendants.

MACRAE, J. All the deeds offered by the plaintiffs were competent to show color of title, and were followed by testimony tending to prove continuous adverse possession, under visible lines and boundaries by the plaintiffs and those under whom they claim for more than seven years. Color of title is a writing upon its face professing to pass title to land. *Keener v. Goodson,* 89 N. C., 273.

The first exception is met by *Hill v. Wilton,* 6 N. C., 14, which held that where the power of attorney was produced and plainly showed that the attorney had no authority to convey land, the deed purporting (226) to be made by virtue of the power therein constituted color of title.

The second exception is covered by the case of *Hare v. Holleman,* 94 N. C., 14, where it is held that where the original papers in a cause have been burned or lost, the minutes of the court are admissible in evidence to establish the validity of the proceedings.

The deed from Sherrod Tyson to W. A. Cherry, trustee, objected to because it had not been probated as to Cherry, was competent, having been proved and registered as the deed of Tyson, under the presumption that it was accepted by the grantee therein. And if probate and registration had been necessary as to Cherry to pass title, the unregistered deed is color of title. *Davis v. Higgins,* 91 N. C., 382.

The deed objected to by defendants because the privy examination of Sophia Paul did not appear to have been taken was also good as color of title, even if Sophia Paul were a *feme covert,* of which we are not apprised. See *Perry v. Perry,* 99 N. C., 270, where cases are cited which meet nearly all of the exceptions.

There was no exception to the refusal of his Honor to give the instruction asked in defendants' first prayer for special instructions, and the instruction was not warranted by the evidence as stated in the case.

It seems that every exception taken by defendants is untenable, and has been repeatedly so held.

NO ERROR.

Cited: Bond v. Beverly, 152 N. C., 61; *Norwood v. Totten,* 166 N. C., 650; *Gann v. Spencer,* 167 N. C., 430; *Clendenin v. Clendenin,* 181 N. C., 471.

(227)

S. C. BROWNE ET AL. v. JOHN T. DAVIS.

Offset to Damages for Detention—New Trial—Construction.

Where, on a former appeal, this Court affirmed a judgment in favor of plaintiffs, allowing damages for rents during the detention of land, subject to credit for valuable improvements made by defendant, the same to be ascertained by a jury upon petition for betterments, but modified it by saying that though the defendant was not entitled to have the value of improvements assessed as betterments, strictly speaking, still the jury, "when they come to inquire into the plaintiffs' damages on account of the use and detention of the lands, . . . ought to make a fair allowance out of the same for improvements of a permanent character," and on a remand the plaintiffs objected, on account of the language quoted, to further inquiry into an allowance for the permanent improvements: *Held,* that the language quoted was general, applying to all cases where offsets should be assessed at the same time damages are assessed, and was not intended to cut off the defendant from such allowance because the rents had already been assessed in this particular case. Such modification was, in effect, a new trial as to the issue, directing the allowance to be deducted in assessing the damages to plaintiff, and the refusal of the court to submit an issue inquiring into the amount of damages was error.

APPEAL from *Shuford, J.,* at Spring Term, 1892, of PASQUOTANK.

From the refusal of the court to submit an issue as to permanent improvements the defendant appealed. The facts are fully stated in same case, 109 N. C., 23, and in the following opinion by *Justice Clark.*

Grandy & Aydlett for defendant.
No counsel contra.

CLARK, J. When this case was first tried, the court below, upon the findings of the jury, rendered judgment in favor of the plaintiffs that they "recover the lands described in the pleadings, subject to a (228) lien for $450 (purchase-money paid by defendant), with interest, and also recover $175 damages found by the jury for rents during the detention, subject to a credit for valuable improvements placed upon the land by defendant, same to be ascertained by a jury upon petition of defendant for betterments or permanent improvements." From this judgment the plaintiffs appealed, both because the judgment made the purchase-money ($450) a lien, and because the judgment entertained the petition for betterments and directed the empaneling of a jury to assess the value of the same. This Court on the hearing, 109 N. C., 23 (*Shepherd, J.*), affirmed the judgment below, but modified it as to the second point by saying that though the defendant was not entitled to have the value of the improvements assessed as betterments, strictly speaking, still the jury, "when they come to inquire into the plaintiffs' damages on account of the use and detention of the lands will be at liberty, and indeed, in duty bound, to make a fair allowance out of the same for improvements of a permanent character and such as the plaintiffs will have the actual enjoyment of." On the going down of the certificate the plaintiffs again insisted in the court below that an allowance for the permanent improvements could not be inquired into, notwithstanding the above opinion, and although the question as to their value had been expressly reserved on the former trial and that fact recited in the judgment. This objection is based upon the language of the opinion: "When the jury come to inquire into plaintiffs' damages for the detention they should make a fair allowance out of the same for value of permanent improvements." This is sticking in the bark. The language of the court was general, applying to all cases of this kind in which such offsets could and properly should be assessed at the same time the rents are assessed. It did not mean to cut the defendant off in (229) this case because the rents had been already assessed. On the contrary, the judgment was affirmed, and the court expressly held that this defendant was entitled to his allowance for the permanent improvements. The only modification was that such allowance should be made, not on a petition for betterments, but as a deduction in assessing damages for the detention of the land. In effect this was a partial new trial as to that issue, directing such allowance to be deducted by the jury in assessing the damages. In refusing to submit the issue, "What damages, if any, have plaintiffs sustained?" there was error.

If the plaintiffs prefer it, the verdict finding $175 as value of rents may stand and an issue be submitted simply as to what deduction should be allowed therefrom by reason of the permanent improvements.

ERROR.

W. H. BASNIGHT v. ROBERT W. SMITH, SHERIFF.

Tax Titles—Color of Title—Constructive Possession—Presumption.

1. Where a patent issued for land, reserving land within its limits as "previously granted," possession under such patent, but outside of the land previously granted, is not constructive possession of the excepted land, nor is the patent color of title to the same.

2. Where, in an action to compel the sheriff to make a deed to plaintiff for lands sold for taxes as the lands of C. H. and J. H., and bought by plaintiff, former title was shown in C. H. and J. H., but no evidence was offered that C. H. and J. H. were the same men from whom the taxes were due, except that the tax list showed land listed and taxes due therefor from parties of the same name: *Held*, that the certificate of tax sale issued to plaintiff as purchaser is, under section 62, chapter 137, Acts of 1887, and section 63, chapter 218, Acts of 1889, "presumptive evidence of the regularity of all prior proceedings," and such presumption was not rebutted.

ACTION tried before *Hoke, J.*, and a jury, at Fall Term, 1892, (230) of DARE.

The purpose of the action was to compel the Sheriff of Dare County to execute to plaintiff a deed for the two tracts of land set out and described in the complaint, and known as the Charles Horton tract and the Hooker tract; said land having been sold by the said sheriff for taxes on 5 May, 1890, and purchased by plaintiff.

The plaintiff proved the sale by the sheriff on 5 May, 1890, for taxes due from Charles Horton and J. Hooker; that plaintiff bought at said sale and took a certificate from the sheriff for each tract, in pursuance of the statute, and also proved the taxes were due from said parties as alleged; that after the expiration of a year from date of sale the plaintiff, who had paid his bid at the time of purchase, demanded of the sheriff deeds for the two tracts of land, and said sheriff refused and still refuses to execute a deed for same.

The sheriff admitted the sale, certificate, etc., and a refusal to make the deed, and claimed that his refusal was rightful, because within the year from the sale for taxes the land had been redeemed by the Eastern Carolina Land and Lumber Manufacturing Company, and testified that

on 22 April, 1891, within the year the said company had, by its agent, paid to the sheriff the entire amount plaintiff bid for the land, together with the penalty and costs, and that he had so notified the plaintiff before this action was brought; and the question of plaintiff's right to a deed was made to depend upon whether said company had such an interest in the two tracts of land described in the complaint as made the repayment to the sheriff a valid redemption of the land.

To show such interest defendant introduced a grant from the State to John Grey Blount, dated 7 September, 1795, for 100,000 acres of land, described by metes and bounds, which grant contained a
(231) reservation as follows: "Within which boundaries there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to Mr. George Pollock 9,600 acres, which begins at," etc. Other deeds were introduced showing conveyance of the land to the defendant, and there was evidence to show that the above deeds in the outer boundaries accorded with the John Grey Blount patent, conveyed the same land and contained the reservations made in the Blount patent. There was evidence, also, showing that the Eastern Carolina Land, Lumber and Manufacturing Company and those under whom it claimed had continuously occupied lands in the Blount patent since 1873, but it was admitted that no portion of the lands sued for and described in the complaint had been so occupied or possessed. There was evidence, also, tending to show that the lands sued for were within the outer boundaries of the Blount patent.

Plaintiff introduced grants and deeds showing title to the lands sold for taxes in the delinquents.

No evidence was offered that John Hooker and Charles Horton were the same men from whom the taxes were due, except that the tax list showed land listed and taxes therefor due from parties of the same name.

Defendant contended that the possession of the land and lumber company within the outer boundaries of the Blount patent, but outside of the two grants introduced by plaintiff, would mature the title to the lands embraced in said grants, under the deeds introduced by them, and gave them such an interest in said lands as would authorize them to redeem the land sold for taxes.

The court being of opinion that such possession of defendant would not operate to give them any interest inside of the two grants which antedated the Blount patent, instructed the jury if they believed
(232) the evidence to answer the first issue "Yes," the second issue "No," and the third issue "Yes." Pursuant to this instruction the jury so responded to the issues as follows:

1. Did plaintiff purchase and pay for land at sale for taxes in May, 1890, and take certificates of the sheriff therefor pursuant to the statute? Answer: "Yes."

2. Was the land redeemed by the owner, occupant or any person having a lien or interest therein within twelve months from such sale? Answer: "No."

3. Did plaintiff demand a deed from the sheriff before bringing this suit? Answer: "Yes."

From the judgment in favor of the plaintiff, defendant appealed.

Grandy & Aydlett for plaintiff.
Busbee & Busbee for defendant.

CLARK, J. The principal point in this case is decided in *Mfg. Co. v. Frey, ante,* 158. It is there held that where a patent issued for a tract of land, reserving land within its limits "previously granted," that possession under such patent, but outside of the land "previously granted," was not constructive possession of the excepted land, and that the patent was not color of title to the land so excepted, though the burden was on the party claiming under the exception to show that the land in question came within the exception. Here that has been done.

The defendant in this case, however, further contends that no evidence was offered that John Hooker and Charles Horton were the same men from whom the taxes were due, except that the tax list showed land listed and taxes therefor due from parties of the same name. It would be sufficient to say that this point was not raised by exception below, nor by prayer for instruction, nor by issue tendered. It cannot be raised here for the first time. If it could be, however it (233) might have been formerly (*Fox v. Stafford,* 90 N. C., 296), by the present law, Acts 1887, ch. 137, sec. 62, Laws 1889, ch. 218, sec. 63, the certificate issued to the plaintiff as purchaser at the tax sale was "presumptive evidence of the regularity of all prior proceedings." This presumption was not rebutted.

NO ERROR.

Cited: Collins v. Pettitt, 124 N. C., 729.

THOMAS MOORE v. JAMES T. SUGG, TAX COLLECTOR, ETC.

Injunction—Sale for Taxes in Arrears for Previous Years.

1. The prohibition in the general Machinery Act against granting injunctions is applicable by its terms only to such as are levied by that particular act, and does not apply when the right to collect taxes in arrears has been revived by a statute for the benefit of a sheriff's sureties containing no restrictions applicable to a particular case arising thereunder.

2. A tax collector, under the authority of chapter 391, Acts of 1891, which was passed to enable the sureties of a sheriff to collect taxes in arrears for several years previous, levied upon for the purpose of selling a tract of land upon which it was claimed a former owner owed taxes. The act contained no provision prohibiting courts from issuing restraining orders, but by the first section purchasers without notice of unpaid taxes were relieved from the encumbrance of a lien for taxes on land bought by them. In a suit brought by the owner to restrain the sale, the complaint alleged that he had no notice that the land which he had bought at a foreclosure sale was encumbered by a claim for unpaid taxes; and the defendant, in his answer, averred that the plaintiff had actual notice of such encumbrance. In such case, there being a serious dispute in reference to a very material fact, an injunction was properly granted until the hearing.

(234) ACTION against tax collector of Greene, for an injunction to restrain the sale of real estate for taxes, heard before *Whitaker, J.*, at Fall Term of GREENE.

The complaint alleged that the plaintiff purchased the land subsequent to 1886, and that defendant had advertised the same for sale for the taxes of 1881 to 1886, both inclusive, and that he had bought the land at a foreclosure sale without notice that the taxes were unpaid. The defendant averred that plaintiff had notice of the encumbrance.

From an order granting an injunction until the final hearing defendant appealed.

T. C. Wooten and L. V. Morrill for plaintiff.
George M. Lindsay for defendant.

AVERY, J. The prohibition embodied in the general act against granting injunctions to prevent the collection of taxes is applicable by its terms only to such as are levied by that particular statute. The law passed at the same session (Laws 1891, ch. 391) to enable the sureties of a former sheriff to protect themselves by the collection of taxes in arrears for the years from 1881 to 1886, both inclusive, contains neither the provision restricting the power of the courts to grant restraining

orders nor the clause usually inserted in such acts forbidding the collection, where the taxpayer shall make affidavit that he has paid the tax; but by a saving clause added to the first section, purchasers without notice are relieved from the encumbrance of a lien for taxes upon land bought by them.

The plaintiff alleges in his complaint, used as an affidavit on the hearing, that he had "no notice, either actual or constructive," that the property was encumbered by a claim for unpaid taxes, while the defendant, in his answer, avers that he had actual notice. With- (235) out adverting, therefore, to the many other questions discussed by counsel, it appears that there is a serious dispute in reference to a very material fact, and, as under our practice, the answer, however frank, full and fair a denial it may contain, is no longer conclusive as to the right to extraordinary relief, the injunction was very properly continued till the hearing. *Blackwell v. McElwee,* 94 N. C., 425; *Durham v. R. R.,* 104 N. C., 261; *Caldwell v. Stirewalt,* 100 N. C., 201; *Whitaker v. Hill,* 96 N. C., 2. We do not think that the law, commonly known as the Machinery Act, was intended to apply where the right to collect taxes in arrears has been revived by statute, and in the absence of statutory restrictions applicable to his particular case any taxpayer may, therefore, in his own behalf only or on behalf of all others similarly situated, bring an action to enjoin the collection, if they are illegally levied. *Sudderth v. Brittain,* 76 N. C., 458; *London v. Wilmington,* 78 N. C., 109.

It is not necessary now to pass upon the question, whether the filing of the affidavit by John Murphy on a former occasion was in the nature of an adjudication that the taxes were not due, nor to determine whether the Legislature has the power, by reviving a lien, to defeat intervening rights acquired while it was dormant. *R. R. v. Comrs.,* 82 N. C., 259. The facts upon which all such questions depend will be fully developed and the law applicable explained on the trial of the cause. It may be that, after a fuller investigation before the jury, some of the matters about which conflicting affidavits have given rise to dispute will be eliminated from the controversy.

AFFIRMED.

Cited: *S. c.,* 114 N. C., 293.

(236)

*H. W. MOORE v. THE CAPE FEAR AND YADKIN VALLEY RAILWAY COMPANY AND THE NORTH STATE IMPROVEMENT COMPANY, ET AL.

Laborer's Lien—Construction of Railroad—Assignment of Claims—Enforcement.

1. A laborer who seeks to subject a railroad company to the payment of wages due him by a contractor in the construction of such company's road, as provided in section 1942 of The Code, must show a substantial compliance with the requirements of such section as to notice, etc.

2. After complying with the requirements of section 1942 of The Code, a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor; but where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account: *Held*, that a demurrer to the complaint was properly sustained.

3. The privilege conferred by the statute (section 1942 of The Code) is restricted to *laborers*, and for work done for thirty days or less in constructing a road, and the company can in no event be held liable for the payment of accounts due by the contractors for *materials*.

4. Where there were intermediate contractors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor: *Held*, that, conceding that the plaintiff could in no event recover from any but the railroad company itself, under the statute, yet the addition of the first contractor as a party would not be a fatal misjoinder.

APPEAL from *Whitaker, J.*, at December Term, 1892, of SAMPSON.

The action was brought by the plaintiff as assignee of various claims due laborers, etc., by a firm of contractors to whom the construc-
(237) tion of a part of the Cape Fear and Yadkin Valley Railway Company's road had been sublet by a subcontractor of the North State Improvement Company, which had the contract for the construction of the whole road. The complaint alleged that a contract had been made by the Cape Fear and Yadkin Valley Railway Company with the North State Improvement Company for the construction of the railroad between Fayetteville and Wilmington; that the said Improvement

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

Company contracted with one W. P. Fortune to grade that part of the road lying between Wilmington and Black River, and that Fortune sublet to McDuffie and Gillis the grading of a part of the section covered by his (Fortune's) contract. The complaint further alleged:

"8. That by and under the said contract of said firm of McDuffie and Gillis a large part of the said grading on said Cape Fear and Yadkin Valley Railway bed was done, executed and finished by the said firm of McDuffie and Gillis, and was received and accepted by the engineer of the two corporations named in articles 1 and 2 of this complaint, and a large part of said completed work was then paid to said firm of McDuffie and Gillis, and a large sum was retained in the hands of said corporations, to wit, about three thousand dollars.

"9. That before the said money was due and payable according to the terms of said several contracts hereinbefore stated, and according to the rules, usages, and customs of said corporations in paying for said grading, this plaintiff, and the others whose claims he now holds, served on the said corporations, the Cape Fear and Yadkin Valley Railway Company and the North State Improvement Company, and on W. P. Fortune, a notice, in writing, which said notice informed them that there was due and owing to this plaintiff and others the (238) sum of twenty-four hundred dollars due for work and labor done and materials furnished in grading said part of the Cape Fear and Yadkin Valley Railway bed, and forbade the payment of the said sum of twenty-four hundred dollars to the said firm of McDuffie and Gillis until such time as this plaintiff and other claims should be fully paid and satisfied.

"10. That James N. Gillis and John McDuffie are wholly insolvent.

"11. That the sum of twenty-two hundred and seventy dollars was assigned and transferred to this plaintiff by the laborers who did the grading on said part of said road between Moore's Creek and Black River, a distance of fourteen miles, and is now and was at the time of said transfer due and owing for labor done and material furnished in grading said road, and the sum of one hundred and thirty dollars is now and was due to this plaintiff for work and labor done in grading and constructing said part of the Cape Fear and Yadkin Valley Railway.

"12. That defendants are justly indebted to this plaintiff in the sum of twenty-four hundred dollars for work and labor done in grading and constructing the Cape Fear and Yadkin Valley Railway between Moore's Creek and Black River, a distance of fourteen miles, and no part of the said sum of twenty-four hundred dollars has been paid: wherefore the plaintiff prays for judgment against the defendants for twenty-four hundred dollars, and for the costs of this action."

The defendants demurred to the complaint, assigning the following causes of demurrer:

"1. That the complaint shows upon its face that there was no contract between the plaintiff and either of the defendant corporations, and that there was no agreement of any kind between them either express or implied.

(239) "2. That the complaint shows upon its face that it does not show a cause of action against either of the defendant corporations, but shows only a cause of action, if any exists, only against the firm of McDuffie and Gillis, who were such contractors of one W. P. Fortune.

"3. Because it appears on the face of the complaint that the court has no jurisdiction of the action.

"4. Because the complaint shows upon its face that several causes of action have been improperly joined.

"5. Because the complaint does not state facts sufficient to constitute a cause of action, in that while it states the amount claimed to be due by McDuffie and Gillis to the plaintiff as one hundred and thirty dollars, it does not state what claims were assigned to him, the names of the parties assigning or the amounts due each, so that defendant could deny or answer each claim specifically.

"6. Because the complaint is multifarious and indefinite."

The plaintiff, at a subsequent term, filed an amended complaint and further alleged:

1. That by virtue of and under the several contracts set forth in paragraphs 4, 5, and 6 of the said original complaint, in accordance with said contracts, and under the direction and guidance and instructions of the agents, engineers and officers of said corporations, and of said W. P. Fortune, John McDuffie, James N. Gillis, and A. H. Slocumb, this plaintiff, and those who have assigned to him as hereinafter set forth, did and performed work and labor in the grading and building of said Cape Fear and Yadkin Valley Railway, amounting to the sum of twenty-four hundred dollars, which said railway company, nor any other person for them, has ever paid to this plaintiff, although said railway has and is now using and enjoying the said railway so constructed by plaintiff.

(240) 2. That there is now due and owing to plaintiff for said labor and materials furnished as aforesaid, from defendants the following amounts (here follows a long list of accounts assigned to plaintiff, most of them small, but one for $130, another for $275 and another for $112).

3. That all the above amounts have been transferred and assigned to plaintiff, amounting to two thousand four hundred and three 7/100 dollars, and were due and payable on 20 December, 1889.

Wherefore plaintiff demands judgment for the said sum of twenty-four hundred and three 7/100 dollars and interest, and for the costs of this action.

The defendants, relying upon their former demurrer, demurred to the amended complaint, assigning the following causes:

1. That the complaint shows upon its face that there is a misjoinder of actions.

2. That the amended complaint shows that the court has no jurisdiction of the action, and that the action is not prosecuted in the name of the real party in interest.

His Honor sustained the demurrer for the causes set out in the first, second, third, fourth and sixth articles thereof, and dismissed the action as to the railroad and the improvement company, and plaintiff appealed.

George Rountree and C. B. Aycock for plaintiff.
George M. Rose for defendant.

AVERY, J. Where a contractor for the construction of any part of a railroad becomes indebted to a laborer for his services on the work which the former has agreed to perform, the latter may, if he comply with the requirements of the statute (The Code, sec. 1942), subject the railroad company to liability for labor for thirty or "a less number days," provided, 1st, that such employee give notice to such com- (241) pany within twenty days after the performance of the labor for which the claim is preferred; 2d, that the notice shall be in writing and shall be served on an engineer, agent or superintendent in charge of the section of the road on which such labor was performed, personally or by leaving the same at his usual place of business; 3d, that said notice shall set forth the time when the labor was performed, the number of days and the amount of the claim. This right to look beyond the contract of employment to an artificial responsibility that may be thrust upon the company, is a creature of the statute, and one who claims the benefit of it must, like a mechanic seeking to enforce a lien under the provisions of The Code, and upon the same principle, show a substantial compliance with the requirements of law. *Wray v. Harris,* 77 N. C., 77; *Cook v. Cobb,* 101 N. C., 68. The Legislature would not, if it had authority to do so, arbitrarily subject corporations or individuals to liability for the debts of others, unless where the company or person, by reason of the relation sustained to the primary debtor, has the power to guard against incurring loss by withholding a payment due to such

debtor. If the claimant complies with the requirement that notice shall be served within twenty days after the performance of the work and embodies in it the specific information mentioned above, the company can ordinarily ascertain the precise amount of its liability for, as well as to, contractors, or approximate it so closely as to be able to retain a sufficient sum on settlement for its own protection. It should appear affirmatively from the complaint and exhibits, not simply that each of the laborers who assigned to the plaintiff claimed a specified sum from the company, but that every such assignor had complied substantially with the statute in giving the prescribed notice previous to the assignment
(242) of his account. *Cook v. Cobb, supra.* After subjecting the contracting corporation to liability by such compliance, each laborer can assign his claim as a debt, either against his employer or the company dealing with him under a direct agreement or as subcontractor, and the assignee could unquestionably sue upon the aggregate amount so transferred to him by various claimants and recover the sum total of all such claims due for such labor, and as to which the requisite notice should be shown to have been given.

The description of the claims assigned is contained in section 2 of the amended complaint, and is as follows: "That there is now due and owing for said labor and materials furnished as aforesaid from defendants the following amounts: To H. W. Moore, $130; to J. G. Thomas, $275; to W. Wills, $2.67, aggregating (including all the amounts set out as due to the various parties) $2,403.07. The privilege of subjecting the contracting company to liability is conferred by the statute only upon laborers and on account of work for thirty days or less in constructing a road. The plaintiff sues as assignee of more than one hundred and forty persons, whose accounts, in section 1 of the amended complaint, are declared upon as for work and labor done in grading and building the railroad, while in the very next paragraph the specific amounts, without distinguishing one from another, are alleged to be due for "labor and materials furnished." If the plaintiff had alleged that the notice prescribed by the statute had been served, as required, by each claimant for work done, it would have been sufficient. It seems probable, at least, that the larger accounts, amounting to from $100 to $200, were not due for labor for thirty days or less, but for materials, and, if so, the company could in no event be held responsible for their payment.

(243) We concur with the court below in the view that the facts set forth in the complaint show no cause of action against any person or corporation other than the firm of McDuffie and Gillis.

If it be conceded that the plaintiff could not in any event recover against any intermediate contractors, but only against the railroad

company, and upon proof of compliance by his assignors with the statute, the addition of the improvement company as a defendant would not be a fatal misjoinder.

For the reasons given, the judgment is

AFFIRMED.

Cited: Bruce v. Mining Co., 147 N. C., 644; *Alexander v. Farrow,* 151 N. C., 323.

CLINTON LOAN ASSOCIATION AND W. A. DUNN, RECEIVER, v. W. J. MERRITT ET AL.

Assignment of Nonnegotiable Instruments—Constructive Notice—Payment.

1. A bond is nonnegotiable until after endorsement, and an assignee of an unendorsed bond takes it subject to any equities or other defenses existing in favor of the maker at the time of or before notice of the assignment.

2. It is a general principle that where one has notice of an opposing claim he is put upon inquiry and is presumed to have notice of every fact which a proper inquiry would have enabled him to discover; therefore, where the purchasers of the equity of redemption in land, knowing that there was an outstanding mortgage and without making any inquiry as to the ownership or possession of the bonds secured by it and requiring no excuse for their nonproduction, paid the amount of the bonds to the mortgagee, who had previously assigned the bonds to plaintiff: *Held*, that the purchasers of the land were affected with constructive notice of the assignment of the bonds to plaintiff.

APPEAL from *Whitaker, J.,* at December Term, 1892, of (244) SAMPSON.

The action was brought by W. A. Dunn, receiver of the Clinton Loan Association, to foreclose a mortgage made by defendant Merritt to A. S. C. Powell to secure three sealed notes which Powell had, without endorsement, deposited with the association as collateral security for his two unpaid notes. The mortgaged land was subsequently conveyed to the defendants J. A. Ferrell and T. M. Ferrell, who, by giving Powell, the mortgagee, credit on an old account, paid him the amount of the secured bonds, Powell promising to have the mortgage canceled. The Ferrells knew that there was an outstanding mortgage on the land, but had no actual notice that the bonds secured by it had been transferred

to the plaintiff association. At the time of the settlement with Powell the Ferrells did not inquire who owned or held the bonds, and required no explanation from Powell as to why he did not produce them.

On the trial the plaintiffs insisted that (1) the defendants Ferrell were not protected under the facts by want of notice; (2) that in taking the deed from Merritt they took merely an equity of redemption, and, being subsequent in time to the right of the plaintiffs, they were inferior in right. His Honor refused so to rule and gave judgment for defendants Ferrell, and plaintiffs appealed.

R. O. Burton for plaintiffs.
No counsel contra.

SHEPHERD, C. J. The defendant Merritt executed to A. S. C. Powell the bonds and mortgage described in the pleadings, and shortly thereafter the said Powell assigned the bonds, without endorsement, to the plaintiff. The plaintiff took them subject to any equities or other defenses existing at the time of or before notice of the assignment (245) (*Spence v. Tapscott,* 93 N. C., 246; The Code, sec. 177), and, therefore, if, after such assignment and before such notice, the mortgagor or the defendants J. A. and T. M. Ferrell (who had purchased the equity of redemption) made a payment to Powell of five hundred dollars on the said indebtedness, he or they will be entitled, as against the plaintiff, to have it applied as a credit on the said mortgage.

The plaintiff argues that neither party acquired any legal interest; and that the payment consisting simply of the crediting of an account due the Ferrells by Powell, their equities are equal, and this being so the case should be decided for the plaintiff upon the principle embodied in the maxim *qui prior est in tempore potion est jure.* While the principle may possibly apply, we prefer to rest our decision upon another ground, and this is that in making the alleged payment the defendants were guilty of such gross negligence as amounts to constructive notice of the assignment of the bonds to the plaintiff. Of course there can be no question that if the mortgagor or any one claiming under him makes a payment with such notice, "he does it in his own wrong and must suffer the loss." 1 Jones Mort., 817.

About a year after the assignment of the bonds the mortgagor sold the land to the Ferrells, and the latter claim that they paid off the mortgage indebtedness by crediting an account which they held against the mortgagee, with five hundred dollars, as above stated. At the time of the transaction the said Ferrells had actual knowledge of the existence of the bonds and mortgage, but they made no inquiry as to who had pos-

session of them, nor did they require that they should be produced or the mortgage canceled. They seem to have relied entirely upon the bare promise of Powell to surrender them to Merritt.

It is a general principle that where one has notice of an op- (246) posing claim he is put upon inquiry, and is presumed to have notice of every fact which a proper inquiry would have enabled him to discover. *Bunting v. Rix,* 22 N. C., 130; *Bryan v. Hodges,* 107 N. C., 492. The rule as applicable to this case is happily stated by *Vice-Chancellor Wigram* in *Jones v. Smith,* 1 Hare, 43, where he places within the principle of constructive notice "cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered or in some way affected, and the court has, therefore, bound him with constructive notice of facts and instruments, to the knowledge of which he would have been led by an inquiry after (*i. e.,* concerning) the charge, encumbrance, or other circumstances affecting the property of which he had actual notice." Illustrations of this doctrine may be found in English Chancery decisions concerning priorities in cases of equitable mortgages, where a failure to inquire for the production of important title deeds is held to be constructive notice, postponing a mortgagee to the claims of another with whom such deeds have been deposited as security. *LeNeve v. LeNeve,* White & Tudor L. C., note.

In this country we have very high authority in favor of its application to cases like the present. In 1 Jones Mortgages, 820, it is laid down that under such circumstances "the mortgagor is bound to take notice of such an assignment upon the discharge of his debt, because proper diligence on his part (or of one who has purchased his equity of redemption) demands that he should require the production of the notes before paying."

In *Kellogg v. Smith,* 26 N. Y., 18, it is held that the purchasers of a bond and mortgage, who failed to require the production of the bond, are chargeable with notice of any defect in the assignee's title thereto. *Gould, J.,* said: "The truth is, they saw fit to trust to Bedell's word that he owned and possessed the bond (with its collateral (247) security), and upon that trust they paid him for the bond and took a written assignment of it. . . . They must abide the consequences of not taking the proper precaution of requiring the production and delivery of the bond."

In *Reeves v. Hayes,* 95 Ind., 527, it is said that where notice of the assignment of the debt and mortgage cannot be given by registry, "then one who takes an interest in mortgaged property must ascertain that the person assuming to release the mortgage is the holder of the notes which it secures. It is unquestionably the law that where notice of title can-

not be given by record, the person seeking to secure rights must ascertain who is the owner of the mortgage, by tracing the notes to the hands of the assignees."

The foregoing authorities go much farther than is necessary to sustain the plaintiffs' contention, and indeed are in advance of some of the decisions in England and America, which do not require the production of the instruments, but only that an inquiry be made and a plausible excuse be given for their absence. Some of the cases are evidently influenced by the existence of statutory provisions for the registration of assignments of mortgages, the courts requiring a slighter degree of diligence where such laws obtain than is sanctioned elsewhere.

With a due appreciation of the importance of guarding the doctrine of constructive notice so that it may be kept within proper limits, we must conclude that, taking either of the views we have presented, the Ferrells were affected with constructive notice, as they made no inquiry whatever as to the ownership or possession of the bonds, nor was any excuse given for their nonproduction.

We are of the opinion that there should be a

NEW TRIAL.

Cited: Wynn v. Grant, 166 N. C., 46, 52.

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(248)

D. W. BAIN, STATE TREASURER, v. CLINTON LOAN ASSOCIATION ET AL.

Joint Stock Association—Rights and Liabilities of Members—Insolvent Corporation—Unpaid Subscriptions.

1. An association of persons doing business as a joint stock company, having no charter either by special act of the General Assembly, or under the general law, and hence having no corporate existence, is a partnership, and suit may be brought by each creditor against any or all of the members or partners; and where such association becomes insolvent its members or stockholders, who are creditors are not entitled to any dividend on their debts until the other creditors shall be paid in full.

2. Where a joint stock (unincorporated) association is succeeded by an incorporated company, whose stockholders are the members of the joint stock association and pay their subscriptions to the stock of the new, not in cash, but in stock of the old concern, they are debtors to the full amount subscribed by them, and if they are also creditors of the corporation and it becomes insolvent, they cannot share in any part of the assets until their liability has been paid in full. In such case, the receiver

should retain all dividends on debts due to stockholders thus indebted to the corporation until he is ready to make a final settlement with all the creditors.

ACTION brought in the Superior Court of WAKE by the State Treasurer against the defendant, the Clinton Loan Association, for the appointment of a receiver and the winding up of its business. W. A. Dunn was appointed receiver, and, in the course of liquidating the company's affairs, petitioned the court for instructions as to payment of dividends, his petition being, in substance, as follows:

That in 1887 divers persons in Sampson County and elsewhere organized an association, or unincorporated joint stock company, called "The Clinton Loan Association," under articles of agreement or constitution, and for several years continued to do a banking business in the town of Clinton; that a corporation called "The Clinton Loan Association" was chartered by the General Assembly at its session (249) of 1891, ch. 57, and on 18 March, 1891, its corporators organized and accepted said charter, and continued to do a banking business till the beginning of this action; that it was the desire of nearly all of the stockholders of the old joint stock company to procure a charter, and upon its granting by the General Assembly, and at the time of organizing thereunder, a meeting of the corporators was held and a resolution adopted that all subscribers to stock in the new concern should be allowed to pay for their stock by the stock of the old joint stock company; about $42,000 (out of $50,000) of the old stock was thus transferred to the new concern in payment for stock; the residue of the old stockholders did not subscribe to the stock of the new concern; said stock was then worthless; that the said joint stock company, before closing business, duly executed a deed of assignment to the corporation, conveying all its property of every description to said corporation in trust, first, for the payment of all depositors, time and call, then any unpaid dividends of said company, and the residue to the stockholders thereof; that the said corporation proceeded to administer the assets of said joint stock company, or association, and paid out in cash to holders of claims against said association about as much as it collected; but in many instances the creditors of the old concern surrendered their evidences of debt or claims against the old concern, and accepted in lieu thereof certificates of indebtedness of the new concern; so that now the new concern has its paper outstanding to the amount of between $38,000 and $40,000 in excess of its collections from the assets of the old concern; that the petitioner has made collections on both the assets of the old and the new concern; that some of the stockholders of the old concern were depositors therein, and it is still indebted unto them on account (250)

of the same; that some of the stockholders of the *corporation.* were depositors therein, and it is still indebted unto them on account thereof; that your petitioner was appointed receiver in this action on or about 22 December, 1891, by the judge of the Superior Court, under proceedings instituted by the State Treasurer; by virtue thereof the receiver took charge of all the assets of the old and new concern, and has made considerable collections, and will very shortly proceed to make a distribution among the creditors. To enable him to do so with safety and fairness he desires the advice and direction of the court upon the following questions:

1. Are the new and the old concern to be treated as separate, or one and the same?

2. Is the corporation entitled to retain from the assets of the old concern the amount of its outstanding paper, which was issued in lieu of the paper of the old concern, before any payments are made to the other creditors of the old concern?

3. Are the stockholders of the old concern, who are also creditors thereof, entitled to any dividend on their debts till the other creditors are paid in full?

4. Are the stockholders of the new concern, who are also creditors thereof, entitled to any dividend on their debts till the other creditors are paid in full?

Bryan, J., rendered the following judgment:

"The court doth order and adjudge as follows, and advise the receiver to pay out upon the following principles:

"Answer to question first: Separate and distinct.

(251) "Answer to question second: The corporation is entitled to stand in the shoes of the creditors of the old concern, whose paper it took up, and may share *pro rata* in the assets of the old concern to that extent.

"Answer to question third: Yes, but the receiver will pay to the creditors who have heretofore obtained judgments against any of the stockholders of the old concern, who are or shall be entitled to dividends as creditors of the old concern, such portions of such dividends as may be equal to the *pro rata* share of the respective liabilities of such stockholders upon such judgments, calculated upon the basis of the amount of the stock held by each of them in the old concern, and any surplus over and above such *pro rata* share will be paid over to the said stockholders respectively."

The answer to the fourth question, though not appearing in the transcript, was stated in the argument to have been "Yes."

From this order the receiver and the creditors of the old and of the new concern appealed.

Robert O. Burton for Receiver Dunn.
No counsel contra.

BURWELL, J. The counsel for the appellant concedes in this Court that the answers of his Honor to the first and second questions propounded by the receiver are correct, but contends that his answers to the third and fourth questions are not in accord with the rights of the creditors of the two concerns, the joint stock company and the defendant corporation.

It is necessary first to determine in what relation the members of the first Clinton Loan Association (the joint stock company) stand toward the creditors of that concern.

Each member is liable to each creditor for the full amount of (252) his claim. This is so because that association was a partnership, and suit may be brought by each creditor against any or all of the partners. The Code, secs. 187 and 222. We speak now of the liability of the members to the creditors, and not of the liability of the members *inter sese*. It was not a corporation. There was no special charter from the General Assembly making it an artificial person capable of contracting. Its members had not complied with the provision of the general law (The Code, ch. 16, and acts amending it) so as thus to acquire for their association this artificial corporate existence, and, indeed, they seem to have been engaged in a business (banking) which prevented them from availing themselves of the provisions of the general law, and becoming a corporation of an *incorporated* stock company. The Code, secs. 677, 684. Mr. Beach, in his work on private corporations, section, 167, says: "A joint stock company may be defined to be a partnership whereof the capital is divided into shares which are transferable without the express consent of all the copartners. Its articles of association have the same relation to it that the charter has to an incorporated company, regulating the duties of the officers and the duties and obligations of the members among themselves. At common law they have none of the rights and immunities of regularly incorporated companies, being nothing more than partnerships, and every member of the company is liable for the debts of the concern, no matter what the private arrangement among themselves may be." All the authorities seem to be to the same effect. We have in this State no statutes regulating the law of such companies, such as are in force in England and in New York, and in some other States.

Such being the relation of "the stockholders of the old concern, who are also creditors thereof" to the other creditors, we conclude that the proper answer to the third question is "No," for they are members of a bankrupt firm, and a partner is not allowed to prove (253)

against a bankrupt estate of the firm for an amount owed him by the firm in competition with joint creditors, for he is their debtor. 2 Bates on Partnership, sec. 836.

We think that the fourth question of the receiver should also be answered, "No."

The "new concern" is a corporation. None of its stockholders have paid any part of their subscriptions for stock. *Foundry Co. v. Killian,* 99 N. C., 501. They are debtors to the full amount subscribed by them, and cannot be allowed to appropriate any part of the fund belonging to the other creditors till their liability has been paid. The receiver should retain all dividends on debts due to stockholders thus indebted to the corporation until he is ready to make a final settlement with all the creditors. The receiver will pay the costs out of the funds in his hands.

JUDGMENT MODIFIED.

Cited: Hanstein v. Johnson, post, 257; *Faison v. Stewart, post,* 333; *Dunn v. Johnson,* 115 N. C., 256; *Lacy v. Loan Association,* 132 N. C., 132; *Gilmore v. Smathers,* 167 N. C., 444; *Wood v. Staton,* 174 N. C., 254.

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(254)

M. HANSTEIN v. A. F. JOHNSON ET AL.

Joint Stock Associations—Partnership—Liability of Partners.

1. Individuals associated in business and claiming to be a corporation and exempt from individual liability for its contracts, in order to shield themselves from such liability, must be able to show that the corporation exists by virtue of a charter granted by the General Assembly or under the general law; when no charter exists such association is a partnership.

2. Sections 1 and 3 of Article VIII of the Constitution do not create joint stock associations, but are directions to the General Assembly not to grant special charters to corporations (which word, by force of Section 3, includes joint stock associations), except where the object cannot be attained under the general law.

3. Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners.

4. The fact that the assets of a partnership are not sufficient to pay the partnership debts, or that a receiver has charge of the assets, or that, there

being many creditors, a multiplicity of suits may ensue, cannot deprive a creditor of his right to enforce his claim against any one, or several, or all of the partners.

ACTION tried at May Term, 1892, of SAMPSON, before *Winston, J.*, upon a case agreed, as follows:

1. That on or about the.....day of ....., 1873, and since that time, the defendants above named became members of the Clinton Loan Association under articles of agreement, which said association at the time hereinafter mentioned was unincorporated and did a general banking business in the town of Clinton.

2. That in February, 1891, and prior thereto, and now, the persons named in the second defense of the answer of A. F. Johnson and others were also members and shareholders of said association.

3. That at the times mentioned in the complaint the plaintiff, M. Hanstein, deposited with said association the amounts of money therein set out, and took certificates of deposit therefor, by which said association promised to pay the plaintiff the said amounts so deposited, with six per cent interest on the same from the date of deposit, after a notice of thirty days, amounting in all to the sum of $5,099.50, as is fully set out in the second article of the complaint.

4. That on 7 December, 1891, the plaintiff demanded payment of said sums of money of said association, and gave notice that payment thereof was required.

5. That on 22 December, 1891, a receiver was duly appointed (255) in an action duly instituted in the Superior Court of Wake County, wherein the State of North Carolina and Donald W. Bain, Treasurer of said State, are plaintiffs, and the said association is defendant, for the purpose of winding up and settling the affairs of said association in accordance with the provisions of chapter 155, Laws 1891, to take charge of the assets of said association upon the ground that the same was insolvent.

6. That said receiver of said association has now in his possession the assets of said association to a large amount, the exact value of which is not now ascertainable and which have not been administered.

7. That prior to the institution of this action the plaintiff obtained an order from *Hon. H. G. Connor*, then holding the courts of the Fourth Judicial District, for permission to institute this action and to prosecute the same to judgment. The petition on which said order was granted and said order are made a part of these facts.

8. That the plaintiff does not seek to interfere with the possession of said receiver, but to establish his debt and to obtain a lien upon the individual property of the members of said association.

9. That some of the members of said association, now reputed to be men of wealth and large means, to wit, O. P. White, James Moore and James Stevens, have within the last ninety days executed conveyances by which large parts of their estates have been disposed of.

10. That said receiver has instituted no action against the defendants upon the certificates set out in the complaint.

11. That said association is insolvent, owing about $100,000 to a great number of creditors in varying amounts, and that twelve of such creditors have already brought separate suits against these defendants, or some of them, to enforce an alleged individual liability, and a

(256) good many other creditors of said association are threatening to bring similar separate suits against these defendants, or some of them, in the Superior Court, and in the courts of justices of the peace in Sampson, to enforce such individual liability.

Upon consideration of the foregoing facts, the court gave judgment in favor of the plaintiff and against the defendants.

From which judgment the defendants appealed to the Supreme Court upon the following grounds:

1. That his Honor erred in holding that all the shareholders in said association are not proper and necessary parties to this action, but that the plaintiff can maintain the same against a part of said shareholders.

2. That his Honor erred in holding that the defendants were individually and primarily liable to the payment of the plaintiff's debt and that such liability can be enforced in this action and need not be sought in the action in which said receiver was appointed, or in an action brought by said receiver on behalf of all the creditors of said association against all the stockholders of said association.

3. That his Honor erred in holding that the defendants were primarily and individually liable to the payment of plaintiff's debt and not secondary to the primary liability of said association, and that it was not necessary to first exhaust the assets of said association before subjecting the individual shareholders to the payment thereof.

4. That his Honor erred in holding, under the facts and circumstances of this case, that a single creditor of said association could maintain his action against a part of said shareholders, and that such defendant or defendants could not set up as a defense the fact that said association was insolvent; that its debts consisted of a great number in varying amounts to different creditors, aggregating about $100,000, and that all said creditors had brought, or were threatening to bring, separate actions in the Superior Court and in the courts of justices of

(257) the peace.

Allen & Dortch and Aycock & Daniels for plaintiff.
George Rountree for defendants.

BURWELL, J. In *Bain v. Loan Assn., ante,* 248, we have decided that the association of that name, and of which the defendants were members, was a partnership, and that, since in this State all contracts are several, each member was liable to each creditor for the whole amount of his claim.

In addition to what is said in the opinion filed in that case upon this subject, it may be remarked that individuals associated together in a business and claiming to be a corporation and exempt from individual liability for the contracts of the association, in order to shield themselves from such liability, must be able to show that this legal entity exists by virtue of some special or general act of a legislative body capable of chartering—giving life to—a corporation. The defendants show no such charter. No special act had conferred on their association corporate existence, and they had not complied or attempted to comply with the terms of the general law (The Code, ch. 16) so as to acquire such existence through its provisions. Indeed, the business in which they were engaged (a general banking business) was such as to preclude them from availing themselves of the facilities of that law for creating and organizing a corporation. Banking and insurance companies cannot become corporations in this State except by special act of the General Assembly, being excepted from the provisions of the general law. The Code, sec. 677.

It was contended by defendants' counsel that inasmuch as their (258) association was a joint stock company it was an *incorporated* joint stock company, or a corporation by virtue of sections 1 and 3 of Article VIII of the Constitution of the State. These sections of the organic law are not intended to create corporate existences, but are directions to the Legislature not to grant special charters to corporations (which word by force of section 3 includes joint stock companies) except in cases where, in the judgment of the Legislature, the object of the corporation cannot be attained under general laws. Chapter 16 of The Code, and the acts amendatory thereof, have been adopted in compliance with the mandates of this article. The General Assembly has not seen fit to provide for the organization and incorporation of "joint stock companies" as has been done in England and also in New York, the Constitution of which State is in this respect the same as ours.

When we have determined that the claim of the plaintiff is against a copartnership, of which the defendants were members, we have virtually overruled all their exceptions to the judgment from which they have appealed. They are jointly bound to him, and, because of this

joint liability, the plaintiff and each partner has a right to demand that the joint property shall be applied to the satisfaction of the joint liabilities. But they are severally bound to him also, under the statutes of this State, in which all contracts are joint and several, and the plaintiff may sue any one or more of the partners as he wills. The Code, secs. 187, 222. Nor does the fact that the partnership is insolvent, that is, that the joint property is not sufficient to pay the joint or partnership debts, or the fact that a receiver has charge of the partnership assets, no matter at whose instance, deprive the creditor of that right. Nor can he be stayed in his efforts to secure the money that is due (259) him because of the fact that there are a great many creditors in like condition with himself, and that there will, therefore, be a multiplicity of suits. The law favors, not hinders, the diligent. A court will sometimes interpose to prevent a multiplicity of suits, but the facts set out in this case do not at all warrant any such interposition.

AFFIRMED.

Cited: Faison v. Stewart, post, 333; *Dunn v. Johnson,* 115 N. C., 256; *Daniel v. Bethell,* 167 N. C., 219; *Wood v. Staton,* 174 N. C., 254.

HENRY HUTAFF v. ADRIAN & VOLLERS.

Injunction—Remedy at Law—Statute of Limitations—Sale Under Power.

Where a mortgagor in possession has a full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the Court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage.

MOTION to dissolve an injunction, heard before *Connor, J.,* at January Term, 1893, of NEW HANOVER.

The complaint, used as an affidavit upon which the order has been granted, alleged that the plaintiff, in March, 1871, in order to secure his promissory note to defendants, due 1 April, 1872, executed to them a mortgage upon certain land in Wilmington, with the usual power of sale in case of default in the payment of the note; that no payment has ever been made on the note and mortgage, which became barred by the statute of limitations on 1 April, 1882, and no action has ever been

brought on the same by the defendants; that the plaintiff has (260) been in actual possession of the land ever since the execution of the mortgage; that defendants have advertised the land for sale on 2 February, 1893, and plaintiff prays that they be perpetually enjoined from selling, etc.

From the order dissolving the injunction, plaintiff appealed.

E. S. Martin for defendants.
No counsel contra.

CLARK, J. Upon the allegations in the complaint taken as true the defendants' bond and mortgage are alike barred by the statute of limitations. The Code, sec. 152 (2) and (3). A sale under such mortgage would carry to the purchaser no title. The plaintiff mortgagor, being in possession, has a full defense to an action for ejectment when brought by the purchaser. *Capehart v. Biggs,* 77 N. C., 261; *Fox v. Kline,* 85 N. C., 173. The Court will, therefore, not interpose by injunction merely to prevent a cloud upon the title. *Southerland v. Harper,* 83 N. C., 200; *Browning v. Lavender,* 104 N. C., 69.

It would be otherwise if the contest was as to the amount due under the mortgage (whether any balance is due at all, or how much), since then, if any balance is due, the purchaser at the mortgage sale will get a good title, and it might put the plaintiff mortgagor to a serious disadvantage if there were a sale before the amount due is determined. *Purnell v. Vaughan,* 77 N. C., 268; *Capehart v. Biggs, supra; Pritchard v. Sanderson,* 84 N. C., 299; *Harrison v. Bray,* 92 N. C., 488; *Gooch v. Vaughan, ib.,* 610.

AFFIRMED.

Cited: Fleming v. Barden, 127 N. C., 217; *Smith v. Parker,* 131 N. C., 471; *Menzel v. Hinton,* 132 N. C., 661, 667; *Miller v. Coxe,* 133 N. C., 582.

(261)

QUINCY SAWYER ET AL. v. JOHN S. NORTHAN ET AL.

Purchase for Minor, Validity of—Agency—Mortgage for Purchase-money.

1. An alleged contract of purchase made by a minor (whose infancy is undisclosed) or by one pretending to act as his agent, under an agreement to mortgage the land back to secure the purchase-money, is a nullity.

2. Where, in an action to recover the possession of land, it appeared that C., intending, but not disclosing his purpose, to act as agent for his minor son, C., Jr., purchased the land from F., the defendant's grantor, under an agreement to reconvey the land by way of mortgage to secure the purchase-money, and F., supposing that he was dealing with C., executed the deed to him and C. caused the abbreviation "Jr." to be added after his own name and had the deed so recorded, at the same time executing notes and mortgage in his own name to F., to secure the purchase-money: *Held*, that a conveyance by "C., Jr.," or his heirs to plaintiff, who had knowledge of all the facts, did not divest F.'s title to the lands.

ACTION for the recovery of land, tried before *Bryan, J.*, and a jury, at Spring Term, 1891, of HYDE.

During the pendency of the action George Credle acquired from the plaintiff Sawyer his interest in the land with knowledge of the pendency of the action and of the equities set up by the defendants, and before the trial was substituted as plaintiff in place of Sawyer.

The plaintiff claimed title under deeds from the heirs of Thomas F. Credle, Jr., who died during infancy, and a deed from O. C. Farrar to said Credle, Jr. He also offered in evidence a mortgage executed by Thomas F. Credle to O. C. Farrar covering the *locus*, and dated ..... July, 1872, and duly recorded.

(262) The defendant claimed under a deed made to him by O. C. Farrar and wife in January, 1879, reciting a sale of the land under the mortgage by T. F. Credle to said Farrar; which mortgage, as the answer alleged, was made contemporaneously with the deed from Farrar to Credle, Jr., to secure the purchase-money notes for $600. The answer alleged that during these transactions the said Thomas F. Credle, Jr., was an infant and died before attaining his majority, and that the said O. C. Farrar was ignorant of the fact that he was dealing with an infant, but on the contrary believed that he was dealing with an adult capable of contracting; that at the time of his purchase, and the payment by him of the purchase-money to the said O. C. Farrar, the defendant was ignorant of the fact that the mortgage under which he purchased was executed by an infant, and, on the contrary, supposed it to have been executed by the father of the said Thomas F. Credle, Jr., who bore exactly the same name, and in whom he supposed the title was. The more so that in signing the mortgage, the addition of "Jr." was omitted. That upon the death of the said Thomas F. Credle, Jr., his real and personal estate descended and came to his two sisters, and a brother since dead, and the plaintiff purchased by deed from the two sisters, dated ..... day of ....., 1880, and had full notice of all the facts hereinbefore set forth, previous to his said purchase.

George Credle testified: "I am the present plaintiff, and I acquired my interest since the institution of this action. I had personal knowl-

edge of the pendency of this action. I had knowledge of the equities set up by the defendant, and I had that knowledge at the time of my purchase."

W. H. Wahab testified: "I sold the land under mortgage from Credle to Farrar, as agent for Farrar, to a man named Sadler, he being the highest bidder. Sadler transferred his bid to defendant, John S. Northan. I was not acquainted with the facts in this case until after suit was brought. The lands are the same that were con- (263) veyed by O. C. Farrar to Thomas F. Credle, Jr." The mortgage notes were shown to the witness, and he states "that these were the notes secured by the mortgage under which I sold as agent of Farrar."

It was admitted that Thomas F. Credle, Jr., was an infant in 1872, and died during his infancy.

The defendants offered the following evidence:

Deposition of O. C. Farrar admitted by consent, which is as follows, to wit: "Soon after the close of the late war I purchased the lands described in the complaint of Thomas F. Credle, then a man of fifty years of age or thereabouts; in 1872 this same Thomas F. Credle applied to me in person to resell him the land, which I did. I made the deed in the manner suggested by said Credle, and took what I supposed to be a mortgage from the said Credle, to whom I had sold. I did not then know that there was a Thomas F. Credle, Jr.; I never saw Thomas F. Credle, Jr., so far as I am aware of, and I never had any transactions with any minor of that name, and I never knew that Thomas F. Credle had a son of that name until the institution of this action, and believed that I was selling to and taking a mortgage from Thomas F. Credle, who had formerly owned the land."

The defendant, John S. Northan, testified: "I am one of the defendants; I bought the land under the mortgage; I was not present when the mortgage was signed; I have seen the mortgage and sent it to O. C. Farrar; it was signed Thomas F. Credle; I took possession of the land at the time I purchased it, and have been since that time in possession."

George Q. Credle testified: "I was a witness to the mortgage from Thomas F. Credle to O. C. Farrar; there were two Thomas F. Credles; Thomas F. Credle, Sr., signed the mortgage; the notes secured by the mortgage were signed by Thomas F. Credle, Sr.; I know (264) his handwriting; I know when the deed was made to Thomas F. Credle, Jr.; he was then about twelve years old; he died when he was about fifteen years old."

Upon cross-examination witness stated: "I think the deed and the mortgage were made at the same time; O. C. Farrar did not live in Hyde County; Thomas F. Credle, Sr., and his son, Thomas F. Credle, lived in Hyde County; I am pretty sure that Farrar knew that Credle had a boy, Thomas F. Credle, Jr."

The issues submitted to the jury and the responses thereto were as follows:

1. Did the present plaintiff, Credle, have notice before his purchase of the fact set forth in the answer? "Yes."
2. Did the original plaintiff, Sawyer, have notice of defendant's equities before he purchased the lands in dispute? "Yes."
3. Did W. H. Wahab have notice of defendant's equities before he acquired his interest? "Yes."
4. Were the sale of the land to T. F. Credle, Jr., and the mortgage given to secure the purchase-money contemporaneous acts? "Yes."
5. Did O. C. Farrar know at the time of the execution of the deed to T. F. Credle, Jr., and the execution of the mortgage to secure the purchase-money, that he was contracting and dealing with an infant? "No."
6. Was the mortgage under which the land was sold signed and executed by Thomas F. Credle, Jr.? "No."
7. Did O. C. Farrar at the time of the making of the deed to Thomas F. Credle, Jr., know that said Thomas F. Credle, Jr., was an infant? "No."

(265) 8. Did Thomas F. Credle, Jr., authorize Thomas F. Credle to sign said mortgage for him? "No."

Upon the findings of the jury the plaintiff moved for judgment that he be declared the owner of the land and for possession, which was refused.

Defendant moved:

1. That the court should render judgment upon the said findings, declaring that the plaintiff was not the owner of the land or entitled to recover possession thereof.
2. That upon said finding the court should render judgment declaring that John S. Northan was subrogated to the rights of O. C. Farrar to the full extent of the mortgage debt, with interest thereon as specified in the mortgage, and declare the same a lien upon the land.
3. That the court should render judgment in favor of John S. Northan for the sum of $300, with interest from July, 1879, and declare the same a first lien upon the land, and render judgment in favor of O. C. Farrar for the balance of the original purchase-money, with interest according to the notes and mortgage, and declare same a second lien upon the land.
4. That the court should render judgment in favor of John S. Northan for the sum of $300 purchase-money paid by him, with interest on the same from January, 1879, and declare the same a lien upon the said land.

The court rendered its judgment as follows:

1. That the plaintiff Credle is not entitled to recover the land described in the complaint without first paying the purchase-money set forth in the deed dated 15 January, 1879, to wit, the sum of $300.

2. That the said sum of $300 is a charge upon the land described in the complaint.

3. That the said Credle is entitled to the possession of said (266) lands upon the payment of the amount herein declared as a lien thereon.

4. That if the said Credle fails to pay to the defendant Northan the said sum of $300 within ninety days after the expiration of the present term of this court, then the commissioner hereinafter appointed is directed to sell said land at the courthouse door in Swan Quarter for cash, after giving thirty days' notice of such sale, and execute title to the purchaser, and out of the proceeds of such sale pay to the defendant Northan the said sum of $300.

5. That defendant recover costs, etc.

From the judgment the plaintiffs and defendants appealed.

J. H. Small and W. B. Rodman for plaintiffs.
C. F. Warren for defendants.

CLARK, J. The transaction, in the light most favorable to the plaintiff, and leaving out of view all circumstances tending to prove fraud, is that Thomas F. Credle, intending to act as agent for his son, Thomas F. Credle, Jr., bought the lands of O. C. Farrar with an agreement to mortgage the same for the purchase-money; that his son was a minor, twelve years of age, and hence incapable of appointing an agent; that the minority of the son was not made known to Farrar, who supposed, indeed, that he was conveying to Thomas F. Credle, from whom he had originally bought the land; that said Thomas F. Credle, after receiving the deed in which he caused the abbreviation "Jr." to be written after the name of Thomas F. Credle, as the grantee named therein, did execute a mortgage on the land covered by the deed and mortgage notes for the full amount of the purchase-money, all of which he signed in his own name.

The jury find that the purchase and the mortgage back were (267) contemporaneous acts, and, of course, parts of the same transaction. The mortgage could have no validity because executed by one to whom the land had not been conveyed. But the deed was equally invalid and conveyed no title because it was merely a part of a trans-

action, which whole transaction was of no effect since Thomas F. Credle (assuming his good faith) had no authority, and could have none, to enter into such contract as agent for a minor.

It is true land can be conveyed to a minor, but when an alleged contract of purchase is made by a minor (whose infancy is undisclosed) under an agreement to mortgage the land back to secure the purchase-money, the whole transaction is a nullity since he cannot execute the mortgage and there is no contract. One attempting to act as agent for him is in no better condition, for the minor could neither appoint an agent nor empower him to make a mortgage which he could not make himself. The conveyance is also a nullity, because the conveyance back by the grantee by way of mortgage, which was a part of the contract, and the basis upon which it was made, was never executed. If the deed by Farrar had conveyed any title, there being a failure by the grantee to give a valid mortgage as agreed, Farrar retained the equitable title or real title, since he could call for a reconveyance.

In *Bunting v. Jones,* 78 N. C., 242, where there was a conveyance of land and a contemporaneous agreement for a mortgage back to secure the purchase-money, but the purchaser's wife refused to join in the mortgage, it was held that no title vested in the grantee, and his wife acquired no dower or homestead rights. In this case, as in that, it might well be said, "it was not intended to give the land to the party, and he has not given anything for it." That case has been cited and
(268) approved in *Moring v. Dickerson,* 85 N. C., 466, and *Burns v. McGregor,* 90 N. C., 222.

If here a valid mortgage back had been executed the subsequent sale thereunder and the conveyance to the purchaser would have divested all rights of the plaintiff, who claims under the minor. As the mortgage was not executed as agreed, the contract was not carried out, what purports to be a deed to the minor conveyed no title, and the whole transaction was a nullity *ab initio.* No question of the rights of third parties can arise, as the plaintiff and all under whom he claims are fixed with knowledge of the facts. Certainly, as between the parties, the title was not divested from O. C. Farrar by such attempted conveyances; and if the subsequent conveyance from Farrar to the defendant has validity, it is because the title still remained in him, and not because he attempted to convey as mortgagee under a power of sale in an invalid mortgage.

The court should simply have given judgment against the plaintiff and in favor of the defendant for the land and for costs. This disposes of both appeals. The defendant will recover costs in both appeals in this Court.

ERROR.

(269)

JONES M. SPENCER v. NANCY E. FORTESCUE ET AL.

Issues—Evidence—Hearsay—Admission of Pleadings as Evidence.

1. Where an issue was tendered which aimed to ascertain the intent of one party to a contract, rather than what was the agreement between the parties, it was proper to refuse to substitute such issue for one submitted by the court framed to ascertain the agreement.

2. Where, in an action on a note, the plaintiff, in explanation of a credit thereon, offered to prove the declarations of a former owner as to a statement, made to him by another former owner to whom the payment had been made: *Held*, that such declarations, being hearsay, were inadmissible. (*Harper v. Dail*, 92 N. C., 394, distinguished.)

3. The whole admissions in pleadings must be taken together; therefore, where, in an action on a note, the plaintiff had offered the first article of defendant's answer admitting the debt, it was proper to admit as evidence for defendant the second article of the answer, which was a qualification of the first.

ACTION for foreclosure of a mortgage, tried before *Shuford, J.*, and a jury, at Spring Term, 1892, of HYDE.

The complaint alleged the execution by E. H. Fortescue and wife to M. Makely of a note and mortgage for $900 on 4 September, 1879, on which there was a balance due on 19 December, 1884, of $343, on which date a payment of $149 was made by R. H. Watson for his sister, the defendant, Nancy E., and as alleged by plaintiff R. H. Watson then, at the request of his sister, paid Makely the balance due and took the note and mortgage to hold until she could repay him. By subsequent assignments the note and mortgage came to the hands of the plaintiff, as he alleged.

The defendants admitted the execution of the note and mortgage, and that on 19 December, 1884, there was due a balance of $343, but averred that the whole had been paid and denied that there had been any assignment or transfer of the note and mortgage by Makely to R. H. Watson or any other person.

There was an endorsement on the note of a credit of $204.60, dated 4 March, 1885, made in the handwriting of the plaintiff at the direction, as he testified, of C. M. Watson, a former holder of the note. Plaintiff claimed that this endorsement related to the payment covered by a receipt for like amount and date given by R. H. Watson to Nancy (270) E. Fortescue. When plaintiff offered to prove what was said by C. M. Watson, at the time of the entry, about the credit and the receipt of the same date and the payment represented by the receipt (Watson

being under subpœna and in attendance upon the court), defendant objected to the testimony and it was rejected under plaintiff's exception.

The plaintiff testified as follows: "The note and mortgage were in my possession at the time of the commencement of this action. I then owned them and do now." . . . He further testified that after he traded for it he had a conversation with Mrs. Fortescue, who told him she could pay it in the fall of 1885; that she said she had made payments to R. H. Watson, who at the last payment took up the small receipts and gave her on 4 March, 1885, a receipt for the whole amount paid, including $149, proceeds of the sale of rice by him for her; that she did not tell him that she had made payments to R. H. Watson for which she had no receipts.

The plaintiff then introduced in evidence the first section of defendant's answer, which admitted that there was due on the note on 19 December, 1884, while in Makely's hands, the sum of $343.

The defendants then introduced evidence as follows:

1. Second section of their answer, which averred that the note and mortgage had been paid and satisfied.

2. A receipt signed by Rufus H. Watson, dated 4 March, 1885, as follows: "Received of Nancy E. Fortescue $204.60 on deeds from Makely." This is the receipt referred to by the plaintiff in his testimony concerning the endorsement of a credit on the note entered by him.

(271) M. Makely testified as follows: "I had many dealings with E. H. Fortescue, and had a long running account with him, showing my transactions with him. I settled these transactions, according to my books, with Mr. R. H. Watson, who was a brother of Mrs. Fortescue. He got the note and mortgage in controversy from me. He is now dead. I had a conversation with him at the time he took up the note from me. He came to me and said he wished to take up Mr. E. H. Fortescue's note and mortgage. I hesitated, and told him I did not know whether I would let him have it or not; that I had promised Mr. Fortescue not to push him on this paper, or take any advantage of him about it, and that I would have to see Mrs. Fortescue before I could do anything about it. He said Mrs. Fortescue had sent him to get the note and mortgage. I said something to him in regard to the money, and he said that Mrs. Fortescue had sold her crop of rice, and stated the amount of money realized from the rice. I do not remember how much it was, but I remember it was not sufficient to pay the note. He did not say where the remainder of the money to satisfy the note was to come from. I then agreed to let him have the note and mortgage, and he paid me part of the money for them, and came back within a few days and paid the remainder and took the papers. At the time he

took the papers I proposed to cancel them, and he objected and said he did not want them canceled at that time as he wished to settle some other debts against the estate, and creditors might press the estate if the mortgage was canceled. I told him I would not transfer the note and mortgage to any one, but would cancel them."

The plaintiff objected to the foregoing testimony as to the transaction and conversation between the witness and Rufus H. Watson, on the ground that the same was hearsay, and further, that Rufus H. Watson being dead, it was incompetent under section 590 (272) of The Code. Objection was overruled under exception, and the witness continued to testify as follows:

"Rufus H. Watson was a brother of Mrs. Fortescue. I have never been requested by any holder of this note to sell the land under the power of sale in the mortgage. I have been asked not to cancel it. According to my books there was due me on 19 December, 1884, $343.19, and this amount is represented by the receipt of that date."

J. W. Hays testified as follows: "I knew R. H. Watson. I had a conversation with him the day he went to M. Makely's to see about the note and mortgage in controversy. He said he was going to Makelyville to take up the mortgage; that he had some money belonging to his sister, Mrs. Fortescue, and was going to take up the mortgage for her, but was not going to have it canceled; that Mr. Wahab had a debt against the estate, and he was going to hold the mortgage to keep Wahab from selling the land."

The plaintiff objected to the foregoing evidence on the same grounds on which he objected to the evidence of M. Makely; the objection was overruled, and the plaintiff excepted.

Mrs. Nancy E. Fortescue testified as follows: "I heard Mr. J. M. Spencer testify. I did not tell him that Rufus H. Watson had only $149 of my money at the time he took up the note. He owed me more money than that. I did not tell Mr. Spencer that the receipt of 4 March, 1885, covered all the payments I had made on the note. It is not true that I told him I claimed credits only for interest. My husband is dead. He left children. He left no will, and no dower has been set apart for me. I stated to Mr. Spencer that Mr. Watson owed me money for my father's estate. I don't remember what I told Mr. Spencer."

The court submitted the following issues:

1. Is the plaintiff the owner of the note described in the com- (273) plaint?

2. Did R. H. Watson purchase said note from M. Makely for his own use, or did he pay it off to M. Makely for the defendants?

3. What amount, if any, did R. H. Watson use of his own funds in taking up said note?

4. Was the $149 received by R. H. Watson from the sale of rice belonging to Nancy E. Fortescue accounted for and included in the receipt of 4 March, 1885?

In lieu of the second issue the plaintiff tendered the following: "If said R. H. Watson used $194 of his own money with which to take up said note, did he intend to pay off said note and mortgage, or to purchase the same and hold the same to secure the amount so advanced?"

The court declined to substitute this issue as requested, and the plaintiff excepted to such refusal and also to the submission of the second issue.

The defendant requested the court to charge the jury as follows:

1. That upon all the evidence you will answer the first issue "Yes."

2. That if you believe the evidence you will find in answer to the third issue "$139.19."

3. That upon all the evidence you will answer the second issue "He purchased said note."

The court declined to give the instructions as prayed for by the plaintiff, and the plaintiff excepted.

The jury found upon the several issues as follows: To the first "No," to the second "For the defendants," to the third "None," and to the fourth "No."

(274) The plaintiff moved for a new trial on the following grounds:

1. For error in refusing to submit the issue tendered by the plaintiff, and the submission of the second issue in lieu thereof.

2. For error in refusing to permit the witness, J. M. Spencer, to testify to the declarations of C. M. Watson in regard to the credit on the note of 4 March, 1885.

3. For error in permitting defendants to introduce section 2 of their answer.

4. For error in admitting the testimony of M. Makely.

5. For error in admitting the testimony of James W. Hays.

6. For error in refusing to grant the special instructions as requested by the plaintiff.

Motion for a new trial denied, and judgment rendered for defendants, and plaintiff appealed.

J. H. Small and W. B. Rodman for plaintiff.

C. F. Warren for defendants.

MACRAE, J. The matter in controversy was whether R. H. Watson paid off the note for the defendant, Nancy E. Fortescue, or whether he paid it only in part with said defendant's funds and purchased it and took it by transfer to himself, subject to the credits; and if the latter were the case, what sum is still due upon the note. The mortgage was admitted, but defendants contended that the note secured thereby had been fully paid and the mortgage satisfied.

1. The issues were intelligently framed by his Honor as raised by the pleadings, with the addition of others suggested by the evidence. He might simply have submitted issues whether the plaintiff was the owner of the note, and if so, what amount, if any, was still due upon it. (275)

The issue tendered by plaintiff's counsel was open to the objection that it sought merely to ascertain the intent of R. H. Watson, and not what was the contract or agreement between the parties when he made the payments. It would not have been proper for his Honor to have substituted the issue tendered by plaintiff's counsel for the second issue which was submitted.

2. The plaintiff had testified that he endorsed the credit of $204.60 upon the note on 4 March, 1885, by direction of C. M. Watson, a former owner of the note, and the proposition was to prove what C. M. Watson said when the credit was endorsed. The contention of plaintiff was that on 19 December, 1884, there was due upon the note $343, and that at that date R. H. Watson paid thereon with the funds of defendant $149 and with his own funds $194, and had taken a transfer of the note and mortgage to himself to secure the balance, $194, which he had paid for it, and that defendant Nancy had paid thereafter a sum sufficient to reduce the amount due on 4 March, 1885 (after the endorsement of credit of that date of $204.60), to the sum of $144.12, which sum with interest he claims to be still due and secured by mortgage, all of which will appear by reference to the amended complaint.

It is not claimed that any payment had been made to C. M. Watson while he was owner of the note; what C. M. Watson said to plaintiff at the endorsement of the credit could only have been as to the declarations of others; it must have been hearsay and inadmissible as part of the *res gestæ*.

This is not like *Harper v. Dail,* 92 N. C., 394, on which plaintiff's counsel relies. In that case the receipt was in these words: "Received of B. H. $150 in part payment of the claim I hold against him as guardian of the heirs of R. Heath, deceased. R. C. B., Guardian." It was in evidence that there were two claims against B. H. held by R. C. B., guardian of the Heath heirs, and it was important that it should be ascertained upon which of these claims the $150 had (276)

been paid; and this Court held that it was competent for B. H. to testify in answer to the question, "What claim he settled when the receipt was given by B., if anything was said about what claim he was paying?" The general proposition was announced by the Court that a receipt, when it is an acknowledgment of the payment of money or the delivery of goods, is merely *prima facie* evidence of the fact which it recites and may be contradicted by oral testimony. As far as we can see, nothing which C. M. Watson could have testified would have been competent to show whether the $149 was part of the $204.60. It also appears that C. M. Watson was present at the trial and under subpœna; if his testimony was competent he might have been examined as a witness if plaintiff desired.

3. The third exception is to the admission as evidence for the defendant of the second article of the amended answer. The plaintiff had offered the first article, which admitted that there was due on 19 December, 1884, on the note while in Makely's hands the sum of $300; the second article was a qualification of the first, which alone was an admission of the debt, and for this reason was admissible. The rule is so well stated in 1 Greenleaf Ev. (14 Ed.), sec. 201, that we avail ourselves of it: "We are next to consider the effect of admissions when proved. And here it is first to be observed that the *whole admission is to be taken together;* for though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against himself, for it is to this only that the (277) reason for admitting his own declarations applies, namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. But though the whole of what he said at the same time and relating to the same subject must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him." See, also, note (*a*) for further illustration. The admission of this evidence, therefore, proceeds from a different principle from that laid down in *Austin v. King,* 91 N. C., 286, cited by plaintiff's counsel—that a declaration of a party made in his own interest is incompetent.

4. The exceptions to the refusal of his Honor to give the instructions asked by plaintiff are founded upon the assumption that there was no evidence on the part of defendant to rebut the presumption arising from the possession of the note by plaintiff and to support her plea of payment and allegation that it had never been assigned by Makely.

We think there was evidence to go to the jury upon each of the issues; its weight was a question for the jury, and after verdict, for the judge, upon proper motion, and cannot be considered here.

We were not favored with an argument or brief upon the fourth and fifth exceptions for error in the admissions of Makely and of Hayes; they were neither waived nor pressed, and we can discover no good ground for a refusal to admit the same. There is

NO ERROR.

Cited: Mfg. Co. v. Steinmetz, 133 N. C., 193; *Smith v. Tel. Co.,* 168 N. C., 517.

(278)

SOLOMON PREISS ET AL. V. E. COHEN ET AL.

Assignment for Benefit of Creditors—Qualifications of Assignee—Injunction—Bond.

1. Where there is a serious controversy as to the *bona fides* of an assignment and of the debts preferred, as well as of the fitness of the assignee, an injunction should be granted to prevent the selling of the property pending litigation.

2. It is the province and duty of the court to pass on the qualifications of an assignee in an assignment for benefit of creditors.

3. Where an undertaking had been given before the issue of a restraining order, it was not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiffs, unless it was shown that the bond already given was insufficient.

ACTION by Solomon Preiss and other creditors of E. Cohen against E. Cohen, H. Dannenberg, trustee, and others, to set aside as fraudulent a deed of assignment made by Cohen.

An order to show cause why a receiver should not be appointed and an injunction issued against the defendants was issued by *Shuford,* the judge presiding in the Second Judicial District, on 3 December, 1892, and made returnable before him at New Bern on 8 December, and a restraining order until the hearing of the motion. On 10 December an order was made by *Shuford, J.,* transferring said motion for hearing before *Bryan,* the resident judge of said district, at New Bern, on 12 December, at which time and place the motion was heard by him,

attorneys of all parties being present and participating in the argument, and no objection to the hearing being made upon the pleadings, affidavits and exhibits.

The court found the facts as follows:

(279) "1. That there is evidence tending strongly to show a conveyance of the property with intent to hinder, delay and defraud the plaintiffs.

"2. That the assignee under the assignment is an unfit person to have charge of the property, and is admitted to be insolvent."

An order was made appointing a receiver (who was required to give bond in the sum of $8,000) and continuing the injunction until the hearing of the action. From these orders the defendants appealed, assigning several grounds for exceptions thereto, two of which were abandoned. Those relied upon in this Court were as follows:

"3. That the court found as a fact that the defendant Dannenberg, the assignee, was an unfit person to discharge the trust, contrary to the evidence.

"4. That it was error to appoint a receiver to take charge of the property in the possession of the defendant Dannenberg, assignee.

"5. That it was error to grant an injunction against the defendant Dannenberg.

"6. That it was error to grant an injunction against the defendant Dannenberg without requiring the plaintiff to file any bond or fixing the amount thereof."

W. D. McIver and C. R. Thomas for plaintiffs.

W. W. Clark for defendants.

MACRAE, J. The plaintiffs, creditors of defendant, E. Cohen, seek in this action to set aside as fraudulent a deed of trust or assignment made by said Cohen to defendant Dannenberg of a stock of goods to be sold by him and the proceeds applied to the payment of certain alleged indebtedness of the assignor.

The complaint and other affidavits charge that the defendant (280) Dannenberg is insolvent, that he is on intimate relations with the defendant and is not a suitable person to administer the trusts mentioned in said deed; that he has set apart to defendant, E. Cohen, as his personal property exemption a quantity of said goods largely in excess of the value of five hundred dollars; that he has removed and secreted a large amount of said goods, which plaintiff has found by means of a search warrant; that he has left the assigned goods in charge

of the father and brother of the assignor and the clerks in his store, and that he has declared his intention to sell the same to defendant, S. Cohen, the brother, at fifty cents on the dollar.

They charge fraud and false representations on the part of defendant, E. Cohen, in contracting the debts due to plaintiff and in the assignment, alleging that the debts preferred in said assignment are fictitious and in favor of near relatives of the assignor, and they aver the apprehension of plaintiffs of irreparable damage to plaintiff if defendant Dannenberg should be permitted to remain in possession of the assigned effects and administer the said trust.

On the part of defendants the answer verified by defendants, S. Cohen and Dannenberg, and many affidavits in addition thereto, deny all fraud and fraudulent representations in the contracting of the debts, aver the *bona fides* of the preferred debts and of the assignment, explain the removal of part of the goods to have been for convenience in taking the inventory and setting apart the personal property exemption, and aver that the goods set apart were valued by three sworn appraisers at their true market value, and are not in excess of the amount to which the said E. Cohen is entitled for his exemption. They deny that defendant Dannenberg has declared his intention to sell said goods to defendant, S. Cohen, at fifty cents on the dollar, but allege that defendant Dannenberg has been advised by merchants in the city that (281) said sum would be a fair price for the same. They admit that many of the preferred creditors are relatives of defendant E. Cohen, the assignor, but assert that the debts are justly due and owing. The affidavit of about twenty citizens of New Bern testify to the good character, business capacity and fitness of defendant Dannenberg to act as assignee.

There may be other facts alleged and denied on each side, for the affidavits are voluminous, but the foregoing is a general statement of the contentions. The first and second exceptions were abandoned and those relied on may be considered together.

The judge may not be governed so much by the number of persons making affidavit to a fact, such as the good reputation and fitness of a person for a special employment, as by his own convictions upon the weight of all the evidence offered him. There being apparent a serious controversy as to the *bona fides* of the assignment and of the debts preferred, it was necessary that the property or the proceeds of its sale should be held by injunction pending the litigation, for, unless restrained, it was the obvious duty of the assignee to sell the property and pay the preferred debts; hence the reasonable apprehension of irreparable injury.

The insolvency of the assignee was admitted, and it devolved upon his Honor to decide upon his fitness under all the circumstances of this case to hold or dispose of the property or the fund arising from its sale, which might be a question entirely distinct from one as to his character and reputation. Many men of good reputation might not be suitable persons for the special business proposed. It became a question as to the custody of this property or fund, which concerned not only the assignor and preferred creditors, but also those unpreferred creditors who were attacking the deed. Justice to all parties concerned (282) would seem to demand that the court should take care to preserve it by placing it in the charge of an officer under bond and directly responsible to the court for its safe-keeping until the end of the litigation.

While at the time of the execution of the deed in question it was entirely competent for a debtor to assign his property to an insolvent person who was otherwise qualified to execute the provisions of the deed of trust for the benefit of creditors, the policy of the law has since been declared by act of assembly to throw greater safeguards around such transactions by requiring every trustee of this kind to give bond upon proper application for that purpose being made to the clerk. Laws 1893, ch. 453.

In *Levenson v. Elson,* 88 N. C., 182, which was very similar to the one now before us, the principles were so clearly explained by the late *Chief Justice Smith* that it is unnecessary for us here to repeat them. In that case the injunction and appointment of a receiver were refused because it was found that the trustee named in the deed was amply solvent and responsible, and able out of his own estate to answer any demands which might be established against him for the management and disposition of the trust estate; and furthermore, that he was competent to conduct the business and entirely trustworthy.

In the present case it is admitted the trustee is insolvent, and found as a fact, in which we concur under the circumstances, that he was not a fit person to execute the trust.

The last exception is that it was error to grant an injunction against defendant Dannenberg without requiring the plaintiffs to file any bond or fixing the amount thereof. The order of *Judge Shuford* required the giving of an undertaking before the issue of the restraining order. This was a compliance with the statute, section 341 of The Code. It was not necessary, if upon the hearing, on the return of the order (283) to show cause, his Honor should continue the injunction to the trial, that he should require a new undertaking, unless for some reason and upon proper suggestion it should be made to appear that the bond already given was insufficient.

AFFIRMED.

R. S. WELLS v. W. W. BATTS ET AL.

PLAINTIFF'S APPEAL

Husband and Wife—Mortgage by Husband of Crops on Wife's Land—Mixture of Crops, Responsibility for.

1. Where a husband, without the authority, joinder, or knowledge of his wife, mortgaged the crops on her land for supplies, which were expended in making the crops, and the mortgagee had notice of the wife's ownership by recitals in the deed, and there was no evidence of any representations made by the wife by which the mortgagee was misled, the mortgagee acquired no right to such crops as against the wife.

2. Acquiescence by a wife for several years previous in the management and control, by her husband, of her lands and the disposition by him of the crops grown thereon, does not, of itself, authorize the husband as her agent to mortgage the crops to one having notice of her ownership.

3. Evidence of the surrender of the rights of the wife to the husband during their joint occupancy of land must be positive and unequivocal in order to confer proprietary control upon him.

4. Where a husband mortgaged the crops growing on his own and his wife's lands, and some of them are so "intermingled and mixed" that they cannot be distinguished or a division made of their proportionate value, the loss must fall upon the wife who permitted her husband to cultivate and intermix them before his death, and his administrators (his sons) to confuse them after his death.

ACTION begun in WILSON, by summons and ancillary proceed- (284) ings in claim and delivery, 13 December, 1889. At June Term, 1890, the case was referred to J. D. Bardin, Esq., whose report of findings of fact and conclusions of law was in substance as follows:

On 7 January, 1889, W. M. Thorne, husband of defendant, M. P. Thorne, executed to plaintiff a mortgage on certain personal property and on the crops to be raised that year on his own and his wife's lands, to secure a note for $594.38 and advances of money and supplies, which plaintiff agreed to make to him to the amount of $1,200, to enable him to cultivate the farm and support the family; and advances were made to the amount of $1,346. W. M. Thorne cultivated the crops, of which he had entire control until his death, 29 September, 1889. For four or five years before, W. M. Thorne had had like control of the crops made on his and his wife's land, with her consent, and he, to obtain the necessary supplies, had executed like mortgages to plaintiff and used the proceeds in paying them off. M. P. Thorne, the wife, had notice that the plaintiff furnished the supplies, but not of the mortgages on the

crops. Plaintiff received of the crops and personal property mentioned in the mortgage of 1889 enough to reduce the account for supplies to $231.10. Corn to the value of $57.80 was made wholly on land of defendant, M. P. Thorne, and the balance of the crop, of the value of $346.18, on the lands of herself and her deceased husband, and were so mixed that it could not be determined what part was raised on the lands of each. That plaintiff and defendant, M. P. Thorne, did not perceive the intermixture of the crops nor consent to it, except so far as her consent may be inferred from her permitting her husband in his lifetime and her son, W. W. Batts, administrator of the husband after his death, to intermix them. There was no agreement between husband (285) and wife that he should pay rent, but the crops in controversy are of about sufficient value to pay rent for her land. The referee found as conclusions of law:

1. That the mortgage of January, 1889, was valid to pass whatever interest deceased husband had in the crops, etc.

2. That her conduct in respect to the crops did not estop her from claiming reasonable rent, and the corn being shown to have been raised on her land was hers.

3. That the burden of proof was on her to show the other crops in controversy were raised on her land, and in the absence of proof from her, plaintiff is entitled to them.

4. That, having permitted the intermixture of crops in controversy with those to which plaintiff is admitted to be entitled, she is not entitled to them.

Plaintiff excepted to conclusion of law No. 2, that defendant M. P. Thorne was not estopped from claiming the crops, and that she is entitled to the value of the corn.

Defendants excepted to conclusion of law No. 3, that the burden was on defendant Thorne to show how much of the crops were made on her land; and to conclusion No. 4, that she is not entitled to the crops because she permitted the intermixture of her and her husband's crops.

The case was heard upon the report of the referee before *Connor, J.*, at November Term, 1891, who overruled all the exceptions and confirmed the report of the referee in all respects, and gave judgment accordingly, and both plaintiff and defendants appealed.

G. V. Strong, F. A. Woodard and Battle & Mordecai for plaintiff.
Woodard & Yarborough for defendants.

SHEPHERD, C. J. (1) It is found by the referee that the *feme* defendant, Mrs. Thorne, "owned in her own right all of the lands upon which the crops of 1889 were made, except five-sevenths of the one

hundred and twenty-eight-acre tract, which belonged to her hus- (286)
band, W. M. Thorne, deceased." The plaintiff claims the whole of these crops by virtue of a mortgage executed by the husband alone. The mortgage recites the ownership of the wife; and indeed, it is not pretended that the plaintiff did not have actual notice of her interest in the said lands. Mrs. Thorne did not know of the execution of the mortgage, and there is nothing whatever to show that she ever authorized her husband to dispose of the products of her lands in any such manner. Neither is there anything to indicate that she made any representations or did any act by which the plaintiff could have been misled. The plaintiff, however, relies upon the fact that from the time of her marriage up to the death of her husband in September, 1889, the latter had "the complete control and management of his and defendants' lands and the crops made on the same"; that he expended the proceeds of the crops made from year to year in the support of the family and the purchase of supplies to enable him to conduct and carry on his farming operations, with the knowledge of the said wife." It also appears that the *feme* defendant knew that her husband obtained supplies of the plaintiff from year to year, but had no knowledge of the execution of any mortgages on the crops.

Upon the death of the husband in 1889, and before all of the crops of that year had been gathered, the plaintiff seized the same under legal proceedings, claiming them under the said mortgage. It appeared that the corn was raised wholly on the lands of the wife, and his Honor sustained the referee in his ruling that she was not estopped from claiming the same, or at least so much thereof as amounted to a reasonable rent for the occupation of her said lands. (287)

If the relation of landlord and tenant existed between the husband and wife, there can be no question as to the correctness of the ruling, as it is well settled that the lien of the landlord prevails over that of a mortgage executed by the tenant for the purpose of obtaining supplies. If the husband was acting as the agent of the wife, the plaintiff would be equally unfortunate, as we are unable to find anything in the record that authorized him to execute a mortgage upon the future income of her property. She did not expressly authorize him to exercise such a power, as she neither knew of nor assented to the execution of this particular mortgage, nor can the authority be implied, as she had no knowledge of the execution by him of similar mortgages during previous years. It is true that she permitted her husband to control and manage her lands for the purpose of supporting herself and the family, and that she had allowed him for several years to apply the crops after they were made to the payment of supplies obtained of the plaintiff. This, however, was not done, so far as she was concerned, by virtue of

any lien or mortgage in favor of the plaintiff, and is entirely consistent with the not unusual acquiescence of the wife where she and her husband are in the joint occupation of her lands, the husband receiving without objection the income arising from the same. Indeed, the law, recognizing the peculiarity of such an occupancy, has taken care that in such cases the rights of neither party shall be prejudiced by the inequitable conduct of the other. While it recognizes to the fullest extent the right of the wife to the exclusive control of her lands and its products (*Manning v. Manning,* 79 N. C., 300), it at the same time provides that where her husband has, during the coverture, received its income without objection, he shall not be liable to account "for (288) such receipt for any greater sum than the year next preceding the date of a summons issued against him in an action for such income." The Code, sec. 1837.

It appears, however, from the above statute that the exclusive receipt by the husband of the income of the wife, even during the entire period of the coverture, does not confer upon him any rights in her property, nor take away his liability to account for its income for at least twelve months preceding a demand. If such an acquiescence in the control of her property and the reception of its income does not, under the statute, exempt the husband from liability to account as above stated, we are unable to see how it can be regarded as conclusive evidence of an implied power to anticipate the income of her property by mortgaging it to one having notice of her rights and thus depriving her of the same for the year preceding the death of her husband. It is very evident from the terms of the statute that the policy of the law requires more than mere acquiescence to so extend the authority of the husband as agent. This view is in harmony with various authors who hold that in such cases a stricter degree of proof is required. Mr. Bishop says: "Under various circumstances an unmarried woman, by permitting another person to possess and use her property, would be bound by any disposition he might make of it on the ground of presumed agency where, should a husband do the same thing, the agency ought not to be inferred. And the reason is that the relationship of husband and wife implies a certain occupancy of her property by him, not falling within what would be the ordinary course of things if the relationship did not exist." 2 Bish. Married Women, 396 (Ed. 1875).

It is clear that in the present case there was nothing more than acquiescence on the part of the wife. The plaintiff knew of her ownership and it was his own folly to have taken a mortgage upon the crops (289) from the husband alone. So far from making any representation by which the plaintiff was misled, it appears that she knew nothing whatever of the transaction, and it is clear beyond all question that

she is not estopped by reason of fraud. "To estop a married woman from alleging a claim to land (and the rule is the same as applicable to this case) there must be some positive act of fraud, or something done upon which a person dealing with her or in a manner affecting her rights might reasonably rely, and upon which he did rely, and was thereby injured." *Towles v. Fisher,* 77 N. C., 437; *Weathersbee v. Farrar,* 97 N. C., 106. There being no estoppel by fraud and nothing more than simple acquiescence in the acts of the husband as above stated, we cannot hold that this warranted a finding that the husband was authorized to execute the mortgage in question. Indeed, he does not pretend to have executed it as agent of his wife, nor is there anything in the instrument to show that he undertook to contract in her behalf. This latter view alone would defeat the claim under the mortgage if the plaintiff relied entirely upon the principle of agency. *Loftin v. Crossland,* 94 N. C., 76.

The plaintiff's counsel, seeing the force of the foregoing objections, contend that the husband was neither the tenant nor the agent of the wife, but the owner of the land and its products at least for the year 1889. There is nothing but the circumstances to which we have adverted to show that the wife gave him the land for that or any other year, and if, as we have seen, her simple acquiescence was not sufficient to exempt the husband from liability to account, we cannot understand how it could confer upon him a future ownership of the land or its income. It is true that the wife could upon a fair consideration have given the land by parol to the husband for a period less than three years (The Code, sec. 1835), but in view of the reasons we (290) have given, we are quite sure that no such agreement existed. There is an intimation in *George v. High,* 85 N. C., 99, that an *express* agreement is necessary to bar the wife's right to an account, and this would seem to apply also to the present case. Moreover, it is to be observed that the finding of the referee does not go to the extent claimed by the plaintiff, as the words "control and management" in themselves imply an agency rather than a proprietary interest in the use of the land. All of the authorities sustain the principle that the evidence of a surrender of the rights of the wife to the husband during the joint occupancy must be positive and unequivocal, and this "is for the reason that (in the general experience of the past at least if not in the philosophy of the present) the wife is under the control of, and subordinate to, the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation or hostile conduct toward her husband, in order to save her property from liability for his unauthorized contracts." 2 Bish. Married Women, 396.

To hold that under the present circumstances the wife has stripped herself of the income of her estate or authorized a mortgage of its future products would produce much confusion respecting the enjoyment of her separate estate in connection with her husband. It is better that the law should require her positive and unequivocal assent than to destroy the domestic tranquility by forcing her, at the peril of forfeiting her rights, to exercise a constant and irritating surveillance over the conduct of her husband in the management and cultivation of her lands for their joint support. No inconvenience can result from such a ruling, as it is quite easy for a party making advances to require that she be joined as a party to the mortgage.

(291) Our conclusion, therefore, is that the wife is the legal owner of the crops as incident to her ownership of the lands upon which they were raised and it must therefore follow that she is entitled to the possession of the same.

As to the corn there seems to be no difficulty, as it was identified as having been raised wholly upon the lands of Mrs. Thorne. As to the other crops it is found that they are so "intermingled and mixed" with those raised upon the lands of the husband "that it cannot be determined how much was raised upon the lands of said Thorne, deceased, and the *feme* defendant respectively."

The confusion having been effected without the consent of either party it is clear that if the crops can be distinguished, the rights of neither will be affected; nor will this result follow although the crops cannot be distinguished, if, being of the same nature and value, a division can be made of their proportionate value. *Robinson v. Holt,* 39 N. H., 557, and the numerous authorities cited.

The referee finds in effect that he can neither distinguish the crops nor ascertain their proportionate value. In such a case the law is "that the party who occasions or through whose fault or *neglect* occurs the wrongful mixture must bear the whole loss." *Robinson v. Holt, supra.* His Honor very properly ruled that under these circumstances the loss must fall upon the *feme* defendant, as we must infer from the finding of the referee that the confusion was caused by "her conduct in permitting W. M. Thorne, deceased, to cultivate and intermix said crops, and her son, W. W. Batts, administrator of said deceased, to intermix them in the same manner after his death." It is true that this was done by her "tacit" consent only, but it was the result at least of her neglect to see that the crops were not intermixed. She had the control of her lands and the crops thereon, and it was her duty to have kept the crops

(292) distinct from the husband's if she intended to insist upon her legal right to the same. It may be urged that it was equally the plaintiff's duty to see that the husband's crops were properly gathered

and stored, but to this it may be answered that he had a right to assume that this would be done by the *feme* defendant and her son, the administrator. She was in possession of her own lands and presumably in possession as tenant in common of those upon which the husband's crops were raised. She and her son seem to have taken control of the crops after the death of her husband, and it is found that she permitted either her husband or son, or both, to mix the same. We must infer that by *permitting* she at least knew of the intermixing and did not object, and this would be "neglect" within the principle of the authority cited.

On the other hand, the plaintiff had but a lien on the crops of the husband, and no right to the possession of the land, and, in the absence of any knowledge that the crops would be confused with those of the *feme* defendant, he had nothing to incite him to extraordinary diligence. He certainly knew nothing of the intermixing and had no opportunity, as did the *feme* defendant, to object to the same. Taking all of the circumstances into consideration, we think his right is superior to that of the *feme* defendant and that the ruling below must be affirmed. Indeed, upon looking over the whole record, we are inclined to the belief that, after all, this result contributes very greatly to an equitable settlement of the whole controversy.

AFFIRMED.

DEFENDANT'S APPEAL IN SAME CASE

SHEPHERD, C. J. For the reasons given in the opinion in the plaintiff's appeal the decision in this case must be

AFFIRMED.

Cited: Branch v. Ward, 114 N. C., 149; *Bray v. Carter,* 115 N. C., 18; *Rawling v. Neal,* 122 N. C., 175; *Lance v. Butler,* 135 N. C., 423; *Rich v. Morisey,* 149 N. C., 45; *In re Gorham,* 173 N. C., 273; *Thompson v. Coats,* 174 N. C., 197; *Shermer v. Dobbins,* 176 N. C., 550; *Guano Co. v. Colwell,* 177 N. C., 220.

(293)

J. S. HARPER v. R. R. PINKSTON ET AL.

Slander of Wife—Action by Husband—Dismissal of Action.

An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed by this Court on motion of the defendant, or *ex mero motu*, for failure of the complaint to state a cause of action.

AVERY, J., concurring. (Discussion of Lord Denman's Act, section 580 of The Code, bill of discovery, matters of privileges, etc.)

ACTION brought to Fall Term, 1892, of VANCE, by J. S. Harper against R. R. Pinkston, J. A. Bridges, W. E. Gary, and W. L. Cuninggim for alleged slander of plaintiff's wife.

(296) *H. T. Watkins, Pittman & Shaw and Edwards & Wortham for plaintiff.*

R. O. Burton and W. R. Henry for defendants.

CLARK, J. The wife, who alone is charged to have been slandered, is not a party to the action. There being no special damage alleged as to the husband, who is the sole plaintiff, the complaint fails to state a cause of action. Newell on Defamation, 365, 1849; Odgers Slander and Libel, 313, 346; Folkard's Starkie on Slander, 332; The Code, sec. 177. The words were not used in regard to the husband, and his reputation certainly has not been assailed. He must aver special damage. The action should, therefore, be dismissed on the motion made here by the defendant. Indeed, it might have been done *ex mero motu* by this Court. Rule 27 of Supreme Court; *Hagins v. R. R.*, 106 N. C., 537; *Gordon v. Sanderson*, 83 N. C., 1.

This makes it unnecessary to consider the interesting questions raised on the argument. There is no case of which a court can take cognizance.

ACTION DISMISSED.

AVERY, J., concurring. When Lord Denman's act was passed by Parliament in 1851 the various courts of law and chancery were still maintained with the established procedure in each, and this fact in part accounts for the modification of the second section of that statute by Laws 1866 (Bat. Rev., ch. 43, sec. 15), and the subsequent acts culminating in the enactment of The Code, sec. 580. The English statute provided that in all actions or proceedings and at all stages, be-

(297) fore any person having authority to hear evidence, "the parties thereto and the persons in whose behalf any such suit or action or other proceeding may be brought or defended, *shall, except as hereinafter excepted,* be competent and compellable to give evidence, either *viva voce or by deposition, according to the practice of the court,* on behalf of either or any of the parties to the said suit, action or other proceeding."

In section 6 of Lord Denman's act it was also provided that in all actions pending in the Superior Courts of common law the right of compelling the production of, of inspecting and of taking copies of the papers of, an adversary party should be confined to those cases where a

discovery might have been obtained at the instance of the moving party by a bill or other proceeding in a Court of Equity. 14 and 15 Vic., 91 Stat. at Large, ch. 99, secs. 2 to 6, inclusive; 2 Taylor on Ev., sec. 1217. When Courts of Equity were abolished in this State the Code of Civil Procedure was passed, embracing what are now sections 579 to 584 of The Code, both inclusive, and section 588 *in totidem verbis,* except the proviso to section 580. Bat. Rev., ch. 17, secs. 332 to 341. Section 579 provided that "no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, etc., *except* in the manner prescribed by this chapter." Except the proviso (to section 580) The Code of New York (Voorhees, secs. 389 to 397, both inclusive) contains precisely the same language as that embodied in our statutes (secs. 579 to 587 of The Code).

The mode subsequently substituted for the equitable proceeding was to compel a party, at the instance of his adversary, *"in the same manner and subject to the same rules of examination as any other witness,* to testify either at the trial or conditionally or upon commission." What rules applicable to testifying at trial or to deposing before a commissioner are still in force here? If, in recognizing the mode of (298) examination adopted in equity practice before a commissioner to take depositions, we hold that parties should be entitled to the same protection as was afforded to other witnesses or to parties by the *rules of evidence* up to that time in force, in answering a bill of discovery, we would find in the practice of the courts of New York and other States where the new procedure prevails, abundant authority to sustain us. But before passing upon that question it may be well to recur to the restrictions adopted by Courts of Equity, to prevent abuse of the statutory power of compelling an adversary to disclose information which was essential to the prosecution of a meritorious action against him, but was often wrongfully or fraudulently withheld.

1. A man was not compellable, in answering a bill of discovery, to criminate himself or to furnish a link in a chain of testimony tending to convict him of crime, or to make any disclosure tending to subject him to a penalty or forfeiture. Adams Eq., pp. 2 and 3; 1 Pomeroy Eq. Jur., sec. 202; *U. S. v. MacRae,* L. R., 3, 79; Story Eq. Pl., secs. 553 and 575; *Liggett v. Postly,* 2 Paige, 601; Cooley Const. Lim., marg. p. 394.

2. The office of such a bill was to compel the discovery "of facts resting in the knowledge of the defendant, or of deeds or writings in his possession or power, in order to maintain the right or title of the party asking it in some suit or proceeding in another court." *Pemberton v. Kirk,* 39 N. C., 178; 1 Pom. Eq. Jur., 195; Mitford Eq. Pl., p. 21.

3. The bill of discovery could not be used to elicit information as to a controversy about a title that might possibly arise in the future or merely to pry into an adversary's grounds of defense in a pending action at law. *Baxter v. Farmer,* 42 N. C., 239; 1 Pom. Eq. Jur., sec. 201.

4. A party might by plea successfully resist disclosures sought
(299) by such a bill, not only on the ground that his answers might subject him to criminal punishment or to a forfeiture or penalty, but because, as many courts held, the discovery might show him guilty of moral turpitude. 1 Story Eq. Jur., sec. 595.

5. Though there is no little conflict between the leading text-writers of England and of this country on the subject, the weight of authority seems to be in favor of the proposition that a party could not be compelled to discover any matter which might tend to show such party liable in a pending civil action for libel or to be used in aid of such suit. Story Eq., sec. 597, and note 3, sec. 553, and note 4, p. 571; 2 Story Eq. Jur., sec. 1494, and note 1; *Glynn v. Houston,* 1 Keen, 329; Mitford Eq. Pl., marg. p. 195; *Opdyke v. Marble,* 18 Abbott, 269; Thompson on Trials, sec. 744. Both Thompson, in the sections just cited, and *Judge Leonard* in *Opdyke v. Marble, supra,* assume that "nothing is better settled than that no discovery could be made under the practice of the court of chancery in an action for libel."

When the opinion in *Opdyke v. Marble* was rendered there were two concurrent statutory provisions in New York that could be used in compelling the production of books and papers, the one exactly the same as the section of our Code (sec. 578—C. C. P., sec 331), and the other a section of their Revised Statutes similar in its terms to section 82, chapter 31, of our Revised Code. Until the last codification of our laws both statutes were still in force here. *McLeod v. Bullard,* 84 N. C., 515. The section of the Revised Code had been enacted in 1828 to accomplish one of the objects attained in the passage of Lord Denman's act, by enabling the Superior Courts of law to procure documentary evidence without invoking the aid of a Court of Equity, but subject to the
(300) same limitations as to the extent of examination that were allowed by the chancellors. The statutory provisions now in force in North Carolina and in New York are and have been substantially the same, except that no discovery can be compelled under our statute until after suit is brought. 2 A. & E., 206, 207.

In *Opdyke v. Marble, supra,* David Dudley Field, in his brief insisted that under the Code of Civil Procedure and the old statute (corresponding with The Code, sec. 578, and Rev. Code, sec. 82, ch. 31), together with the additional right given by the act in force there, to call for the production of papers before trial, the plaintiff could compel the production of the books of *The World,* a newspaper, in order to ascertain

who besides Mr. Manton Marble were the owners of the paper and amenable to an action for libel. Upon that state of facts it was held that a discovery could not be had when "it would not have been allowed by the principles and practice of the late court of chancery," and therefore no discovery could be granted in an action for libel. It appears, therefore, that when, by our own statutes (Rev. Code, ch. 31, sec. 82), the courts of law were permitted to require disclosures in reference to books, papers, etc., they were subject, as were the English Superior courts under Lord Denman's act, to the restrictions imposed by the rules of the courts of chancery. When our Courts of Equity were subsequently abolished we adopted and enacted those sections of the Code of New York which had been previously construed (*Opdyke v. Marble, supra*) as prescribing the same limits to the compulsory examination of adversary parties. The provisions of our Code having been passed after the courts of New York and other states had construed them it may *"be presumed"* that they were enacted with a knowledge, if not approval, of the judicial construction already given them. *Bridgers v. Taylor,* 102 N. C., 86; *Redmond v. Comrs.,* 106 N. C., 122.

Where the bill of discovery has been abolished by similar (301) statutes in the various States of America and by the judicature acts in England, it seems to have been generally if not universally held that "all of the principles of the law of discovery not modified or abrogated by the new statute are still in full force." 2 A. & E., 210; *Anderson v. Bank,* L. R., 2, Ch. Div., 644; *Cashier v. Craddock,* L. R., 2, Ch. Div., 240. Pomeroy, 1 Eq. Jur., sec. 194, says: "It follows from the foregoing statements that the suit for a discovery as a branch of the auxiliary jurisdiction is now confined to a portion only of the States and territories, and even in those commonwealths a resort to it is quite infrequent. For this reason an extensive and minute discussion of the rules which govern it seems to be unnecessary. On the other hand, the principles and doctrines relating to discovery, which have been settled by the Courts of Equity and which determine what facts parties can be compelled to disclose and what documents to produce, and under what circumstances the disclosures or productions can be obtained, will still continue to be recognized by the courts and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings. The abolition or discontinuance of technical 'discovery' has not abrogated those principles and doctrines." Recurring to the language of the statutes for the purpose of giving my own construction we find that the Legislature may be said to have discontinued the formal bill of discovery, but to have retained the right to compel similar disclosures "in the manner prescribed" (sec. 579); that is, subject to the same settled method and rules

of examination applicable to other witnesses. Without adopting the extreme views of some text-writers that a discovery cannot be
(302) compelled under the usual provisions in the new codes of procedure, in aid of any action of tort, or passing upon the question whether a party can be forced in any case to disclose his own moral turpitude, I am sustained by the general current of authority in holding that the defendant was not compellable, either in aid of the pending civil action for libel or in view of the possible use of his answer in a criminal indictment against him, to disclose what was meant by the word "merciful," and the nature of the rumors with reference to which it was used in the report. The palpable purpose in asking the defendant Cuninggim whether the committee had reported as to the conduct of the *feme* plaintiff after consultation with him and, following that, upon receiving an affirmative response, by interrogating him as to what he and the committee meant by the use of the word "merciful" in the reports submitted to the church, was first to connect the witness as an abettor and counselor with the other defendants composing the committee, and then to establish the innuendo by showing from his own testimony a common purpose on the part of himself and the committee in the use of the words to charge the *feme* plaintiff with incontinency. The direct tendency of the question, therefore, was to furnish a portion of the evidence necessary to sustain not only the pending civil action for slander but an indictment, if one should be found, for slandering an innocent woman (under The Code, sec. 1113), against the witness and his co-defendant. It will be noted that no such protective proviso as that, applicable to proceedings supplementary to execution (The Code, sec. 488 [5]), was enacted in reference to the ordinary examination of parties, and hence we may fairly infer that the Legislature intended, in omitting the provision as to parties, to emphasize the fact that in all other
(303) cases except that of an execution debtor, a party under examination should have the benefit of all such instructions as the law had, for his own safety, thrown around him in the conduct of the proceeding. The statute (The Code, sec. 581) permits either party to demand the examination of an adversary "at any time before trial at the option of the party claiming it before the judge or clerk of the court." When a party elects to have the examination before the clerk it would seem that the mode of conducting it must be in all respects the same as if had before the judge. The examination was not conducted for the clerk or judge by a referee or commissioner. Conceding that the witness was not entitled to the benefit of the objection that his answer might criminate himself, unless he had rested his refusal to answer on that ground instead of his privilege as pastor as to confidential communications, we think it is clear that a plaintiff cannot use the privilege of ex-

amining a defendant for the purpose of extorting confessions that will tend to enable the plaintiff, in the very action in which the examination is had, to prove that the defendant has maliciously libeled him. It is not necessary, therefore, to determine whether it was the duty of the clerk to caution the defendant and "advertise him of his right to decline" to answer, in view of the developments which must have made apparent the danger of self-incrimination, if the theory of the plaintiff as to the innocence of the *feme* plaintiff should prove to be well founded. 1 Greenleaf Ev., sec. 451, p. 549. Where a party offers himself as a witness in his own behalf on the trial of the action, he opens the door for questions on cross-examination that would not otherwise have been competent, and hence the case of *McDougald v. Coward,* 95 N. C., 368, is not even analogous to this. It has been expressly held by this Court that where judges hold courts on legal holidays their proceedings are valid and binding upon parties whose rights are affected by adjudications made on such days. *S. v. Moore,* 104 N. C., 743.

It has been held in *Fertilizer Co. v. Taylor, ante,* 141, and in (304) effect in *Parker v. McPhail, post,* 502, that such interlocutory orders as that appealed from involve a substantial right, and are therefore subject to review in this Court. As the record presents the questions raised fully, it was not essential that there should have been a formal statement of the case on appeal.

For the reasons stated I think that the court erred.

Cited: Tobacco Co. v. Tobacco Co., 145 N. C., 382.

COSSACK & CO. v. W. H. S. BURGWYN.

Partnership—Participation in Profits—Evidence.

1. One who shares in the profits of a business otherwise than as the profits are looked to as a means of ascertaining the compensation which, under the contract, is to be paid to an employee for his services, incurs the liability of a partner therein.

2. Where B. endorsed a note of, and made advances to, a firm to enable it to perform a contract, of which, as estimated, the profits would be $39,000, and took a bill of sale of the firm's property to secure such endorsement and advances, and the firm also executed to B. a note for $5,000, due one year from date, on which $500 was to be paid monthly "out of the estimated profits": *Held,* that the facts *prima facie* constituted B. a partner with the firm.

3. *Quære,* whether B. could be held as a partner if the note for $5,000 was given as a *bonus* for the endorsement and advances.

ACTION tried before *Bryan, J.*, and a jury, at the February Term, 1892, of VANCE.

The following issues were submitted to the jury:

(305) 1. Is the defendant company indebted to plaintiffs, and if so, in what sum?

2. Was W. H. S. Burgwyn a partner in the Henderson Tobacco Company when said debt was contracted?

Several contracts were introduced by the plaintiffs for the purpose of showing the relationship existing between the said Burgwyn and Daingerfield, Jenkins and others, trading under the name of the Henderson Tobacco Company. It appears that the said Burgwyn endorsed a note of $5,000 for the said firm, and also agreed to advance it as much as $5,000 during the twelve months succeeding the date of the contract of 20 December, 1889. On the same day and in pursuance of said contract the said firm executed to Burgwyn a bill of sale of its stock, machinery, etc., for the purpose of securing the said endorsement and advances. One of the objects, at least, of the endorsement and advances was to enable the said firm to perform a certain contract which it had entered into with one Thomas H. Blacknall, by which it was to manufacture a large amount of smoking tobacco of certain specified brands, and the said Blacknall was to sell it at a price which would net the company an estimated profit of $39,000. The contract with Burgwyn further provides that the said firm shall do all its "collecting of drafts for sales of tobacco and other banking business through the said Burgwyn's bank" at the usual bank charges; that it shall make a monthly exhibit to said Burgwyn by showing its books, etc., "of the condition and workings of its business," and the members of said firm further agreed not to enter "upon or engage in other business for the next year, other than the carrying out of the said contract with the said Thomas H. Blacknall." After stating that the endorsed note and advances shall be paid, the

(306) contract further provides (paragraph 9) that the said parties shall give their note to said Burgwyn "for the sum of $5,000, due one year from date, on which said monthly payments of $500 shall be endorsed as they are respectively paid." The other contracts relate to changes in the firm and other matters subsequently occurring, which are not material to the determination of the case. No testimony was introduced in behalf of the defendant Burgwyn, but it was in evidence that on an examination before the clerk he was asked the following question: "Please state what was the consideration of the $5,000 note of 20 December, 1889, due one year after date, of Daingerfield and Jenkins to you?" He answered "that the note of 20 December, 1889, for $5,000 was executed in pursuance of section 9 of said contract, and said payment of $500 on the same was to come out of the estimated profits

of $39,000 which they were to make out of the contract with Blacknall, and was not in the nature of a *bonus;* not a dollar profit was made, so far as I know, and not a cent paid on this note; the whole contract with Blacknall went to pieces, and the whole thing is of no value, except as a lesson of experience." The defendant Jenkins stated that on said examination the defendant Burgwyn testified that "the note was not a *bonus,* but it was his part of the prospective profits to come out of the Blacknall contract."

The witness was asked to explain how they came to fix on six cents per pound on each pound of "Clear the Track" and two cents per pound on each pound of "Golden Hub" and three-quarters of a cent per pound on each pound of "All Round the World" sold the previous month, as the amount to be paid Burgwyn out of such sales as provided in article 3 of contract of 8 October, 1890.

Objection by defendant; objection sustained, and plaintiffs (307) excepted.

Cross-examination.—My feelings towards Burgwyn are pretty tough; I would make him pay all I could.

H. T. Jenkins, recalled, testified that the bill of sale of 20 December, 1889, was to operate as a mortgage; the property was to be returned to us.

Plaintiffs here closed, and defendant introduced no testimony.

Plaintiffs requested the following charges in writing, and before the opening of the argument:

1. If the jury shall be satisfied from the evidence that Burgwyn was to be paid $5,000 out of the net profits of the Henderson Tobacco Company, in addition to eight per cent interest on the money loaned or advanced by him to said company, such agreement is to be contrued as evidence tending to establish the partnership relation, and in the absence of any other proof is to be regarded as sufficient to establish the partnership.

2. If you shall find from the evidence that Burgwyn has so contracted with the Henderson Tobacco Campany that he has a right to examine the books of the company, and was entitled to receive regular statements showing the condition of its firm business, such rights and privileges are badges of partnership.

3. If you shall find that before R. L. Daingerfield could dispose of his interest in the Henderson Tobacco Company it was necessary for him to have the consent of Jenkins, Shelby and Burgwyn, such an agreement was a badge of partnership.

4. If you shall find that Burgwyn drew checks in the name of the Henderson Tobacco Company, and the same were honored and paid at his bank, that this is a very strong badge of partnership.

(308) 5. If you shall find that under the contract of Daingerfield and Jenkins with Burgwyn, and also the contract of Daingerfield, Jenkins & Shelby, trading as the Henderson Tobacco Company, neither of them, the said Daingerfield, Jenkins or Shelby was to engage in any other business during the continuance of the contract, and was to give his undivided attention to said business, that such an agreement is a badge of partnership.

6. If you shall find that the payment of the $5,000 note of 20 December, 1889, was contingent upon the success of the business and not upon the personal security of the borrowers, then it is *prima facie* evidence of a partnership.

7. That there is no evidence that the $5,000 note on which monthly payments were to be made was secured in the bill of sale for $10,000, dated 20 December, 1889.

His Honor charged the jury to find the first issue in favor of the plaintiffs, and on the second issue for the defendant Burgwyn, whereupon plaintiffs submitted to a nonsuit as to the defendant Burgwyn and appealed, and assigned for error as follows:

1. That his Honor erred in refusing plaintiffs' request for instructions to the jury from 1 to 7, inclusive.

2. That his Honor erred in excluding evidence offered by the plaintiffs and objected to by defendant.

3. That his Honor erred in his charge as given, that there is not sufficient evidence from which the jury might reasonably conclude that W. H. S. Burgwyn was a partner with other defendants in said firm.

H. T. Watkins and W. H. Cheek for plaintiffs.

J. H. Bridgers for defendant.

(309) SHEPHERD, C. J. Ever since the decision of *DeGray, C. J.*, in 1775, in *Grace v. Smith,* 2 William Blackstone, 998, it has been generally held that all persons who shared in the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated. The decision was subsequently approved in the leading case of *Waugh v. Carver,* 2 H. Black, 235. This seems to have been the rule, without any qualification, until an exception was made in cases where the profits were looked to as a means only of ascertaining the compensation which, under the contract, was to be paid for the services of an employee. Thus the law of England stood for nearly a century, and these general principles are still regarded in North Carolina and most of the States as the "ordinary tests" of copartnership. *Fertilizer Co. v. Reams,* 105 N. C., 283. Ap-

plying these principles to the case before us it seems clear that the plaintiffs have made out at least a *prima facie* case of copartnership against the defendant Burgwyn. The fact that the said defendant endorsed the note and made advances to the firm, taking the bill of sale as security therefor does not prevent his being liable as a copartner if the other elements of a copartnership exist. The note executed pursuant to the contract for $5,000 payable in monthly installments of $500, was not given for advances made or to be made, and could not have been enforced as between the parties except as against the profits of the business. Its payment, it seems, was contingent upon the estimated profits of $39,000 which the parties expected to make out of the Blacknall contract. It is argued that this $5,000, although usurious, was simply in lieu of interest, and that under the modification of the law as laid down by the House of Lords in *Cox v. Hickman* and some of the modern American decisions, this would not constitute a copartnership.

In *Fertilizer Co. v. Reams, supra,* we referred to this departure (310) from the ancient doctrine, but stated that it was unnecessary to decide whether it would be recognized in this State. Neither is it necessary to pass upon the question at this time, as the evidence does not disclose the existence of such an agreement as that assumed by counsel. On the contrary, it appears that the $5,000 was not a *"bonus,"* and if not a *bonus* we cannot see how it can be regarded as a mere compensation in lieu of interest, etc. If, upon another trial, this testimony is explained and the agreement be such as claimed by counsel, a new and interesting question will be presented to the Court; but in the absence of testimony to this effect we cannot but infer that it was the understanding that the defendant Burgwyn was to participate in the profits as such.

Neither is it shown, as contended, that the agreement was merely executory. It appears that money was advanced under the agreement, and the said defendant does not deny that the contract ever went into effect. He says the contract with Blacknall "went to pieces," but he does not state at what time. He simply says that not a dollar of profit was made out of it *as far as he knew.* Under the evidence adduced by the plaintiffs it is incumbent on the defendant to establish such a defense, and this he has not attempted to do. We are, therefore, of the opinion that there was error in holding that there was no evidence tending to fix upon the said defendant the liability of a partner. We are also of the opinion that the testimony offered by the plaintiffs should have been admitted.

NEW TRIAL.

Cited: Jeter v. Burgwyn, 113 N. C., 158; *Machine Co. v. Morrow,* 174 N. C., 200.

(311)

ELLEN DICKENS ET AL. V. J. A. LONG ET AL.

Sale of Decedent's Land for Assets—Collateral Attack by Minor Heirs —Homestead.

1. A purchaser at a judicial sale will be protected if the sale was authorized by a judgment rendered by a court having jurisdiction of the subject-matter and the person, although the judgment might be impeached for irregularity.

2. Minor children of a deceased person who were made parties to a proceeding for the sale of their father's land to pay his debts, and failed to claim homestead rights in the land, cannot, after coming of age, maintain an action against the grantees of an innocent purchaser under a decree of sale rendered in such proceedings to set aside the sale and recover possession of the land on the ground that it was the homestead of the deceased and as such exempt from payment of his debts "during the minority of the children or any one of them."

APPEAL from *Connor, J.*, at November Term, 1892, of PERSON.

The case was heard at April Term, 1891, by *Boykin, J.*, and from the judgment then rendered dismissing the action an appeal was taken and heard at September Term, 1891, of this Court, and was reported in 109 N. C., p. 165, where the facts are fully stated.

Under leave granted the plaintiffs, after entering a *nol. pros.* as to Hal and Isabella Edwards, amended their complaint by alleging that the decedent, their father, whose land was sold, and which they seek to recover, was indebted, and that the debts were not such as to be good against the homestead, and that the land sold, being the homestead, was exempt from sale during the minority of the plaintiffs, Vinie, Susan and Lucy, or either of them, who had no other homestead.

(312) The defendants demurred to the complaint, assigning as cause:

1. That under the decision of the Supreme Court, made in this cause at September Term, 1891, none of the plaintiffs can further prosecute the present action except Isabella Edwards and her husband, Hal Edwards, and as to them the defendants rely upon the answer heretofore filed.

2. That none of the other defendants being purchasers at the sale of John R. Chambers, administrator, are affected with notice of any alleged fraud or irregularity, but being purchasers at a sale made by the heirs at law of Sallie Barnett, or from those who were such purchasers, and without notice of any irregularity or fraud, have acquired a good title and ask that the same be protected by the court.

3. That the plaintiffs, who were defendants in the action of John R. Chambers, administrator, are estopped by the judgment rendered in that action, and the same cannot be impeached in this action brought to recover the land.

4. That the heirs and administrator of Sallie Barnett are necessary parties to any action to impeach the order heretofore made in the action of J. R. Chambers, administrator, and to have right and justice done to the defendants, and to have the heirs of said Sallie Barnett or her administrator subrogated to the right of the creditors of Mangum Barnett, whose debts have been paid by the money of Sallie Barnett if, in any event, the said sale can be vacated.

5. That the plaintiffs who were of age at the time of the sale made by John R. Chambers have no interest in this action, as the sale was good and effectual as to them, and they are bound by the decree rendered in said action.

The court, being governed by its construction and understanding of the opinion of the Supreme Court on the former appeal in regard to the legal effect of the failure on the part of the administrator to have the homestead allotted, overruled the demurrer, the judge settling the case on appeal saying that the other averments in the com- (313) plaint in regard to the procedure in the special proceedings were not considered, and that the judgment had reference entirely to the homestead phase of the case. His Honor further stated: "The court in its ruling has endeavored to follow the opinion of the Supreme Court. If it has failed to do so it respectfully disavows any purpose to disregard the said opinion."

The defendants appealed from the judgment overruling the demurrer, and assigned as error:

The ruling of the court that after the plaintiffs had entered *nol. pros.* as to Hal and Isabella Edwards the other plaintiffs could further prosecute this action, and contend that said ruling is contrary to the opinion of the Supreme Court, which allowed the action to be prosecuted in the name of Isabella Edwards alone, and decided that the other plaintiffs were properly nonsuited and must await the result of a direct proceeding before suing for the possession of the land. That the court erred in holding that this action was a direct proceeding for such purpose and in accordance with the decision of the Supreme Court.

W. W. Kitchin for plaintiffs.
J. W. Graham, Merritt & Bryant for defendants.

AVERY, J. When this case was brought before us upon appeal from the rulings of the court in the course of a trial (109 N. C., 165) it was held that the action in the then existing state of the pleadings could not be maintained by the other plaintiffs, but that as Isabella Edwards and her husband, Hal Edwards, were not concluded by the judgment in the special proceeding, she was entitled to be let into possession as a tenant

(314) in common, if it should be found that she was an heir at law of Mangum Barnett, as was alleged on the one side and denied on the other, and had not aliened her interest. After amending their complaint so as to allege that none of the debts, for which the administrator of said Barnett was licensed to sell, were contracted before 1868, or were of such a nature that the homestead of the decedent or his children could be subjected for their satisfaction, the plaintiffs, Isabella Edwards and her said husband, entered a *nol. pros.,* and the action is now avowedly prosecuted upon the theory that the extrinsic allegations as to the character of the debts owing by Barnett give the plaintiffs a status in court, and upon proof of their truth entitle them to recover on the ground that they have thus collaterally shown the judgment in the special proceeding to have been void *ab initio.* By the withdrawal of Isabella Edwards as a plaintiff counsel have emphasized their purpose to rest their right to recover exclusively on this position.

The former appeal (109 N. C., 165) was from a ruling of the judge below that upon the pleadings and testimony offered before the jury the plaintiffs were not entitled to recover. The plaintiffs submitted to a judgment of nonsuit, and upon review in this Court a new trial was granted and the plaintiffs were allowed to amend their complaint. The view, obviously entertained by the judge below on the former trial was that whether the action was then treated as a direct proceeding to vacate the decree for sale, as preliminary to a demand for possession in the same suit, or simply as an action for possession in which the plaintiffs set forth in advance specific averments as to title, for the purpose of showing that the defendants claimed title from the same source, and that the conveyance through which they deraigned title was void, in either event they had failed, both by allegation and proof, to (315) make a *prima facie* case. Counsel contended on the former appeal that the original complaint set forth all of the impeaching facts, upon proof of which the Court could in one action vacate the decree and give judgment for a writ of possession. Eliminating the question as to the rights of Isabella Edwards, which is no longer involved, the Court here sustained the ruling below, assigning as a reason, among others for so holding, that even where a plaintiff relied upon a sale under execution and a sheriff's deed in deranging his title if, upon an exhibition of the judgment, execution, and levy, it did not appear whether the judgment was rendered for a debt for which the homestead could be subjected or not, he was *prima facie* entitled to recover, citing *Mobley v. Griffin,* 104 N. C., 112; *McCracken v. Adler,* 98 N. C., 400, and *Wilson v. Taylor, ib.,* 275, to sustain that view. Considered then as a direct attack, and even giving the plaintiffs the benefit of the liberal rule applicable to sales under execution, instead of to judicial sales, the

original complaint would have fallen short of showing apparent title in failing to negative the right to sell under the decree. The first complaint, considered as an impeachment of the decree because it required an illegal sale of a homestead, did not state facts sufficient to warrant a judgment vacating it, because of the failure to make the negative averment. If they rested their demand for such relief, preliminary to the grant of a writ of possession, upon the alleged irregularities in the proceeding, then the curative statutes passed from time to time by the General Assembly were held to have validated the decree. *Ward v. Lowndes,* 96 N. C., 367; *Fowler v. Poor,* 93 N. C., 466; *Morris v. Gentry,* 89 N. C., 248; *Cates v. Pickett,* 97 N. C., 21, and others, sustain the position. So that in neither aspect of the pleadings were the plaintiffs then entitled to recover upon proof of all that was (316) alleged.

Advancing a step further, the original plaintiffs, other than Isabella Edwards and her husband, demand in their amended complaint that upon proof that the license was granted to create assets for the payment of debts, for which the homestead would not have been liable to sale, if objection had been made in apt time on behalf of some of the plaintiffs, the decree shall be set aside even now after the infants, who were parties to the original proceeding, have arrived at maturity, and when the lands have passed by a second judicial sale as the property of the purchaser at that sale into the hands of strangers who have bought in good faith.

It seems that the learned judge below was misled, possibly by the want of perspicuity in the opinion or the failure to extend the discussion so as to anticipate the phase which the case has now assumed, though the statement that comes up contains a disavowal of any purpose to make a ruling in conflict with that of this Court.

The statute (The Code, sec. 502) enjoins upon the sheriff the mandatory duty of summoning three discreet persons to appraise and allot a homestead to any judgment debtor who is entitled to such exemption, before levying an execution in his hands upon the land. Neither his ignorance of the rights of a debtor nor his obstinate refusal to recognize them will be allowed to defeat the latter's claim to the benefit of a home for which the Constitution provides, though the presumption of law prevails in favor of the legality of his action in selling, till a party attacking it shows its invalidity because made in disregard of a statute enacted to carry into effect the organic law. *Mobley v. Griffin* and *Wilson v. Taylor, supra.* The sale by the sheriff was not under a judicial decree, and if he flies in the face of a mandatory provision of law, by accident or design, his acts must be declared void at the instance of a party who shows even collaterally, after a proper averment, that his constitutional rights were disregarded. (317)

If the judgment in the special proceeding were reversed for irregularity, a purchaser "at a sale made under and in pursuance of such judgment, which was in force and which was authorized will be protected. All that the purchaser in such case is required to know is that the court had jurisdiction of the subject-matter and the person and made the judgment, upon the faith of which he purchased, and that such judgment authorized the sale." *England v. Garner,* 90 N. C., 197; *Williams v. Johnson, post,* 424. The court had the authority in that proceeding to order a sale to create assets, and the defendants, as appears from the complaint, claimed either directly or indirectly from Sallie Barnett, who purchased at the sale under the decree.

We may add that the beneficent provisions of the Constitution exempted the homestead from the payment of any debt of the owner "during the minority of the children, or any one of them" (Art. X, sec. 3), for the purpose of providing them a home, and where they fail to make claim to such exemption as parties to a proceeding which involves their right, and suffer a decree to be entered, which is inconsistent with such right, they will not be allowed after arriving at years of maturity to have the decree declared void, and cause innocent purchasers at the sale and those claiming under them to suffer by reason of their reliance upon the stability and validity of the decree. The plaintiffs, who were infants then, are adults now and no longer entitled to the benefits not asked in their behalf when their right to them was drawn in question. *Hughes v. Hodges,* 102 N. C., 236.

(318) We think that the court below erred in overruling the demurrer. It should have been sustained, with a proviso that the plaintiffs might amend upon such terms as might have been thought proper.

REVERSED.

Cited: Smith v. Huffman, 132 N. C., 603; *Card v. Finch,* 142 N. C., 146; *Johnson v. Whilden,* 171 N. C., 156.

R. W. KING v. WILMINGTON AND WELDON RAILROAD COMPANY.

Practice—Writ of Recordari, When Used as a "Writ of False Judgment."

1. The writ of *recordari* is authorized by statute (section 545 of The Code) and recognized by the decisions of this Court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment.

2. Where a judgment was rendered by a justice of the peace against the defendant, who alleged that no service of the summons was made, he had his election to move before the justice, or his successor in office, to set aside the judgment or to apply for a writ of *recordari* as a writ of false judgment; and it was error for the judge below to dismiss the petition for such writ, without inquiring into the facts, upon the ground that the petitioner had mistaken his remedy, and could only proceed by a motion in the cause before the justice of the peace to vacate the judgment.

3. Relief against a final judgment rendered by a justice of the peace, and alleged to have been obtained by fraud and collusion between him and others, cannot be had by means of a writ of *recordari*, but must be sought by an independent action.

4. The provision in section 876 of The Code for an appeal in fifteen days after notice of judgment in cases where "the process is not personally served," applies only in cases where the service is by publication, and has no application when the summons is personally served on the agent or officer of a corporation, under section 217 (1) of The Code.

PETITION for *recordari*, heard before *Bryan, J.*, at March (319) Term, 1892, of PITT.

The plaintiff obtained judgment against the defendant before a justice of the peace on 14 July, 1891, docketed a transcript of the same on 9 December, 1891, and on same day execution was issued. The defendant thereupon filed its petition for a writ of *recordari, supersedeas,* and restraining order, alleging, among other things, lack of jurisdiction of the justice of the peace, lack of service of the summons, and fraud and collusion between the justice of the peace and others. The plaintiff, after filing an answer denying the material allegations of petition, moved to dismiss the same on the ground that a motion in the cause was the proper remedy. From the order of the judge dismissing the petition and dissolving the restraining order (which had theretofore issued) the defendant appealed.

T. J. Jarvis and Don Gilliam for plaintiff.
J. L. Bridgers and J. E. Moore for defendant.

CLARK, J. The amended petition for *recordari* avers that there was no service of summons upon the defendant or its agent. If so, the judgment could be set aside at any time upon motion before the justice of the peace who tried the cause, or his successor in office. *Whitehurst v. Transportation Co.,* 109 N. C., 342. His Honor, being of opinion that this was the only remedy, dismissed the petition. The defendant contends that, at its election, it was entitled to have the writ of *recordari* in the nature of a writ of false judgment. This is the principal question in the case.

At common law, and up to the adoption of the Code of Civil Procedure, the writ of *recordari* served a double purpose, either as a substitute for an appeal lost without default of the petitioner, or as
(320) a writ of false judgment, where the justice did not have jurisdiction or when judgment was taken without service of process. The original Code of Civil procedure of 1868, by section 296 (now The Code, sec. 544), abolished writs of error and substituted appeals, but did not provide for writs of *certiorari* and *recordari,* as was pointed out by the Court in *Marsh v. Williams,* 63 N. C., 371. And thereupon the act of 1874-75 (now The Code, sec. 545) was enacted, as follows: "Writs of *certiorari, recordari,* and *supersedeas* are hereby authorized as heretofore in use. The writs of *certiorari* and *recordari,* when used as substitutes for an appeal," etc. From this it would seem that the writ of *recordari* was authorized to the extent it had been "heretofore in use," and extended to cases other than "when used as substitutes for an appeal." But we are not without express decisions upon the point. In *Weaver v. Mining Co.,* 89 N. C., 198, *Smith, C. J.,* says: "The writ of *recordari,* under the former practice, *and retained in the new,* as has been often declared, is used for two purposes—the one, in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." In *McKee v. Angel,* 90 N. C., 60, where there was a motion made before the justice to set aside the judgment for want of proper service and an appeal from such ruling, the Court held that such course was correct, or the defendant could have had his remedy by a writ of *recordari,* in the nature of a writ of false judgment. *Ashe, J.,* says, in that case: "There is no doubt that, as soon as he discovered that such judgment had been rendered against him (*i. e.,* without service of process), he might have availed himself of the remedy of a *recordari,* in the nature of a writ of false judgment. But he has failed to resort to that remedy, and has had recourse to a motion before
(321) the justice who made the judgment to vacate it. Was it in the power of the justice to do that? If it was, it was clearly his duty to do so." The Court then go on to cite *Hooks v. Moses,* 30 N. C., 88, as authority for the latter course. In the following cases, since the Code of Civil Procedure, the use of the writ of *recordari* as a writ of false judgment has been recognized and approved: *Caldwell v. Beatty,* 67 N. C., 142; *S. c., 69* N. C., *365*; *Morton v. Rippy,* 84 N. C., 611, and there are others.

Nor is there anything in *Whitehurst v. Transportation Co., supra,* which militates against these authorities. In that case the justice's judgment having been docketed in the Superior Court, the defendant

brought an action in that court to have the judgment set aside on the ground that process had not been served in the case in which judgment had been rendered. This Court held that the court below properly dismissed the action, since relief could have been had by a motion in the cause before the justice to set aside the judgment. But it was not held that the defendant might not also have had relief by another proceeding in the cause, *i. e.*, by an application for a *recordari.*

As to the other allegation in this application, of fraud and collusion between the justice and others, inasmuch as final judgment had been rendered, relief could only have been had on that ground by an independent action. *Guano Co. v. Bridgers,* 93 N. C., 439. The general rule is also repeated in *Rountree v. Carter,* 109 N. C., 29, citing many authorities.

The defendant had its election. Had it proceeded by a motion in the cause before the justice, and appealed from the refusal, the finding of fact by the justice would not have been conclusive, as would be the findings upon a similar motion in the Superior Court. *Finlayson v. Accident Assn.,* 109 N. C., 196. But probably the defendant preferred the application for a *recordari,* because, if granted, a (322) *supersedeas* might issue. (See Superior Court Rule 14, 104 N. C., 939, and *Weaver v. Mining Co., supra,* which settle the procedure in applications for *recordari.*) Whether there could be a *supersedeas* upon an appeal from a refusal by the justice to set aside a judgment may admit of some doubt.

In reference to the argument made by defendant's counsel as to the words in The Code, sec. 876, providing for an appeal in fifteen days after notice of judgment in cases where "the process is not personally served," it is proper to say that those words apply only in cases where the service is by publication and have no application when the summons is personally served on the agent or officer of a corporation, under The Code, sec. 217 (1). *Clark v. Mfg. Co.,* 110 N. C., 111.

The court below should have found the facts (*Collins v. Gilbert,* 65 N. C., 135; *Cardwell v. Cardwell,* 64 N. C., 621), and dismissed, or have set aside the judgment (*McKee v. Angel,* 90 N. C., 60), in accordance with the law applicable to such state of facts. The judgment dismissing the petition without inquiry into the facts, upon the ground that the defendant had mistaken his remedy and could only proceed by a motion in the cause before the justice to vacate the judgment, is

REVERSED.

Cited: Gallop v. Allen, 113 N. C., 26; *Rhyne v. Lipscombe,* 122 N. C., 657; *Turner v. Machine Co.,* 133 N. C., 385; *In re Scarborough's Will,* 139 N. C., 426; *Rutherford v. Ray,* 147 N. C., 262.

(323)

S. A. WHITE v. C. BARNES.

Assault—Action for Damages—Judge's Charge.

1. Where, in an action for assault, there was no material conflict of testimony, and that of the defendant put the matter in the most favorable light for himself, it was not error for the judge to charge the jury that if they believed the defendant's statement as to the facts (which was equivalent to saying that if they believed the evidence in the most favorable light in which it could be considered for the defendant), the plaintiff was entitled to some damages.

2. In such action, where there was no evidence showing that the plaintiff engaged in or showed a willingness to fight, defendant cannot complain of an instruction "that plaintiff is entitled to recover, even though he entered the fight willingly."

3. Exemplary damages may, in proper cases, be awarded in this State for injuries; and, granting that plaintiff was a trespasser on defendant's premises at the time of the first assault on him, that fact would not debar him from recovering exemplary damages for a subsequent assault by defendant, who, after his arrest, followed the plaintiff 15 feet and struck plaintiff a violent blow, while the latter was held by a policeman and unable to defend himself.

ACTION to recover damages for an assault and battery, tried at February Term, 1892, of WILSON, before *Bryan, J.*, and a jury.

By consent, the following issues were submitted to the jury:

1. Did the defendant unlawfully assault the plaintiff?

2. What damage, if any, is plaintiff entitled to recover?

To the first issue the response was "Yes," and to the second, "Five hundred dollars."

J. A. Privett, policeman, testified: "I was on the street in Wilson in May, 1890, when defendant and his son came by, and defendant said, 'Come on.' He kept right on down the street, and I followed him. We went to ginhouse; saw a wagon backed up there, and White had been loading it. Barnes asked White what he meant by getting (324) things out; said they were his until freight was paid. White said, 'Freight has been paid.' Barnes said, 'You're a liar,' and Barnes and son both struck White—one, over the eye; the other, on the breast; and White took out his knife, but did not open it. I took hold of White and took him before me, with his hands pressed down to his sides, behind, and had carried him about half-way across the street, at least 10 feet from Barnes, when Barnes followed and struck White on the nose with a stick. I had White when Barnes struck him. White was trying to get away, but no more so than is usual. Stick was about

2 feet long. It looked like a pretty severe lick. I took White over to Finch's and set him down; he was bleeding profusely. This was in the streets of Wilson, and several people were around."

Cross-examination.—"Barnes said it was strange, or ridiculous, that White should go there to take the things. When we got there White had some things out of the house. The door was open. White said they were his things; that he did not owe Barnes anything. Barnes first struck White with his fist. White did not strike Barnes at all. I took hold of White because he had got his knife out and held it in his hands. I did not see the knife open. I thought I would take White to stop the difficulty. Have known White ever since he came here, two or three years ago; he worked like a near-sighted person."

S. A. White, *plaintiff*, testified: "I am the plaintiff. Mr. Barnes came down the street and spoke to me. I was moving a table. He asked me what I was going to do with it. I said it was mine. He said, 'How came it yours? It was to be mine until freight was paid.' I said, 'The freight is paid.' He said, 'You are a liar,' and he and his son both struck me. I then got out my knife, but did not open it. Privett then seized me from behind and pressed my hands down by my sides, behind, and Barnes, the defendant, followed and struck me a blow (325) on the nose with a stick; damaged my eyesight. I have always been near-sighted, but worse since the blow. I have suffered great pain since the blow. It gives me great trouble. I was senseless for a while after the blow. I bled profusely. The next thing I knew after the blow I was in Dr. Anderson's office. It was eight or nine months before I could stand the sun. My nose was corked to stop the bleeding. My business is the manufacture of tobacco. I was at that time farming, but was not able after the blow to stand the sun. Have now recovered. My services were worth $15 per month. I did not tell Barnes he was a liar; did not open my knife, and had no intention of opening it."

Cross-examination.—"I came to Wilson in 1889; brought a couple of negroes with me. Came to manufacture tobacco. Machinery was shipped in name of Mr. Barnes; $53 freight was due on it. I did not tell Barnes to pay freight and hold machinery until he was repaid. Machinery was taken out of depot in June. Barnes paid $20 board for me. I paid him back, working for him. I did not leave until Barnes said he was not going into the business. When I came back I found the house locked up with different lock. I asked Barnes for the keys; he refused. I then went to the house and opened the window and went in. I had rented the house myself, and it was mine, and I had a right to go in it. I had a wagon there, and some things had been put on it. Barnes and his son and Privett came up. Barnes said, 'What are you doing with that table?' I said, 'It is mine.' He said, 'How came it yours?' I said, 'I brought it here.' "

There was testimony by other witnesses for the plaintiff corroborating him and showing the aggravated nature of the assault and serious character of the wound inflicted.

(326) The defendant testified as follows: "Am defendant. In June, 1870, these fixtures were shipped to me from Rocky Mount; they stayed in warehouse some time. I was afraid the whole thing was not worth $54. White opened the window of the house and went in and took out things. I took things by claim and delivery. He took them again. He took some things that were mine. I called White a liar; he said I was another, and I struck him; then he took out his knife, and my son struck him; then the policeman took him and started across the street with him. When he had gotten some 15 feet away some one called out that White had his knife out, and I then got a stick and struck him with it. I told White, before this, that if he had anything in the house, to get key and get it out. I do not know that he opened the knife. I think that, before this, I had been very kind to the old man."

Cross-examination.—"I have no harm against him. I went down there to arrest him, and I took the policeman along for that purpose. When he took out his knife, my son said, 'Stand back; I'll attend to him.' I don't know that he drew his knife on me. I struck him with a little hoop. I have never offered to pay his doctor's bill. I have not spoken to him or showed him any kindness since I struck him. I have been indicted for fighting, and convicted. I was under bond to keep the peace when I struck White. White was under arrest and in the hands of the policeman when I struck him, but he was trying to get away from the policeman. I struck him because some one said he had a knife and he was about to get away from the policeman. I took out claim and delivery before the fight." (He is here shown his claim and delivery papers and asked if they do not show that they were dated after the fight, which he admits, but says that he took them out before the fight.)

"White and I rented the house jointly; that is, I told him to rent
(327) the house and I would stand his security. I thought White had surrendered possession to me."

Redirect.—"I was tried for this assault."

James D. Barnes, son of defendant, testified as follows: "Am son of defendant. Went down the street with Privett and father. I had told father that White had broken into house and was taking things out. The table was made there. White said it was his table. Father said he was a liar, and struck him. I struck him one lick. Privett took White across street. Some one said, 'He has a knife.' Father picked up stick, followed, and struck White across nose. Stick was willow and weighed 8 ounces. We were arrested and carried up town."

Cross-examination.—"Father got stick off ground. White was trying to open his knife when I struck."

The plaintiff requested the court, in writing, to charge the jury:

1. That if the jury believe the defendant's statement as to the facts in this case, the plaintiff is entitled to recover some damages. (Given, and defendant excepted.)

2. If the jury shall believe that Barnes struck White with the stick described in the evidence, and broke his nose, the plaintiff is entitled to recover, even though the jury believe that White entered into the fight willingly. *Bell v. Hansley,* 48 N. C., 131. (Given, and defendant excepted.)

3. That this is an action of tort, and in such actions, if the jury believe that the act complained of was attended with circumstances of aggravation or oppression, the jury may, in their discretion, give exemplary damages. (Given, and defendant excepted.)

The defendant requested his Honor to charge as follows, each of which his Honor refused, and defendant excepted:

1. If you find that Mr. White was a trespasser, that he had no right to remove the property, then in no event can you give him more than actual damages, and the circumstances of aggravation and provocation on the part of Mr. White (if such there be) are to be considered by you as tending to reduce the actual damages to a nominal (328) sum.

2. If you believe that at any time during the affray Mr. White fought willingly, or made any attempt to strike Mr. Barnes when the same was not absolutely necessary for the protection of his person, then White can recover only actual damages, and any circumstances of provocation or aggravation may be considered as tending to reduce the recovery to a nominal sum.

3. In no aspect of the case can the defendant recover more than actual damages.

His Honor, among other things, charged the jury: "That if they believed the evidence they would find the first issue 'Yes.' In assessing damages of the plaintiff in the action, the jury are at liberty to take into account the extent of plaintiff's injuries, so far as shown by the evidence; the pain and suffering endured by him, if any, in consequence of said injuries; his loss of time and the cost of medical attendance, and award such damages as you think right and proper. And if you find that the assault and battery was maliciously, willfully and wantonly committed on the plaintiff, and that he was seriously injured and damaged thereby, then you are not confined to the actual damage proved, but you may give, in addition thereto, such exemplary damages, or smart money, as in your judgment will be just and proper, as a punishment to the defendant, in view of all the facts and circumstances proved on the

trial. The damages are to be fixed by the jury, under all the circumstances of the case; the amount is left largely to the common sense and discretion of the jury."

His Honor further told the jury that "An illegal act is wanton when it is needless for any rightful purpose, without any rightful
(329) provocation, and manifests a reckless indifference to the rights of others."

At the conclusion of the judge's charge, the defendant's counsel asked the court, orally, to charge that the jury might take into consideration, in mitigation of damages, the fact that the defendant had been convicted and fined for the assault and battery. His Honor responded that he had already told the jury that they could consider all circumstances and facts proved by the defendant or appearing in the evidence of the plaintiff tending to mitigate the damages. The court told the jury that they could consider the fine that defendant paid, and "to consider all the facts and circumstances."

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

G. V. Strong, F. A. Woodard, and Battle & Mordecai for plaintiff.
Woodard & Yarborough for defendant.

MACRAE, J. There was no exception to the charge of his Honor upon the first issue. The testimony of all the witnesses to the assault was, that after the plaintiff was being carried off by the policeman, his arms held closely to his sides from behind, so as to render him powerless even to defend himself, the defendant followed him some 10 or, according to defendant's own testimony, 15 feet, and struck him in the face, inflicting very serious injury.

The contention was as to the damages upon the second issue. The first exception was to the charge, that if the jury believed the defendant's statement as to the facts in this case, the plaintiff was entitled to some damages.

There was no material conflict in the testimony; that of defendant himself put the matter in the most favorable light for him. While it has been often held that where there is conflicting testimony it is
(330) improper for the court to select one of the witnesses and instruct the jury that if they believe him they will find according to the direction of the court, this is not at variance with the common practice in the trial of criminal actions, for the judge to tell the jury that if they believed the defendant's own statement they should find him guilty, or, in civil actions, where there is no conflict in the evidence, to put the case to the jury upon the admissions of a defendant in his own testimony.

We take from defendant's brief *Anderson v. Steamboat Co.*, 64 N. C., 399, which holds that in case there are a number of witnesses *who contradict each other,* it would be improper generally for the court to set up one of them and instruct the jury that if they believe him they must find their verdict in a particular way; and in *Brem v. Allison,* 68 N. C., 412, where it is said that there may be cases where it would be proper, but generally it is safer to put the case to the jury upon all the evidence, with proper explanations. In this case his Honor said, in effect, that if the jury believed the evidence in the most favorable light in which it could be considered for defendant, the plaintiff was entitled to some damages, and in this we concur without hesitation.

The defendant has no right to complain of the second prayer of plaintiff, which was given by his Honor to the jury, that the plaintiff was entitled to recover, even though the jury believed he entered into the fight willingly; this proposition was correct in the abstract, but there was no fight—there was nothing to indicate the willingness of plaintiff to fight, unless it be the testimony of defendant, "I called White a liar, he said I was another, and I struck him. He took out his knife, and my son struck him; then the policeman took him and started across the street with him. When he had gotten some 15 feet away, some one called out that White had his knife out, and I then got a stick and struck him with it." According to all of the other witnesses (331) testifying to the assault, the plaintiff never opened his knife.

It will be observed that the words used in the instruction, that the plaintiff is entitled to recover, were upon the second issue, upon which defendant contended that plaintiff was not entitled to recover damages. In the sense used, they differ entirely from the same words as referred to in that line of cases where it is held that, upon issues submitted, it is not proper for the judge to instruct the jury that the plaintiff is, or is not, entitled to recover, because that was not the question involved in the issue, but was for the judge to determine upon their findings of fact in response to the issue.

The defendant's counsel, in their brief, earnestly contend that if the plaintiff were a trespasser and had no right to remove the property, in no event can he recover more than actual damages; indeed, that the aggravation and provocation on the part of the plaintiff should reduce it to nominal damages. But it appears by all the testimony that there was a contention between plaintiff and defendant as to the true ownership of the property, and the plaintiff, at the time of the assault upon him, was in possession of it. If it had appeared that the plaintiff was a trespasser upon defendant's property at the time of the first assault by defendant and his son, the second and subsequent violent and unpro-

voked blow in the face, given by defendant with a stick while plaintiff was held by the arms and unable even to defend himself, was, to say the least, "attended with circumstances of aggravation and oppression."

There is no evidence that plaintiff fought willingly or made an attempt to strike defendant. We cannot, at this late day, open the question as to the right to recover exemplary damages in North Carolina in proper cases; it has been too long settled for us now to be called
(332) upon to cite authorities or enter upon a discussion of the reason upon which the principle is based.

We are much inclined to doubt whether the jury intended to give exemplary damages in the present case; their moderation would seem to have kept them within the strict bounds of compensation for the injuries inflicted.

We think his Honor fairly instructed the jury. It was not practicable for him to array the testimony and present it with the law bearing upon it in its different aspects, for it was all one way; it disclosed a violent assault without provocation. At this distance, and by the light of the testimony, it seems to us that the officer of the law arrested the wrong man, deprived him of his first right of self-defense, and permitted the defendant to strike "the old man" in the face with a stick while he was wrongfully held in custody.

What we have said disposes of all the exceptions.

No ERROR.

Cited: Hansley v. R. R., 115 N. C., 612; *Lewis v. Fountain,* 168 N. C., 280.

W. L. FAISON, CASHIER OF CLINTON LOAN ASSOCIATION, ET AL., AND W. A. DUNN, RECEIVER, v. J. L. STEWART, ADMR. OF JOHN ASHFORD, ET AL.

Partnership—Borrowing Partner—Statute of Limitations.

Where a member of an unincorporated joint stock association (which is a partnership) borrows money from the association, he assumes toward the other members or partners the position of a trustee, and is bound to account with them whenever they may call upon him to do so, and hence the statute of limitations does not begin to run in his favor until such demand. The fact that the note, the evidence of the indebtedness, is made payable to the cashier of the association does not change the relations of the parties.

(333) APPEAL from *Winston, J.,* at April Term, 1892, of SAMPSON.

From a judgment in favor of defendants, plaintiff Dunn, receiver, appealed.

The facts are sufficiently stated in the opinion of the Court.

R. O. Burton for plaintiffs.
Allen & Dortch and Battle & Mordecai for defendant.

BURWELL, J. This action was brought by all the members of the joint stock company known as the Clinton Loan Association, except the defendant's intestates, John Ashford and J. R. Beaman, to recover certain sums of money due the said association and evidenced by promissory notes not under seal, payable to the cashier, who was also one of the stockholders or members. J. R. Beaman was living when the suit was begun.

While the action was pending at April Term, 1891, the corporation known as the Clinton Loan Association became the owner of all the assets of the joint stock company of that name, and was made plaintiff. Afterwards, W. A. Dunn was appointed receiver of this corporation, according to the provisions of chapter 155, Laws 1891, and he became plaintiff, and has appealed to this Court from the judgment of the Superior Court, excepting to that judgment because his Honor, being "of the opinion that the right of action on all said notes upon which three years have elapsed since last payment thereon was barred by the statute of limitations," declared that he could not recover on such notes.

We have decided in *Hanstein v. Johnson, ante,* 253, and *Bain v. Loan Association, ante,* 248, that the joint stock company of which the plaintiffs and defendants were members, and which did a general (334) banking business under the name of the Clinton Loan Association, was a partnership. It follows that the debts due from the defendants to the plaintiff are debts due from two members of a copartnership to the firm for money borrowed from the firm. The fact that the notes were made payable to the cashier of the Clinton Loan Association does not affect the relations of the parties to this controversy. The real creditor is the partnership, called a joint stock company, of which this cashier was an agent or servant. As cashier he was not a necessary party to this action, nor would he be to any action brought on a note payable to him, as the notes involved in this action are, for now actions must be brought in the name of "the real party in interest." It might well be argued that the statute of limitations cannot protect the defendants, for the reason that no suit could be brought on any of the notes mentioned in the complaint till a dissolution of the firm, for the reason that, as a general rule, one partner cannot sue another partner in such an action. But the right of the plaintiff, receiver, to have judgment on all the notes, notwithstanding the lapse of time, can be put on even better ground. It is said in *Patterson v. Lilly,* 90 N. C., 82, that "The

functions, rights and duties of partners, in a great measure, comprehend those of both trustees and agents." When, within the scope of the business of the firm, a partner does any act in the name of the partnership, he binds all his associates, for he is in all such matters their agent, as they are his. And where a partner takes into his own possession or borrows from the firm, or appropriates to his own use, any of the assets of the copartnership, he assumes toward the other partners the position of a trustee, and is bound to account with them for the assets so taken or appropriated or borrowed whenever the other partners make
(335) demand upon him so to do. No time runs in his favor till such demand is made. It is alleged in the complaint, and admitted in the answer, that plaintiffs' demand upon the defendants for the payment of all these notes, due from them to the firm, was made "recently, before the commencement of this action."

These general principles of the law of partnership are especially applicable to the peculiar facts of the case before us. These borrowing partners were of those to whom the management of the partnership business was entrusted. They were directors of the concern. It was their duty to see that notes due the firm were collected. The articles of agreement so provided. Directing and managing partners of a banking firm who allow notes, on which they are liable, to remain so long unpaid can only escape a charge of that *crassa negligentia* that is closely akin to fraud by asserting that their purpose was to pay these obligations whenever the exigencies of the firm required them so to do, and that they knew that no lapse of time would protect them from the just demands of their copartners and creditors.

REVERSED.

Cited: Dunn v. Johnson, 115 N. C., 256; *Baker v. Brown,* 151 N. C., 15; *Chatham v. Realty Co.,* 180 N. C., 504.

(336)

H. N. SNOW AND ELLINGTON, ROYSTER & CO. v. THE BOARD OF COMMISSIONERS OF DURHAM COUNTY.

Contract—Claim Against County—Materials Furnished Subcontractors—Priorities.

Where county commissioners contracted with E. & Co. to build a courthouse, who sublet the plumbing and piping to S., who, in his turn, assigned it to B. and took B.'s note, and in payment of a small sum due the contractors by him transferred it to the contractors, with an agreement, assented to

by B., that they would pay to S. the amount of the note (less the small sum due by S. to them) out of the money to become due to B. from them, and B. subsequently became indebted to R. & Co. for materials used in completing the plumbing contract, and the commissioners, by a lien filed by R. & Co., the materialmen, paid the latter the balance due E. & Co. on the contract for the whole work: *Held*, (1) that a courthouse cannot be subjected to a lien for labor or material; (2) that the county commissioners are liable to S. for the amount which the contractors agreed to pay him out of the sum due B. from them; (3) the materialmen, R. & Co., being creditors of B. only, are entitled to recover of the money in the county commissioners' hands no more than was due B. under the agreement in force when the claim for materials originated, which was the difference between the contract price of the work done by B. and the sum which the contractors had agreed to pay to S., B.'s assignor.

APPEAL from *Connor, J.*, at Fall Term, 1892, of DURHAM.

The parties duly waived trial by jury, and consented for the court to hear and determine all questions of law and fact. Pursuant thereto, the court heard the testimony and found the following facts:

The plaintiffs, W. J. Ellington, L. H. Royster, and B. F. Park, doing business under the firm name and style of Ellington, Royster & Co., in the city of Raleigh, N. C., on 5 July, 1887, entered into a contract, in writing, with the defendant, the Board of Commissioners of Durham County, whereby they undertook to erect, in the town of Durham, in said county, a public courthouse, in accordance with certain plans and specifications therein referred to. A copy of said contract is hereto attached, marked Exhibit "A." That as a part of said plan and specifications it was provided that certain plumbing and piping were to be placed in said courthouse; that said Ellington, Royster & Co. contracted with Goodwin & Co. to do the said plumbing and piping, and the said Goodwin & Co. transferred their said contract to the plaintiff H. N. Snow, and on 26 October, 1888, the said H. N. Snow transferred the said contract to J. C. Brewster, of Raleigh, N. C. A copy of (337) said transfer is hereto attached, marked Exhibit "B." Goodwin & Co. were to receive for said plumbing and piping the sum of $1,200 from the said Ellington, Royster & Co. Goodwin & Co. and H. N. Snow had, for the purpose of completing said work, purchased certain material, which they transferred to said J. C. Brewster, together with some tools, etc. In consideration of the said assignment and the said material and tools, etc., the said J. C. Brewster, on 26 October, 1888, executed to the plaintiff H. N. Snow his promissory note for $694.46, to be due 15 January, 1889. Said Ellington, Royster & Co. had notice of, and assented to, the assignment to said J. C. Brewster. There was an agreement, made after the execution of the note, on the part of said J. C. Brewster, with said H. N. Snow, that the said note should be paid out of the money coming to him from the commissioners of Durham on

account of the plumbing and piping of the said courthouse. Ellington, Royster & Co. had notice of, and assented to, this agreement. The said Ellington, Royster & Co. having a claim against the plaintiff H. N. Snow on account of some work—work included in said contract—for $38, the said H. N. Snow, on 11 December, 1888, endorsed the said note to them, with the agreement, made on said day, that they were to receive the money therefor from said amount due Brewster from said work, and, after deducting said sum, pay the balance to the said H. N. Snow, and said J. C. Brewster was a party to this said agreement.

The defendant board of commissioners were notified of the plaintiffs' claim and the agreement between J. C. Brewster, Ellington, Royster & Co., and the plaintiff on 1 April, 1889, after the said courthouse and said plumbing and piping had been completed. The said plumb-
(338) ing and piping was the last work done on said courthouse.

James Robertson, trading under the firm name and style of James Robertson & Co., of the city of Baltimore, Md., between 6 November, 1888, and the 23d of said month, furnished to the said J. C. Brewster plumbing and piping material, which were used by the said Brewster in and on account of the said courthouse, of the value of $904.08, which sum said Brewster failed to pay the said James Robertson & Co. The said James Robertson & Co., on 19 December, 1888, filed in the office of the clerk of the Superior Court of Durham County notice of lien on said courthouse and all unpaid balance due or to become due from the Board of Commissioners of Durham County to said Ellington, Royster & Co., and from Ellington, Royster & Co. to Goodwin & Co., or to H. N. Snow, surviving partner of said Goodwin & Co., or to J. C. Brewster as subcontractor, . . . to an amount sufficient to pay the aforesaid bills for material, amounting to $904.08. (See Lien Book, Lien No. 178.) A copy of said lien is hereto attached, marked Exhibit "C." The defendant board paid to the said Ellington, Royster & Co. all of the contract price for building said courthouse, except $86, which was the balance due J. C. Brewster on account of the plumbing and piping.

On 1 April, 1889, the defendant board of commissioners notified Messrs. Ellington, Royster & Co., James Robertson & Co., J. C. Brewster and the plaintiff H. N. Snow that they were ready to pay said sum to whomsoever it might be lawfully due, and the said parties, in
(339) person and by their attorneys, appeared before said board and asserted their respective claims to said sum. The said Ellington, Royster & Co. and plaintiff H. N. Snow protested against the payment of said sum to any one save themselves, and the said James Robertson & Co., by their attorney, W. A. Guthrie, claiming said sum by virtue of the aforesaid lien, the defendant board of commissioners thereupon noti-

fied the said parties claiming said sum that they would leave the said sum in the hands of the treasurer of the county for a reasonable length of time, until the parties claiming the same should establish their right thereto by the judgment of some competent court. No action was instituted to have the right of either of said parties to said sum adjudicated, and on 3 June, 1889, the defendant board of commissioners paid the sum over to W. A. Guthrie, attorney for James Robertson, in the discharge of the aforesaid lien. The plaintiffs have demanded the payment of so much of said sum as is necessary to discharge the said note and interest thereon, and the defendants have refused to pay the same. The plaintiffs thereupon, on 27 December, 1890, instituted this action to recover the said amount.

The court, upon the forgoing facts, adjudged that the plaintiffs recover of the defendant board of commissioners, for the use of the plaintiff, H. N. Snow, the sum of $694.48, with interest thereon from 15 January, 1886, together with the cost in this behalf expended, to be taxed by the clerk. The defendants excepted and appealed.

The material parts of Exhibits "A," "B" and "C" referred to in case on appeal are as follows:

Exhibit A.—Articles of agreement between Ellington, Royster & Co. and the board of commissioners of Durham County, in which it is stated that the former will in a workmanlike manner build and finish a courthouse in the town of Durham, according to plans and (340) specifications made a part of this contract, and that they are to furnish all material and labor; and the said commissioners agree to pay therefor $19,900, in certain installments mentioned, etc.

Exhibit B.—The contract was transferred to J. C. Brewster, who agreed to carry out fully all work required of Goodwin & Co., in fulfillment of the contract, and to receive all payment for same (this was the contract made between Goodwin & Co., of Durham, and Ellington, Royster & Co., the same being signed by H. N. Snow for Goodwin & Co., and by J. C. Brewster).

Exhibit C.—Baltimore, 1 December, 1888. James Robertson & Co. in account with J. C. Brewster. This account shows the material furnished for plumbing, etc., in said courthouse, amounting in the aggregate to $904.08. Robertson & Co. subsequently filed a lien for said materials against Brewster, Goodwin & Co., Ellington, Royster & Co. and the board of commissioners of Durham County to secure payment of said $904.08, the said lien being filed upon the said new courthouse building and the lot and premises on which the same is situated and being erected, together with his claim for a lien as a material man upon all unpaid balances due from the said board of commissioners from Ellington, Royster & Co., and from Ellington, Royster & Co. to Good-

win & Co., or to H. N. Snow, surviving partner of Goodwin & Co., or to J. C. Brewster as a subcontractor as aforesaid, or to John Devereux, Jr., trustee of Brewster, under a certain deed of assignment from Brewster to Devereux, and registered in the county of Wake, to an amount sufficient to pay said Robertson & Co. the above sum for materials furnished as aforesaid.

(341) *Fuller & Fuller for plaintiffs.*
Boone & Parker and W. A. Guthrie for defendants.

BURWELL, J. We find no error in the judgment from which the defendants have appealed.

By the terms of the contract between the plaintiffs, Ellington, Royster & Co., and the defendant board of commissioners the latter were bound to pay to said plaintiffs the price agreed upon for the building of the courthouse. So far as appears they have never waived their rights to any part of this sum, nor consented that the commissioners should pay to any other person what was due to them upon the completion of the work they had agreed to do. A portion of their work was the "plumbing and piping," which was done by J. C. Brewster, not for defendants or on their credit, but for Ellington, Royster & Co., and on their credit. The defendants have never owed Brewster any money for that work. The relation of debtor and creditor has not existed between them. But that relation did exist between Brewster and Ellington, Royster & Co. by virtue of the subcontract made by them for the "plumbing and piping" with Goodwin & Co., and by them assigned to Snow, and by him assigned to Brewster. It was entirely competent for Ellington, Royster & Co., the debtor, and Brewster, the creditor, to agree that Snow should receive a certain part of the money to become due from them to Brewster. No third party had acquired any lien on the fund. And no one now can complain because Ellington, Royster & Co. agreed to pay to Snow a certain portion of the money to become due to Brewster, the amount so to be paid being evidenced by a note given by Brewster to Snow, or because Brewster agreed to accept the difference between the contract price of the "plumbing and piping" and the sum so to be
(342) paid Snow in full satisfaction of his demand against Ellington, Royster & Co. The effect of the arrangement between these parties was as if Brewster had drawn a draft on Ellington, Royster & Co. in favor of Snow for the sum mentioned in the note, to be paid out of the contract price, *and Ellington, Royster & Co. had accepted the draft.*

If the agreement between Snow and Brewster as to the manner of the payment of the note, to wit, out of the fund to be in the hands of Elling-

ton, Royster & Co., had not been assented to by them, it would have been in effect as if a draft had been drawn as above stated and *Ellington, Royster & Co. had not accepted it,* and there might have been presented to our consideration the question whether or not the agreement between Brewster and Snow amounted to an assignment by the former to the latter of the sum named in the note out of the total sum in the hands of Ellington, Royster & Co. But we have here no controversy between the holders of the fund, Ellington, Royster & Co., and the claimant to a part of it, Snow. They admit their agreement with Snow and their liability thereon and only insist that their debtors, the defendants, shall pay what is due them under the original contract so as to enable them to carry out their agreement with Brewster and Snow. To this recovery Robertson & Co. have no right to object. They are creditors of Brewster and of Brewster alone, and by no action of theirs or of Brewster's can they recover of his debtor more than is due him under the agreement in force when their claim against him for materials originated, and that, as we have seen, was the difference between the contract price of the plumbing and piping and the sum which Ellington, Royster & Co. had agreed to pay to Snow for Brewster, and that sum they have received and may retain without objection on the part of the plaintiffs.

Nor can the defendants defeat the recovery of plaintiffs by showing that they have paid the sum sued for to Robertson & Co. (343) in order to discharge their alleged lien, for, in the first place, a courthouse cannot be made subject to any lien for labor or materials, and, in the second place, if it be conceded that the lienors acquired thereby a lien on the money due from defendants to Ellington, Royster & Co., or on the money due from Ellington, Royster & Co. to Brewster, still the limit of their lien was the net amount due Brewster after deducting what they had assumed to pay to Snow.

AFFIRMED.

Cited: Satterthwaite v. Ellis, 129 N. C., 71; *Gastonia v. Engineering Co.,* 131 N. C., 362; *Hardware Co. v. Graded School,* 150 N. C., 681; *Hall v. Jones,* 151 N. C., 424; *Hardware Co. v. Schools, ib.,* 509; *Hutchinson v. Comrs.,* 172 N. C., 845.

W. P. MAYO v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Companies—Railroad Commission, Jurisdiction of.

1. The Railroad Commission Act (chapter 320, Laws 1891) confers upon the commission no power to prescribe rules or regulations for telegraph companies other than those directed by section 26 of said act, which requires it to fix rates, etc.

2. For a violation of the rules prescribed by the commission fixing rates for messages, the commission may serve notice of such violation on the offender, and may, on hearing, direct full compensation to the injured party, enforceable by civil action, under section 10.

3. Where a complaint against a telegraph company charges defendant with specific instances of unnecessary delay in transmitting and delivering messages, but alleges no violation of the regulations of the commission prescribing the rates of charges for messages, it states no cause of action under the act.

This case was commenced before the Railroad Commission by petition of plaintiff, a resident of Mount Airy, who complained that in two instances the defendant corporation was negligent, and unnecessarily delayed the transmission of messages between himself and his cor-
(344) respondents at Henderson and Winston, to his serious inconvenience and damages. The petitions alleged that the defendant is subject to the act of Assembly establishing the Railroad Commission and providing for the general supervision of railroad, steamboat or canal companies, express and telegraph companies doing business in the State of North Carolina. The prayer of the petition was as follows:

"That the defendant may be required to answer the charges herein, and that after due hearing and investigation, an order be made commanding the defendant to cease and desist from said violation of the act to provide for the supervision of railroad, steamboat or canal companies, express and telegraph companies doing business in the State of North Carolina, and for such other and further orders as the commission may deem necessary in the premises."

The defendant filed a demurrer, assigning as grounds thereof that—

1. The court has no jurisdiction of the subject of this action.

2. That the petitions do not state facts sufficient to constitute a cause of action, because it is not alleged that the acts complained of were in violation of any rule or regulation provided and prescribed by the commission.

The commissioners overruled the demurrer and required the defendant to answer, whereupon defendant appealed to the Superior Court of

Wake County, at the October Term, 1892, of which Bryan, J., sustained the demurrer and dismissed the case, from which judgment plaintiff appealed.

R. O. Burton for plaintiff.
Strong & Strong for defendant.

MACRAE, J. We had occasion, at last term, in *Express Co.* (345) *v. R. R.*, 111 N. C., 463, to consider the scope and purpose of the Railroad Commission Act, ch. 320, Laws 1891, and to remark upon the failure of the act to define with more exactness the powers and duties of this important function. There was no difficulty, however, in reaching the conclusion that ample authority was conferred upon the commission to entertain and pass upon complaints for violations of the rules and regulations respecting matters embraced within section 4 of the act. We may now extend this conclusion as to the authority of the commission to all subjects with regard to which the act in question directs or empowers them to make rules and regulations; and it will be our duty to inquire as to the extent of such authority as conferred by said act.

Confining ourselves to the question before us—section 5 directs the commission to make reasonable and just rates of freight and passenger tariff; reasonable and just rules and regulations to be observed by all railroad companies doing business in this State, as to charges at any and all stations for the necessary handling and delivering of freight; such just and reasonable regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in the State; reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroad; just and reasonable rules and regulations to be observed by said railroad companies to prevent the giving, paying or receiving of any rebate or *bonus,* directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight or passengers.

By section 6 the commission is empowered to make, conjointly (346) with carriers of freight to and from points beyond the limits of the State, special rates for the purpose of developing manufactures, etc., in the State.

By section 7 it is required that they shall make rates of charges for transportation of passengers and freights and cars, subject to the right of appeal to the Superior Court. And section 9 provides for such rules and regulations concerning contracts and agreements between railroad companies as to freight and passenger rates as may then be deemed necessary and proper.

Section 13 extends the meaning of the words "such companies" and "railroad companies" to all corporations, companies or individuals owning or operating railroads, steamboats, canals, express business and telegraph lines.

And section 26 requires the commission to make rates of charges by express companies and for the transmission of messages by any telegraph line or lines doing business in this State, and provides for penalties upon said companies for charging higher rates than those fixed by the commission, actions to recover said penalties to be brought as provided in section 7.

Section 10 provides for notice to railroad companies (and by virtue of section 13 this term will embrace telegraph lines) violating these rules and regulations, and for ample and full recompense for the wrong and injury done thereby, to be directed by the commission, and to be enforced by penalties to be fixed by the judge of the court in which the action shall be tried, which penalties are to be recovered by action in the name of the State.

We have thus examined the statute with a view to ascertain the powers and duties of the commission as to the making of rules and regulations and the enforcing of the same; it was not necessary to refer to the power given to make rules of procedure, nor to consider the effect of chapter 498, Laws 1891, making the commission a court of record.

(347) It will be observed that all of these sections are highly penal in their nature, and intelligent minds will at once concede that while it is our duty to interpret the whole law in a fair and even liberal spirit in order to reach its true intent, we are likewise required by all the principles of construction not to extend this interpretation beyond the plain and evident meaning of the words employed, in that sense which will ascertain the policy and object of the Legislature.

There is nothing to show the intent of the statute to give to the commission power to prescribe other rules and regulations for telegraph lines than those directed in section 26, with regard to their charges for the transmission of messages, as neither of the other sections could be made to apply to telegraph, even if the same had been specifically named.

In our opinion, for any violation of the rules prescribed by the commission, fixing the rates to be charged for transmission of messages by telegraph, the commission may cause notice to be served upon the companies or persons charged with such violation. And upon a proper hearing before them under such procedure as they may legally prescribe, they may ascertain and direct ample and full recompense to be made by the company, corporation or person so offending against said rules, which recompense may be enforced by civil action, as prescribed in sec-

tion 10. We are not called upon now to determine the effect to be given the findings and direction of the commission, whether *prima facie* or conclusive, if not appealed from, in the action for the penalty. It is enacted in the proviso attached to section 29 of the same act, "that from all decisions and determinations arising from the operation and enforcement of this act the party or corporation affected thereby shall be entitled to appeal therefrom." (348)

The complaint alleges no violation of the regulation, circular 3, prescribing the rates of charges for the transmission of messages by telegraph.

It, therefore, does not state grounds sufficient to constitute a cause of action, because it is not alleged that the acts complained of were in violation of any rule or regulation prescribed by the commission.

The plaintiff, if he has a cause of action, is left to his remedy in the courts as existing before the passage of the act which we have had under consideration.

AFFIRMED.

Cited: Comrs. v. Tel. Co., 113 N. C., 220, 226; *Leavell v. Tel. Co.*, 116 N. C., 221; *Pate v. R. R.*, 122 N. C., 880; *Hendon v. R. R.*, 125 N. C., 128; *Corp. Com. v. R. R.*, 170 N. C., 569.

MARCUS TILLEY, ADMR. OF S. WALKER, v. M. C. BIVINS ET AL.

Proceedings to Sell Land for Assets to Pay Debts—Right of Heir to Contest Validity of Judgment Against Administrator.

In proceedings by an administrator for leave to sell land to make assets to pay decedent's debts, the heir has a right to show that judgments taken against the administrator after the commencement of the proceedings were wrongfully suffered to be entered against him. In such case, it seems, the judgment creditors ought to be made parties.

PETITION to rehear this cause decided at February Term, 1892 (110 N. C., 343), in which the judgment of the court below was affirmed for failure on the part of the appellant to specifically assign the errors in the rulings of the court.

The principal ground of objection to the rulings of the referee, approved by the court below, to which the petition for the rehearing calls attention, was the refusal of the referee, in a proceeding brought by the plaintiff administrator to sell land for assets, to permit (349)

testimony showing that judgments taken against the administrator after the commencement of the proceedings were collusively taken. As will be seen by reference to the report of the case on the former hearing, the report and rulings of the referee were, in all respects, confirmed, and defendants appealed.

Fuller & Fuller for plaintiffs.
J. S. Manning and J. Parker for defendants.

MACRAE, J. A more careful examination of the record in this case than was given it on the former hearing (110 N. C., 343) brings us to the conclusion that the appellants' exceptions were sufficiently definite and should have been considered. Without specifying each separate exception, we remand the cause that the defendants may be allowed to contest the existence of those alleged debts against the estate on which judgments were taken against the administrator since this proceeding was begun and while it was pending.

In proceedings under the act of 1784, by *sci. fa.* against the heirs, they might plead that the judgment against the administrator, was obtained by fraud. *Tremble v. Jones,* 7 N. C., 579. No change in principle was wrought by the act of 1847 providing a different and less expensive procedure in obtaining a judgment for the sale of land for assets.

It was held in *Speer v. James,* 94 N. C., 417, that upon petition by administrator to sell lands for assets, if the debts had not been reduced to judgment, the heir might plead the statute of limitations, but when the debt had been reduced to judgment the heir is bound by the
(350) judgment unless he could show that it was obtained by fraud and collusion.

As we understand the case presented to us, after these proceedings began, several judgments were taken before a justice of the peace against the administrator, thus ascertaining debts which the defendants say are not due and owing and which they aver that the administrator wrongfully suffered to be taken against him. There can be no reason why the heirs should not be permitted to contest the validity of these judgments. It may be proper, however, to make the judgment creditors parties.

We express no opinion upon the merits. As to judgments which had been rendered against the testatrix in her lifetime such defenses only can be made by the heirs as would be available to the intestate while living. The referee ought to have considered all proper testimony offered before him to show that the judgments were fraudulently or collusively rendered and that the indebtedness did not exist.

PETITION ALLOWED. REMANDED.

Cited: McArthur v. Griffith, 147 N. C., 547; *McNair v. Cooper,* 174 N. C., 568.

(351)

BEAUFORT COUNTY LUMBER COMPANY v. ELIAS DAIL.

Assignment of Mortgage—Verbal Release of Part of the Property—Rights of Purchaser at Foreclosure Sale.

B., while holding by purchase from the mortgagor the equity of redemption in the timber on the mortgaged land, and by assignment from the mortgagee the mortgage on the land itself, conveyed to plaintiff the equity of redemption in the timber, which conveyance was registered subsequent to an assignment by him of the note and mortgage to C., with whom there was a verbal exception of the timber on the land. C. assigned the note and mortgage, with like verbal exception of the timber, to D., at whose instance the land was sold, in a suit for foreclosure, and the defendant became the purchaser, having no actual notice of the verbal agreement concerning the timber: *Held*, (1) that the purchaser was not fixed with constructive notice of an assignment of the equity of redemption in any of the mortgaged property by any of the successive holders of the mortgage, nor was he compelled to inquire further than to ascertain from the records, or from the mortgagor, whether the debt had been paid or the mortgage released, in whole or in part, to him by any of the assignees of the mortgage; (2) that while the transfer of the note after maturity would have made it subject to equities as between the mortgagor and the assignees of the note, in in this case none arises from that fact in favor of the plaintiff, who purchased the timber rights subject to the mortgage under which the defendant claims.

PETITION to rehear this case decided at September Term, 1892, and reported fully in 111 N. C., 120.

W. D. McIver and O. H. Guion for petitioner. (353)
W. W. Clark, contra.

CLARK, J. This is a petition to rehear this case decided at the last term, 111 N. C., 120. The defendant purchased at a foreclosure sale made at the instance of the last assignee of the mortgage. The mortgage passed by assignment through several hands, and between some of the successive holders there was a verbal agreement that the mortgage should not embrace the timber right. But of this the defendant, purchaser under the decree of foreclosure, had no notice. There was no release at any time of the mortgage as to the timber, nor any payment on the mortgage debt. Hence the defendant got the mortgagor's title by purchase at the foreclosure sale, such as it was at the date the mortgage was executed.

Subsequently to the registration of the mortgage the mortgagor conveyed his equity of redemption in the timber on the mortgaged land to B., who afterwards became one of the assignees who in succession held

the mortgage. While holding both the mortgage of the land and the equity of redemption in the timber thereon, B. conveyed the equity of redemption in the timber to the plaintiff herein, but did not release the mortgage thereon by any paper executed to the mortgagor or any endorsement on the registration of the mortgage.

(354) The conveyance of the equity of redemption in the timber to the plaintiff was registered subsequently to the assignment of the mortgage to another in the line of successive holders of the mortgage. But aside from that, the conveyance of the equity of redemption in the timber to the plaintiff was not made by B., as mortgagee, though at the time holding the mortgage, because as mortgagee B. did not have the equity of redemption in the timber. The purchaser was not fixed with constructive notice of an assignment of the equity of redemption in any of the mortgaged property by any of the successive holders of the mortgage, nor was he compelled to inquire, for they had no power to make such. All he was required to do was to ascertain from the record, or by inquiry of the mortgagor, if the debt had been paid or the mortgage released in whole or in part to him by any of them. This they had not done.

When B. conveyed to plaintiff he happened at the time to be also holder by assignment of the mortgage, but he could only make a valid conveyance of the equity of redemption by virtue of its having been conveyed to him by the mortgagor. But such conveyance, as we have seen, was made subsequently to the registration of the mortgage and subject to it. This is the title which the plaintiff got, while the defendant got the mortgagor's title. The plaintiff's equity was cut off by the decree and sale of foreclosure.

Nor is there anything in the point that the note, being transferred after maturity, was subject to equities. That is true as between the mortgagor and the several assignees of the mortgage note. It has no application to this case. There were no equities in favor of the mortgagor.

PETITION DISMISSED.

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(355)

J. W. PIPKIN v. J. A. GREEN, SHERIFF.

Dismissal of Appeal—Reinstatement—Laches.

1. A motion to reinstate an appeal dismissed for failure to print must be made at the same term (Rule 30 of the Supreme Court), and will only then be allowed for good cause shown.

2. A motion to reinstate an appeal dismissed for failure to docket the record at the first term of this Court after the trial below is fatally defective, where it does not show that the delay was without laches on the part of the appellant.

MOTION to reinstate the appeal which had been previously dismissed.

W. E. Murchison for plaintiff.
E. C. Smith for defendant.

CLARK, J. This is a motion made at September Term, 1892, to reinstate the appeal which had been dismissed at February Term, 1892 (110 N. C., 462), for failure to print, and also for failure to docket at the proper term. The motion to reinstate, when the dismissal is for failure to print, must be made at the same term (Rule 30 of the Supreme Court), and will only then be allowed "for good cause shown." The motion, therefore, comes too late, and must be denied.

The motion, indeed, does not show good cause. *Stephens v. Koonce,* 106 N. C., 255, is in point. Furthermore, notice of the motion to reinstate was not given as required by Rule 30.

This renders it unnecessary to consider the other ground of dismissal—for failure to docket appeal at the next term of the Court after the trial below. We will note, however, that if this was caused by the delay of the judge to settle the case in time, the appellant should have docketed the record proper and have asked for a *certiorari* for the (356) "case" at such first term thereafter. *Pittman v. Kimberly,* 92 N. C., 562; *Porter v. R. R.,* 106 N. C., 478. Besides, as a motion to reinstate the appeal dismissed on this ground, it is fatally defective for failure to show that the delay to docket the appeal was without laches on the part of the appellant. *Simmons v. Andrews,* 106 N. C., 201.

MOTION DENIED.

Cited: Graham v. Edwards, 114 N. C., 230; *S. v. Freeman, ib.,* 873; *Carter v. Long,* 116 N. C., 47; *Guano Co. v. Hicks,* 120 N. C., 30; *Burrell v. Hughes, ib.,* 278; *Parker v. R. R.,* 121 N. C., 504; *Calvert v. Carstarphen,* 133 N. C., 26; *Howard v. Speight,* 180 N. C., 654.

THE GEORGE W. HELM COMPANY v. C. F. GRIFFIN.

Statute of Limitations—Acknowledgment of Debt—New Promise.

1. A mere acknowledgment of a debt barred by the statute of limitations, though implying a promise to pay, will not repel the statute; to have that effect, the acknowledgment, as provided by section 172 of The Code, must not only be in writing, but must be accompanied by an unconditional promise to pay the debt.

2. Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future: *Held*, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed.

ACTION tried at October Term, 1892, of WAYNE, before *Bryan, J.*, a jury trial being waived.

The plaintiff declared on an account for $235.07, dated 29 November, 1887, for goods sold and delivered. The defendant admitted the sale and delivery of the goods at the price named, but denied the in-
(357) debtedness, and pleaded the statute of limitations.

The plaintiff replied, alleging a new promise made to Benjamin Lyon, who, it was admitted, was the agent of the plaintiff, and to support such new promise put in evidence a letter in the following words and figures, to wit:

GOLDSBORO, N. C., 6 October, 1891.

MR. BENJ. LYON, Wilmington, N. C.

My Dear Sir:—Your letter of last night to hand, and in reply thereto would say that I reckon I might as well hold on awhile in taking hold of your snuff, as I feel quite a delicacy in asking your firm for further credit, knowing that I have been unable to pay what I owed them in Wilson. I have perfect confidence in paying what bills I may contract in the future, and am better able to do so now than I was then. Let me get straight with the world, then I will ask for their confidence, but never till then. What confidence is given me must be voluntary.

With the highest regards for you, I am,

Yours truly, C. F. GRIFFIN.

The plaintiff, also, for the purpose of identifying this as the Wilson debt referred to in the letter, introduced a deed of assignment, made in Wilson, N. C., by the defendant, dated 2 January, 1888, in which, among the creditors named to be paid among his general creditors, was the plaintiff, as follows: "George W. Helm Co., Helmetta, New Jersey, $235.07, due by account."

The court, being of the opinion that the evidence was not sufficient to repel the statute of limitations, gave judgment against the plaintiff for the cost of the action, from which judgment the plaintiff appealed.

W. C. Munroe for plaintiff. (358)
No counsel contra.

CLARK, J. Under the former statute of presumptions an acknowledgment of the nonpayment of a debt coming within its operation would rebut the presumption of payment arising from the lapse of time. But now we have no statute of presumptions. The Code, sec. 138, prescribes a statute of limitations only. The acknowledgment which is now requisite as evidence of a new or continuing contract must not only be in writing (The Code, sec. 172), but it must be an unconditional promise to pay the debt. *Bates v. Herren,* 95 N. C., 388; *Greenleaf v. R. R.,* 91 N. C., 33. A mere acknowledgment of the debt, although implying a promise to pay it, will not revive it. *Riggs v. Roberts,* 85 N. C., 151; *Faison v. Bowden,* 76 N. C., 425. This section (172) provides that the statute is only waived by an acknowledgment or new promise, which amounts to "a new or continuing contract."

The letter here relied on contains no promise whatever, neither express nor implied, conditional nor unconditional. It is in no sense a contract. At the most, it is a mere acknowledgment of the indebtedness, which had become barred, but without any promise to pay it. The bar of the statute is, therefore, not removed.

AFFIRMED.

Cited: Phillips v. Giles, 175 N. C., 413.

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(359)

CITY OF GREENSBORO v. W. D. MCADOO.

Petition to Rehear—Dismissal of Appeal for Want of Assignment of Error—Assessment by City for Special Benefits to Abutting Property —Statute, Repeal of.

1. An appeal from an adjudication upon an agreed state of facts is a sufficient assignment of error by the party against whom the ruling is made.

2. The power to levy assessments upon owners of property for special and peculiar benefits accruing to the same from improvements is not inherent in a public corporation, but must be directly conferred by statute.

3. Where a statute conferring authority on a municipal corporation to make assessments on property for special benefits prescribes the mode in which that power shall be exercised, that mode must be strictly pursued, except as to entirely immaterial matters.

4. Repeals of statutes by implication are not favored, and in order to give an act, not covering the entire ground of an earlier one nor clearly intended as a substitute for it, the effect of repealing it, from implication of an intention to repeal must necessarily flow from the language used, disclosing an irreconcilable repugnancy between its provisions and those of the earlier law; therefore, where the charter of the city of Greensboro (Private Laws, 1869-70, ch. 122, as amended by chapter 13, Acts of 1875), relating to the construction and repair of sidewalks and the assessment upon owners of abutting property for the special benefits thereto, required that such benefits should be ascertained by a committee of five freeholders chosen jointly by the commissioners and the property owner, and an amendment to the charter was made by chapter 44, Acts of 1887, which authorized the commissioners generally to grade and lay out streets, make *local assessments*, etc., but, provided no method of making the assessment: *Held*, that the latter enactment did not, by implication, repeal the particular method prescribed by the former law of making assessments as to sidewalks.

5. Inasmuch as chapter 219, Laws 1889, creating a new charter for the city of Greensboro, provides no method of levying special assessments of any character, either for past or future improvements, it seems that, as to the latter, they must be made under the general law (The Code, sec. 3803); but as the new charter, after declaring that all existing laws in conflict with it are repealed, provides that such repeal shall not "affect any act done or right accruing or accrued or established, but the same shall remain in full force, and be preserved and enforced and enjoyed," etc., the act does not operate to repeal the old mode of assessment for improvements commenced before the new charter took effect, though not assessed for until afterwards.

(360) PETITION by defendant, to rehear the appeal dismissed at February Term, 1892, for lack of specific assignment of error in the ruling of the judge below, as reported in 110 N. C., 430.

The cause was heard below before *Boykin, J.*, at February Term, 1891, of GUILFORD, on appeal from the Board of City Aldermen of Greensboro, upon a case agreed and facts found by his Honor. There was judgment for the plaintiffs, and defendant appealed.

The facts are set out in the opinion of *Shepherd, C. J.*

L. M. Scott and J. T. Morehead for petitioner.
Dillard & King and James E. Boyd contra.

SHEPHERD, C. J. Upon a more careful examination of the record we are of the opinion that the appeal in this case should not have been dismissed for want of sufficient assignment of error to the adjudication

of the court below. The cases cited in support of the dismissal are not in point (110 N. C., 430), as in neither of them was the judgment predicated, as in this case, upon a statement of the facts agreed.

In *Chamblee v. Baker,* 95 N. C., 98, the Court said: "The case is made out in the facts agreed and submitted, and the appeal from the adjudication upon them is a sufficient assignment of error. It does not, in this respect, differ from a ruling upon a demurrer to the complaint, when no separate case is required. In each case the question is as to the plaintiff's right of action and recovery upon the facts agreed."

In *Davenport v. Leary,* 95 N. C., 203, the Court remarked: (361) "An error is sufficiently assigned in an appeal from the ruling as to the law upon an agreed state of facts by the party against whom the ruling is made. What greater particularity can be required? The issue is joined by the adverse contentions as to the law arising upon the facts, and an appeal from an adverse decision distinctly presents it for reviewal."

The practice as thus indicated was followed in *Raleigh v. Peace,* 110 N. C., 32, which was tried upon a statement of facts agreed, and in which there was no specific assignment of error.

The appeal, then, being properly before us, we will now proceed to a consideration of the questions presented by the record and elaborately argued by counsel.

In the case of *Raleigh v. Peace, supra,* we had occasion to examine, at some length, into the principle upon which taxation in the form of local or special assessments is founded, the source from which the authority is derived, the manner in which it may be exercised and other matters relating to the subject. It will be sufficient, therefore, in the present discussion to state briefly that assessments of this character "are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it." Cooley on Taxation, 416.

Such assessments are quite distinct from the general burdens (362) imposed for State and municipal purposes, and are governed by principles that do not apply generally. The power to levy them is not inherent in any public corporation, but must be directly conferred by statute. Elliott on Roads and Streets, 370.

"There must," says *Cooley, J.,* "be special authority of law for imposing them" (Law of Taxation, 418; *Raleigh v. Peace, supra*), and this distinguished jurist, together with Dillon, Desty, Burroughs and other authors, fully sustains Mr. Elliott in the following propositions,

which we extract from his excellent work on Roads and Streets, 371: "The power is purely a derivative one, and it is not only fettered by all the limitations contained in the statute which delegates it, but it has no existence beyond the scope which a strict construction will yield. It is, therefore, always essential that one who bases a claim upon a local assessment shall show the foundation for his claim to be a valid statute, and that upon a strict construction of that statute against him his claim is within the authority which the statute confers. There is no elasticity in such statutes, and it is beyond the power of the courts to so stretch them as to make them cover cases not fully and clearly within their scope."

"The rule, however," remarks the same author (*supra,* 374), "does not so limit the authority as to exclude the necessary incidents of the principal power, provided that such power is clearly conferred." *Raleigh v. Peace, supra.*

Another principle equally well established is that where the statute from which the authority is derived prescribed the mode in which it shall be exercised that mode must, except as to entirely immaterial matters, be strictly pursued.

"A departure from any statutory provision should, as a general rule, be considered as sufficient to destroy the order in all cases where an attack is directly and reasonably made, and the case is not affected by any question of waiver or estoppel." Roads and Streets, 371;
(363) 2 Dillon Mun. Corp., 769, note; 2 Desty Taxation, 1241; Cooley Taxation, 418.

In the case under consideration the power to order the improvement of the sidewalks and to levy assessments against the abutting owners to the extent of the special benefits conferred is not denied; but it is insisted that there was, as applicable to the present assessment, a specific method prescribed by the plaintiff's charter, and that as this method was not pursued in several material particulars, and as objection was taken in apt time, the assessment is invalid and cannot be enforced in this action.

The improvements were ordered by the city in August, 1888, and the work was completed in June, 1889. In the charter of the city, granted in 1870 (Private Laws 1869-70, ch. 122), there is no specific provision authorizing the levying of special assessments, but in respect to the improvement of sidewalks it was amended by the act of 1875, ch. 13, sec. 1, which provides as follows: "The owner or owners of property in front of which the commissioners shall construct, pave or repair any sidewalks shall be chargeable and pay for any special benefit accruing to such property by reason of said improvement, and such property shall be bound for the value of such special benefit, to be ascertained in the same

manner as herein prescribed for laying off streets, including the right of appeal." In section 58 of the charter it is provided "that when any land or right-of-way is required by said city of Greensboro for the purpose of opening new streets or for other objects allowed by its charter, and for want of agreement as to the value thereof the same cannot be purchased, . . . the same may be taken at a valuation to be made by five freeholders of the city, to be chosen jointly by the commissioners and the party owning the land, . . . and in making said valuation said freeholders after being duly sworn . . . shall take into consideration the loss or damage which may accrue to the owner or owners in consequence of the land or right of way being (364) surrendered, and also any special benefit or advantage such owner may receive," etc. Thus it appears from the foregoing acts that a particular method was prescribed, under which the owner was entitled to have the special benefits assessed by five freeholders to be chosen jointly by himself and the commissioners. It does not appear from the record that the persons who made the present assessment were freeholders, and under the principle of construction to which we have referred it was clearly the duty of the plaintiff in a proceeding like this, where the validity of the assessment was directly attacked, to have established affirmatively the existence of so important a prerequisite. "In an assessment for a local improvement every act required to be done must be done or the assessment will be void, and the *onus* of proving such performance is on the party claiming the assessment to be valid." 2 Desty Taxation, 1241; *Nichols v. Bridgeport,* 23 Conn., 189.

Neither does it appear that the defendant had any voice in the appointment of the commissioners. On the contrary, the record discloses that he had no notice of such appointment, and that it was the act of the city alone. As there is nothing which can reasonably be construed into a waiver of these particulars by the defendant, it must follow that, if the provisions of the charter as amended by the act of 1875 are applicable, the assessment is invalid and cannot be sustained.

It is contended by the plaintiff that the above provisions were repealed by Laws 1887, ch. 44, and that a general power to make assessments was conferred by the said act which prescribes no method of levying the same, but left this to be supplied by the city under its implied authority to do everything incidental to the exercise of the principal power.

It has been truthfully remarked that this power of making (365) special assessments is at best a dangerous one to entrust to municipalities, and the courts will be slow, in the absence of a purpose clearly manifested on the part of the Legislature, to construe a general power of this character (laconically expressed "to make local assess-

ments," section 7) into a repeal of certain existing safeguards with which the law has carefully invested the citizen, in reference to an assessment of a particular character. "Power is ever aggressive, and, under one specious pretext and another, perpetually struggling to strengthen its position and enlarge its sphere, and succeeds to a greater or less degree, even when surrounded by the most watchful and jealous vigilance; but when not so surrounded its strides become fearful and detrimental to the rights and interests of the citizen."

The act of 1887 provides, among other things, for the issuing of bonds for the improvement of the city, and further provides "that the board of commissioners of the city of Greensboro is hereby authorized and empowered to erect suitable graded school buildings in such part of the city as they may select; to grade and lay out streets, to make local assessments, to provide water supplies for the city," etc.

It must be observed that prior to this act the city, under its charter had no power to levy assessments of any character, except in the case of sidewalks, and as to these, it had prescribed a remedy. When the Legislature extended its power to make assessments in respect to other improvements, such as grading the city and laying out streets, and failed to prescribe the mode in which the power was to be exercised, it did not have the effect of working a repeal of the existing method of assessing benefits as to sidewalks. Indeed, it is by no means certain that the act relates to sidewalks at all, as it does not mention them, although (366) it enumerates several other subjects of improvement. However this may be, the act does not cover the entire subject-matter of the old law in reference to sidewalks, and, as it is entirely consistent with it, the latter is not repealed by implication. Endlich on Statutes, 195-228. The same author (section 210) says that repeals by implication are not favored and "that in order to give an act, not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law so positive as to be irreconcilable to any fair, strict or liberal construction of it, which would, without destroying its intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law and construing both together in harmony with the whole course of legislation upon the subject."

Tested by these principles, it is entirely clear that there was no repeal of the particular method of assessment as to sidewalks. Such was the law at the time of the completion of the improvements and up to the enactment of the new charter, which went into effect on 1 July, 1889.

Under this, the former law, the defendant, as we have stated, had the privilege of having the special benefits assessed by freeholders to be jointly chosen by himself and the plaintiff.

The assessment not having been made until after the passage of the act of 1889, it would have been competent for the Legislature to have therein prescribed a different method of assessment, provided that no substantial right would have been affected. So far from doing this, it seems to have failed to provide for the levying of special assessments of any character, either for past or future improvements, and as to the latter it appears that they must be made under the general law. The Code, sec. 3803; *Raleigh v. Peace, supra.* The act (section 60) simply authorizes the city "to grade, macadamize and pave the (367) sidewalks, and to lay out, change and open new streets," etc. This does not authorize a special assessment under the charter, as we have seen that this extraordinary power must be granted expressly by the Legislature. The case of *Smith v. New Bern,* 70 N. C., 14, is not in point, as it did not relate to assessments of this character, but only involved the power of the city to contract for the building of a market-house, the same to be paid for in money raised by ordinary taxation. We do, however, find a provision as to the improvement of sidewalks, but this does not relate to an assessment, but is a provision under the police power, which authorizes the city, in the event of the failure of the owner after twenty days' notice to pave his sidewalk, to have the work done at the sole expense of the owner, the same to be a lien upon the property. It can hardly be contended, therefore, that the assessment in question was made according to any method prescribed in the new charter, as none is therein provided; nor can it be sustained under the provision as to the improvement of sidewalks, as we have seen that this has nothing to do with an assessment. Even if it could be considered as such, it could not avail the plaintiff, as the defendant was not required to pave his sidewalk, and the city could only do so upon his failure to comply upon notice.

In passing, in order to avoid confusion, we will add that in *Raleigh v. Peace, supra,* the improvements were made to the streets and not to the sidewalks, and the case turned upon the validity of the assessment.

We have discussed the provisions of this last act (act of 1889) for the purpose of showing that they do not conflict in any manner with the method of assessment prescribed by the previous law under which the improvements were ordered and completed. We are unable (368) to see how a subsequent statute which prescribes no remedy whatever can, in the absence of a clearly expressed intention to do so, have the effect of repealing a particular remedy prescribed by a former statute. As we have said, it is competent for the Legislature in all cases to change

the remedy to a qualified extent, but in this instance it has not attempted to do so either by express provision or impliedly by the substitution of a new one. Statutes may be repealed either by implication or by express enactment. We have seen that upon no principle was there a repeal of the prior statute by implication.

Was it repealed by the express provisions of the new charter?

There is no provision in respect to past improvements and therefore no distinction as to them is made between the right and the remedy. It was, it seems, so far as the city is concerned, competent for the Legislature to have taken away its "imperfect right" to have any assessment whatever, and we are unable to discover from the language used any reason for holding that the remedy was destroyed which does not equally apply to the annihilation of the right itself. It is "a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley Const. Lim., 455. Such an intention should be "expressed by clear and positive command, or be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt." Endlich, *supra,* 271.

(369) In view of these principles we think it but just, both to the city as well as to the defendant, that the new charter, even if it conflicted with the old, should be construed as prospective only in its operation. This conclusion is amply sustained by the saving clause of the new charter.

After declaring that said act shall thenceforth be the charter of the city and that existing laws in conflict with the same are repealed, it provides that such repeal shall not "affect any act done or right accruing or accrued or established, . . . but the same shall remain in full force and be preserved and enforced and enjoyed," etc. This expressly applies to the right "accruing" or which had "accrued" to the city to have the special benefits assessed. While, as we have remarked, it may have been competent for the Legislature to destroy this right (not being a vested one), it was careful not to do so, and we are very sure that if the right were now impeached by the defendant, this very provision would if necessary be relied upon for its protection. If the right continued, why did not the specific remedy continue also? As we have seen, there is no express repeal of the remedy, nor is there any repeal by implication, as no new remedy is prescribed. If it were otherwise, the city could not under its present charter make any assessment; as we have before stated, no power to assess in any case is therein granted. If, then, the right is preserved, it is fair to presume that the

Legislature intended that the specific existing remedy should also remain in effect. To sanction a resort to implied powers or to the undefined methods of the general law when a specific remedy is prescribed, would be establishing a dangerous precedent, and one which would destroy all limitations upon the exercise of municipal authority and be productive of incalculable evil.

These considerations induce us to believe that in so far as it (370) affects the method of assessment in this case the new charter should be regarded as prospective only.

We are, therefore, of the opinion that the assessment now sought to be enforced cannot be sustained. The defects, however, are not of a jurisdictional nature, and the order declaring that the improvements should be made and the abutting owners assessed to the extent of the special benefits conferred is not therefore void. The city may now proceed to make an assessment according to the prescribed method. "Reassessment," says Mr. Desty, "is proper after a judicial decision against the first proceeding, if based upon errors and defects merely"; and in this he is sustained by abundant authority. Cooley Taxation, 233.

For the reasons given the judgment must be reversed.

PETITION ALLOWED.

Cited: Asheville v. Trust Co., 143 N. C., 367; *Wallace v. Salisbury*, 147 N. C., 60.

C. C. CHEEK v. J. J. NALL AND WIFE.

Alteration of Bond and Mortgage, Effect of—Feme Covert.

1. Where a husband, without the consent or knowledge of his wife, altered a bond executed by them in "raising" the amount before delivery to and without the knowledge of the obligee: *Held*, that the bond was rendered void as to the wife by such alteration.

2. Where a wife, with her husband, executed a bond and mortgage upon her land to secure the same, and the instruments were entrusted to the husband for delivery, and he, without her knowledge or consent, and before delivery to, and without the knowledge of, the obligee, altered the bond by "raising" the amount, and the mortgage by "raising" the consideration recited therein, but the description of the debt secured by the mortgage (as "a certain bond of even date, herewith," etc.) was not altered: *Held*, that, though such alteration avoided the bond, it did not render the mortgage void, the alteration of the consideration being immaterial, and the mortgage may be enforced for the amount of the debt intended to be secured by the mortgage, notwithstanding the invalidity of the bond.

(371) APPEAL from *Bryan, J.*, at February Term, 1893, of CHATHAM, for the foreclosure of a mortgage.

By consent of parties a jury trial was waived, and his Honor found the following facts:

On 4 March, 1889, the defendants executed the bond and mortgage mentioned in the amended complaint. That subsequent to the execution and attestation of said bond, and the acknowledgment and privy examination of the mortgagors, the bond was changed so that it was a promise to pay $400 instead of $200, and the consideration of the mortgage was changed from two to four hundred dollars, and that these changes and alterations were made without the knowledge or consent of the *feme* defendant or the plaintiff; and that after such execution and before the said changes, the said bond and mortgage were, by the consent of the *feme* defendant, taken possession of by the male defendant, and some days thereafter delivered to Cheek. And the alterations and changes from two to four hundred dollars were made after the *feme* defendant parted with the bond and mortgage and before their delivery to the plaintiff. That the *feme* defendant is the wife of the male defendant, and was at the time of the execution of said bond and mortgage. That the land described in the said mortgage was conveyed to the defendants after their marriage, to them as husband and wife. Upon these facts his Honor gave judgment for the plaintiff for $200 and interest from the date of the mortgage, and for sale of the land. To this judgment the defendants excepted, and from the same appealed, assigning for error that his Honor held that, notwithstanding the bond and mortgage had been changed from two to four hundred dollars after signing and attestation of the bond, and after the acknowledgment of the signing of the mortgage and the privy examination of the *feme* defendant, and

(372) after she had parted with all control over them, or consent, yet the mortgage was valid as security for $200, the sum for which said bond and mortgage were given.

T. B. Womack for plaintiff.
Charles E. McLean for defendants.

SHEPHERD, C. J. As to the male defendant, the delivery of the bond and mortgage is admitted, and it is very clear that his fraudulent alterations of the same cannot have the effect of relieving him from the liability imposed by their original terms.

As to the *feme* defendant it appears from the admission in the pleadings and the facts found by his Honor that she signed both of the abovementioned instruments and was privily examined as to the execution of

the mortgage. These, with her consent, were taken possession of by the male defendant, her husband, and some days thereafter delivered to the plaintiff.

From this it appears that the delivery of the bond and mortgage, in their original form, was authorized by the *feme* defendant, but as the alteration was made before actual delivery she claims that neither of the said instruments is her act and deed, and that both are absolutely void as to her. The bond was altered so as to read $400 instead of $200, and, this being a material alteration of the terms of the instrument without the consent of the *feme* defendant, it may be avoided by her.

The mortgage, however, is valid, as the alteration was not a material one, and it is well settled that "an alteration which does not change its legal effect does not, in law, amount to an alteration, and, of course, does not invalidate it either at law or in equity. 1 Jones (373) Mortgages, sec. 95; *Robertson v. Hay,* 10 Pa. St., 242; *Hunt v. Adams,* 6 Mass., 519; *Gardner v. Gilleland,* 7 Harris, 326. The only alteration in the mortgage consisted in changing the amount of the recited consideration from $200 to $400, but no change whatever was made in the description of the debt to be secured therein, which debt is identical with the bond of $200 mentioned in the pleadings. A deed is good although no consideration is recited (*Love v. Harbin,* 87 N. C., 249, and *Mosely v. Mosely, ib.,* 69), and it has also been decided that a recital of the purchase-money is not contractual in its character. *Barbee v. Barbee,* 108 N. C., 581. If the recital was non-contractual and unnecessary, a change in the amount of the expressed consideration was immaterial and could not affect the validity of the mortgage. The title passed, and whatever may have been a recital as to the consideration, it could in no event affect the amount of the sum to be secured.

If, then, the mortgage is valid, why may not the debt be enforced against the land? In *Capehart v. Dettrick,* 91 N. C., 344, the Court, after an elaborate discussion, reached the conclusion that in this State the mortgage is not regarded as merely subsidiary to the debt, but is "a direct appropriation of property to its security and payment." The note or bond, it is said, is the personal obligation of the debtor and may be enforced in a personal action, while the mortgage may be enforced in a proceeding to subject the property to the satisfaction of the indebtedness. "These remedies," continues the Court, "against the person and property specifically assigned are entirely different, and while subsisting and concurrent, either may be resorted to. The loss of one does not of itself cut off a resort to the other." This doctrine has been applied where the personal remedy was barred by the statute of limitations (*Capehart v. Dettrick, supra*), and where the (374)

personal liability has been extinguished by a discharge in bankruptcy. 2 Jones Mortgages, 1231; *Brown v. Hoover,* 77 N. C., 40. In these instances the creditor may enforce the collection of the indebtedness against the property mortgaged, and "such is also the case if the mortgage note be made invalid by alteration." 2 Jones Mort., 1215; 18 Hun, 10.

The destruction of the bond by the alteration did not take away the liability of the *feme* defendant as recognized in the mortgage. Indeed, having pleaded coverture, she was not personally liable upon the bond at all, and the legal obligation was only imposed by the executed contract (the mortgage), which, upon being privily examined, she was authorized to make. The mortgage, then, being valid and the debt not having been paid according to its conditions, we think that the alteration of the bond cannot have the effect of divesting the legal title of the plaintiff, the mortgagee; nor should it preclude him from enforcing the collection of the amount due him by subjecting the property which has been specifically appropriated to its payment.

The result would probably be different had the obligation been created by the bond only—the same being void *ab initio.*

AFFIRMED.

Cited: Martin v. Buffaloe, 121 N. C., 36; *Marcom v. Adams,* 122 N. C., 225; *Bryan v. Eason,* 147 N. C., 292; *Wicker v. Jones,* 159 N. C., 111.

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(375)

JOHN BUIE v. ELLEN SCOTT.

Judgment on Old Debt—Parol Testimony—Dower.

1. In an action to recover land sold under execution on a judgment rendered by a justice of the peace and docketed in the Superior Court, parol testimony was properly admitted (upon proof or admission of the loss of the original papers) to prove that the note was executed prior to the year 1868, when the homestead exemption was established.

2. The debt being one prior to 1868, the defendant, the widow of the execution debtor, is not entitled to a homestead in the land so sold, but the purchaser at the sheriff's sale became the owner and is entitled to recover the land subject only to the widow's right of dower.

ACTION for the recovery of land, heard before *Winston, J.,* at November Term, 1892, of CUMBERLAND.

The land was sold and conveyed to plaintiff in 1884 by the sheriff of Cumberland County under an execution which issued in 1882 on a judgment in favor of the plaintiff against the deceased husband of the defendant, rendered by a justice of the peace in 1873, and duly docketed in the Superior Court. Neither the judgment nor the sheriff's deed showed that the judgment was given on a note executed prior to 1868.

The defendant insisted that she was entitled to a homestead in the land; if not to a homestead, then to dower.

The judgment docket of the Superior Court was introduced, showing that the transcript was docketed on 4 April, 1873, the judgment bearing interest from 1 April, 1873. The loss of the note and original papers being admitted, parol evidence was admitted to prove that the note was dated in 1861.

The sheriff who sold the land and executed the deed to the (376) plaintiff testified that the defendant in the execution had no other property than that which was sold.

The defendant testified that she was the widow of the execution debtor, and that neither he nor she had any children.

It being left to his Honor to find the facts and declare the law thereon, he found from the evidence that the note on which the judgment was based was an old note, executed in 1861; that the execution debtor owned no other land at the time of the sale, and that the defendant was not entitled to a homestead in the land, but that the plaintiff was the owner and entitled to the possession thereof, subject to the defendant's dower, etc.

From the judgment rendered the defendant appealed.

N. W. Ray for plaintiff.
R. P. Buxton for defendant.

CLARK, J. It was competent to show by parol testimony that the note upon which the judgment was rendered (under which the land was sold) was executed prior to 1868. *Dail v. Sugg,* 85 N. C., 104. In that case, as in this, the judgment had been rendered in the justice's court, but docketed in the Superior Court, and the original papers lost. When this case was here before (107 N. C., 181) this evidence was rejected because the witness by whom it was then offered to prove this fact was incompetent under The Code, sec. 590. So, also, it was held that it could be shown by parol that the judgment was rendered on a debt for the purchase-money of the land, though not recited in the judgment. *Durham v. Wilson,* 104 N. C., 595. In *Mobley v. Griffin,* 104 N. C., 112, it is held that if a sheriff's deed in plaintiff's chain of title is de-

(377) fective by reason of the homestead not having been laid off against the execution, advantage can be taken of the defect without its being specially pleaded by the defendant. This is followed in *Buie v. Scott,* 107 N. C., 181. This is not affected by *Dickens v. Long,* 109 N. C., 165, which simply holds that in proceedings to sell land to make assets a party claiming a homestead who does not set it up is barred by the judgment in that action.

It now appears that the judgment was upon a debt contracted in 1861. The defendant in the execution was therefore not entitled to a homestead. The judgment below correctly declared the purchaser the owner of the land and entitled to recover, subject only to the widow's right of dower, if entitled thereto (*Patton v. Asheville,* 109 N. C., 685), which question we understand is not prejudiced by the judgment. If so advised the widow can take proper steps to have her dower laid off. Subject to such possible action the plaintiff is entitled to his writ of possession upon the judgment.

AFFIRMED.

Cited: Davis v. Evans, 142 N. C., 465.

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(378)

*A. D. PUFFER & SONS MANUFACTURING COMPANY v. A. F. LUCAS.

Claim and Delivery—Sale—Lease Contract, Breach of—Damages—Forfeiture.

1. Where it appeared that, during the pendency of an action of claim and delivery to recover a soda water machine leased to defendant, plaintiff had agreed to deliver a new machine to defendant and take back the one in controversy at a certain value: *Held,* that the agreement being executory, and not executed, did not bar the further prosecution of the action, and its breach by the plaintiff did not furnish ground for a proper counterclaim, since it did not exist at the commencement of the action.

2. The measure of damages to defendant for such breach was the difference between the cost of a similar machine purchased by him from another manufacturer and the new machine which plaintiff agreed to furnish.

3. A contract of sale conditional upon the payment of the purchase price in successive installments cannot be modified or its legal effects avoided by the fact that it is called a "lease" and the installments are called "rent"; therefore, where a lease contract provided that the "lessee" of a machine should pay as rent $330 in installments, and on full payment title should

* BURWELL, J., did not sit on the hearing of this appeal.

vest in him as owner, but, if the installments should not be paid in full as they became due, all payments made should be forfeited and the claims of the lessee to the leased property should be at an end, and it was found by the jury that all but seventy dollars of the "installments" had been paid by the lessee, and that the latter was entitled to twenty-six dollars damages for a breach of contract by the lessor: *Held*, that it would be inequitable to allow the "lessor" to take the property and declare all payments forfeited; but defendant should be allowed a reasonable time to pay the balance due (after deducting the damages allowed him), and in default of such payment a foreclosure sale should be ordered.

CLAIM AND DELIVERY to recover of defendant a soda-water machine in possession of defendant, tried before *Brown, J.*, at January Term, 1892, of NEW HANOVER.

It was alleged by plaintiffs and admitted by defendant that the plaintiffs delivered the machine in controversy to one S. Eifert by a lease contract, which was duly made and registered in New Hanover County 5 December, 1884, which is as follows:

"*Know all men by these presents,* That I, S. Eifert, No. 16 South Second street, of Wilmington, State of North Carolina, have hired, leased and received of A. D. Puffer & Sons Manufacturing Company, of Boston, Commonwealth of Massachusetts, for the term, to wit, one year ending 5 December, 1885, subject to the conditions herein stated, the following described goods and chattels: One (1) second-hand Matthews' No. 2 iron set porcelain-lined, consisting of one (1) (379) generator, two (2) cylinders complete on frame, one (1) second-hand bottling table with syrup pumps, five (5) syrup cans and base to connect.

"Manufactured by the said A. D. Puffer's Sons, and numbered 2.

"And I do promise and agree with the said A. D. Puffer's Sons, their representatives and assigns, to pay them for the possession and reasonable use thereof, for said term, the sum of $330 as rent; to be paid cash $40, balance in the installments set forth in the several obligations given by me therefor, as follows: . . .

"And it is provided that said property hereby leased is not to be removed from the premises where now located, No. 16 South Second street, in said Wilmington, North Carolina, nor the interest of the lessee under this lease to be transferred without the consent of said A. D. Puffer's Sons in writing thereto first obtained.

"And it is further provided that upon full payment of the several obligations aforesaid all claim and title to said property on part of said A. D. Puffer & Sons Manufacturing Company shall cease, and the whole title shall vest in said lessee as owner. But upon any breach of the provisions of this lease, especially upon failure by the said lessee to pay the several obligations or either of them as they become due and payable,

then this lease and any and all claim or right on the part of said lessee under the same, or to further use and possession of said property, shall be thereby terminated, and the said A. D. Puffer & Sons Manufacturing Company may thereafter at any time enter the premises where said property may be and resume possession of the same without process of law or let or hindrance from the lessee; and such of the said obligations as mature after said A. D. Puffer & Sons Manufacturing Company have resumed possession of said property shall be taken and held to be
(380) void and returned to the lessee upon demand. Said obligations are not to be taken as a payment for said goods and chattels under any law in any State, but only as evidence of the amount to be paid whenever the lessee should desire to become owner of the property."

It was admitted that before this suit Eifert delivered said machine to the defendant; that the possession of the said machine was demanded of the defendant, who refused to surrender the same.

It was admitted that the value of the machine described in the complaint is $330, and has been damaged by use at the rate of $2.50 per month since 16 August, 1886, when demanded of the defendant by the plaintiffs.

It is admitted that Eifert had not fully paid the sum in paper-writing entitled "Lease," hereinbefore set out, and that defendant was in possession of the machine described in the complaint, and that he refused to surrender it to the plaintiff on demand, before suit was brought.

The following issues were submitted to the jury:

1. Did the plaintiffs agree with the defendant, during the pendency of this action, to deliver a new machine at a certain value and upon certain terms and to take back the machine in controversy?

2. Did the plaintiffs deliver the said new machine, and did they perform their part of said contract?

3. What damages has defendant sustained by reason of the breach of contract on part of plaintiffs?

4. What amount, if any, is due on the old machine by Eifert under the contract set out in the complaint?

Defendant contended and introduced evidence to prove that after the institution of this action he entered into a contract with plaintiffs whereby they agreed to sell him a new machine and to take the one which he bought from Eifert (and the subject of the action) in
(381) part payment. Defendant was to retain the old until the new machine was shipped. Plaintiffs subsequently refused to ship the new machine, and defendant bought one from Tuft, another manufacturer, which cost him $20 more than he was to pay plaintiffs for the new machine. He paid $300 for repairs on the Tuft machine.

Defendant's counsel claimed that the damages of the defendant should be the $20 difference and the $300 repairs which he paid out for the Tuft machine.

The court excluded testimony concerning the repairs, holding that the $20 was an element of damage under the third issue, but the $300 repairs was not.

The jury responded to the issues as follows: To the first, "Yes"; to the second, "No"; to the third, "$26," and to the fourth, "$70."

It is unnecessary to set out the charge of the court except upon the third issue. The defendant asked the court to instruct the jury as follows:

"That if the plaintiffs made the contract alleged and did not perform the same upon their part, and by reason of said failure the defendant was deprived of the $225 interest in the old machine, allowed by the plaintiffs, the defendant has been damaged to that extent as a part of the damages in this action." His Honor refused said instructions. Defendant excepted.

The court charged the jury upon the third issue, that the only damage the defendant had sustained by reason of the breach of contract with the plaintiffs, if there was a breach, was the sum of $20, as shown by the defendant's own testimony, being the difference between a similar machine actually purchased by the defendant from Tuft and the new machine mentioned in the agreement with Franks. Defendant excepted. Defendant moved for a new trial, on the ground that the court misdirected the jury upon the third issue on the question (382) of damages. Motion overruled. Defendant excepted.

The defendant them moved that this action be dismissed, as the jury found that the contract made by the plaintiffs with the defendant was that said new contract should put an end to this action. Overruled. Exception by defendant.

The defendant further moved that he be allowed to pay the balance found by the jury to be due, and relieve himself of any forfeiture, as he expressed his ability and willingness to do in his answer. Overruled. Defendant excepted.

Judgment rendered for the plaintiffs for the possession of the machine described in the complaint, and $162.50 damages for the detention thereof, and, in case of failure to recover the machine, then for the value thereof, $330, with interest from 16 August, 1886, in lieu of damages, and the defendant appealed.

A. M. Waddell and T. W. Strange for plaintiffs.
J. D. Bellamy, Jr., for defendant.

CLARK, J. The prayer of defendant for instruction as to the measure of damages was properly refused, the damages asked being too remote, and the instruction given in lieu was correct. The agreement found by the first issue was executory, not executed, and hence did not bar the further prosecution of the action. Indeed, its breach did not furnish ground for a proper counterclaim in this action since it did not exist "at the commencement of the action." The Code, sec. 244 (2); *Hogan v. Kirkland,* 64 N. C., 250; *Reynolds v. Smathers,* 87 N. C., 24.

But the plaintiff is not excepting thereto.

(383) We think, however, the court erred in refusing the last motion.

"Where the transaction between the parties is in reality, and in its legal effect, a contract of sale conditional upon the payment of the purchase price in successive installments, it cannot be modified, nor its legal effects avoided by the fact that they speak of it as a 'lease' and call the installments 'rent.'" 3 A. & E., 426, and the numerous cases there cited. The principle applicable is thus clearly stated by *Davis, J.,* in *Hervey v. Locomotive Works,* 93 U. S., 664: "It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last installment?"

This view is in accordance with well recognized legal principles, is supported by "the reason of the thing" and sustained by the overwhelming weight of authority. Such contracts as the one in question are becoming greater in frequency and general interest. They are principally used in connection with the sale of sewing machines, pianos, furniture, soda-fountains, rolling stock on railroads, and the like. The intent and agreement clearly expressed that upon the payment of the last installment of so-called "rent" the thing leased shall become the property of the lessee, stamps unmistakably the true nature of the transaction. To permit the so-called "lessor" to resume possession of the property and declare all payments forfeited when perhaps all but one may have been paid, is contrary to the fundamental principles observed in Courts of Equity.

Among the very few cases which may be considered as holding or intimating a contrary opinion is one from our own courts, *Puffer v. Baker,* 104 N. C., 248. An examination of that case shows that it holds that the contract (which is like the one before us) was "terminable by the lessees," and that upon such termination the obligation of all future notes for rent became null. In this we concur. It is as if upon

(384) a paper which is on its face a deed of conveyance with forfeitures, but which in equity is a mortgage, the vendee should avail himself of the forfeiture and throw up the contract instead of asking in equity to be relieved of the forfeiture upon paying the balance, or, for

a sale. Not asking for his equity, he is remitted to his legal rights. The vendor has no equity to assert, as he has his remedy at law to recover the property on breach of the condition.

It is true that the decision in *Puffer v. Baker, supra,* may be further construed as meaning that upon the failure to make any payment, as it becomes due, the vendor can resume possession of the property without any equitable right in the vendee to call for an account and a sale of the property. We hardly think the court intended to go so far. But if that is a just construction of the language used, the decision does not meet with our concurrence. In *Foreman v. Drake,* 98 N. C., 311, the lessee had an "option" and the title did not pass, as in the present case, *ipso facto* upon performance of the conditions; *i. e.,* on payment of the last installment of "rent."

The judgment below should be modified by permitting the defendant in a reasonable time (to be stated by the Court) to pay the sum found to be due plaintiff after deducting the counterclaim from the balance remaining unpaid of the purchase-money, with interest, and if not then paid, a sale of foreclosure to pay off such balance and the costs of the action, the residue, if any, to be paid to the defendant.

The appellee will pay the costs of the appeal.

ERROR. MODIFIED.

Cited: Crinkley v. Egerton, 113 N. C., 447, 451; *Clark v. Hill,* 117 N. C., 12; *Barrington v. Skinner, ib.,* 52; *Mfg. Co. v. Gray,* 121 N. C., 170; *Wilcox v. Cherry,* 123 N. C., 84; *Phipps v. Wilson,* 125 N. C., 107; *Yarborough v. Hughes,* 139 N. C., 203; *Smith v. French,* 141 N. C., 9; *Hamilton v. Highlands,* 144 N. C., 283, 285; *Hauser v. Morrison,* 146 N. C., 252; *Hicks v. King,* 150 N. C., 371; *Piano Co. v. Kennedy,* 152 N. C., 200; *Guy v. Bullard,* 178 N. C., 230; *Sewing Machine Co. v. Burger,* 181 N. C., 252.

(385)

*SARAH HIGH v. CAROLINA CENTRAL RAILROAD COMPANY.

Injury to Person on Railroad Track—Contributory Negligence—Liability of Railroad Company—Defective Record on Appeal.

1. Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties,

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

the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured, the law imputes it to his own negligence and holds the railroad company blameless.

2. A record on appeal which does not show that a Superior Court was opened and held at all in the county from which the appeal comes, is fatally defective.

ACTION tried at Fall Term, 1892, of BLADEN, before *Winston, J.*, to recover damages alleged to have resulted by reason of defendant's negligence. The following issues were submitted to the jury by consent:

1. Was the plaintiff injured by the negligence of defendant as alleged?
2. Did plaintiff by her own negligence contribute to the injury?
3. Did plaintiff execute the release set out in the answer?
4. If plaintiff executed the release, did she understand the meaning and effect of it?
5. What damage, if any, is the plaintiff entitled to?

The plaintiff testified as follows: "I was on the railroad at Rosindale on 4 February, 1891, on the side track, and did not hear the
(386) engine until it ran over my foot. It had touched me before I heard it and I jumped, as I was going from the train; heard no whistle or bell. My right foot was crushed and the doctor cut it off; was in bed for three or four weeks; train was running slowly and went only a short distance after it struck me. It was a freight train."

Upon cross-examination plaintiff said: "I first saw the train below the end of the switch. It was then moving on the main track. This was when I first came up to the railroad crossing. I was first on the main track and then got on the side-track. I got on the main track at Clark's store at Rosindale and went up the same a short distance to the pump-house; did not look back again. If I had looked back I could have seen the engine. It was a straight track. I could have stepped off the side-track. I was going home from Clark's house, but did not follow the dirt road. I went up the railroad. The dirt road to my house crosses the railroad. I could have crossed over the side-track, but did not. I had seen the train below me; no trestle on the road near Rosindale; no embankment; no fences. I was in the middle of the side-track when the engine struck me and I got all off but my foot."

On redirect examination she stated: "I live a mile from Rosindale and the county road leads by my door to Elizabethtown; no dirt road near railroad track. The doctor came the night I was hurt. I was hurt in the morning. He gave me no medicine to quiet me. I could have walked along the side of the railroad at the point I was struck."

Clark, sheriff, a witness for the plaintiff, testified: "I was at my store, fifty or seventy-five yards from the plaintiff, when the accident happened, and saw her a little while afterwards. The engine was running slowly when it passed my store; heard no bell or whistle, but heard the whistle blow for the station where freight was put (387) off that morning. Freight trains usually go on main track until freight is put off; engineer could have stopped the train in ten feet at the speed he was going. It was up grade a little at that point. Plaintiff was suffering, but was conscious, and wanted to go home. By the side of the cross-ties is a path and a dirt road, which was a half mile out of her way home. I think the mail train was at the tank, and both trains blew for the station. There was nothing there to prevent one's seeing the train. Plaintiff could have crossed the side-track after she crossed the railroad and might have gone along the side of the track. She said to me that she thought the engine was on the straight track until it brushed her and she jumped and fell, and that it was her own fault that caused the injury. Have known plaintiff for several years. She is neither blind nor deaf nor crazy, nor was she lame before receiving the injury. Rosindale is a place on the defendant railroad, where there is located nothing but a wood-rack and pump-house."

James Council, a witness for plaintiff, and her brother-in-law, testified: "I went to see the plaintiff and waited on her for four weeks. She suffered pain, and for three weeks did not sleep. The doctor left no medicine for her to take. I told Elmore I thought it was plaintiff's own negligence that caused the accident."

The plaintiff was recalled and testified that she walked across the main track to the side-track, where she thought the train would not come, and she walked on up the side-track. It is needless to set out defendant's rebutting testimony; it is not necessary to the understanding of the opinion.

At the conclusion of the evidence, the court being of opinion (388) that plaintiff was not entitled to recover, directed the jury to answer the second issue, Yes; and thereupon judgment was rendered in favor of the defendant, and the plaintiff appealed, assigning error as follows:

1. There was evidence sufficient to justify the jury in finding a verdict for the plaintiff, and the presiding judge should have submitted it to the jury.

2. There being some evidence, it was the duty of the judge to submit it with proper instructions to the jury, and the failure of the judge to do this was error.

Strong & Strong for plaintiff.
W. H. Neal for defendant.

AVERY, J. This case is governed by the principle laid down in *McAdoo v. R. R.*, 105 N. C., 140. Where an engineer sees, on the track in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless. *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236.

This case is clearly distinguished from *Deans v. R. R.*, 107 N. C., 686; *Bullock v. R. R.*, 105 N. C., 180, and *Clark v. R. R.*, 109 N. C., 430. In the first case named, the engineer could by proper watchfulness have seen that the person killed was lying apparently helpless across the track, at a distance of half a mile; in the second, the engineer at a distance of a thousand yards actually saw a man running on the track waving his handkerchief as a signal to stop, and also saw or
(389) might have seen a horse and wagon apparently stalled at a crossing one hundred and fifty yards farther on; in the third, the engineer could have seen, in time to avert injury, that the decedent had gone upon a trestle in his front, from which he could not step off in time to avert injury, if the speed of the engine should not be diminished.

The failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted it. Whether he saw the plaintiff at a distance of one hundred and fifty yards or of ten feet, he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this. For present purposes the relative condition of the parties would have been the same had the engine been moving fifty miles an hour and had she been discovered on the track at a distance that would be traversed in the same time that would have been consumed in going ten feet at the rate of ten miles an hour, unless additional liability should have been incurred by running so fast in a populous town.

If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should in the exercise of ordinary care always do, she would have seen that the train, contrary to the usual custom, was moving on the siding. The facts that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licenses; but, on the contrary, should have made her more watchful. *Norwood*

v. R. R., supra. There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a company is warranted in expecting licensees (390) or trespassers, apparently sound in mind and body and in possession of their senses, to leave the track till it is too late to prevent a collision. *Meredith v. R. R., supra.*

The record is fatally defective, in that it does not show that a Superior Court was opened and held for Bladen County at all. Besides, the judgment is not sent up, nor does it appear whether it was founded upon a verdict on the issues or a nonsuit, to which plaintiff submitted on hearing the intimation of the judge. But it is an appeal by a pauper, and there may be some palliative, if not meritorious, reason for failing to look after the making up of the transcript, and, if not, we can foresee no evil from viewing the case in the most favorable aspect for the plaintiff by supposing that she submitted to judgment of nonsuit and appealed.

APPEAL DISMISSED.

Cited: Syme v. R. R., 113 N. C., 565; *Matthews v. R. R.*, 117 N. C., 642; *Purnell v. R. R.*, 122 N. C., 850; *Asbury v. R. R.*, 125 N. C., 576; *Neal v. R. R.*, 126 N. C., 638, 644; *Wheeler v. Gibbon, ib.*, 813; *Wright v. R. R.*, 132 N. C., 331; *Bessent v. R. R., ib.*, 940; *Pharr v. R. R.*, 133 N. C., 611; *Crenshaw v. R. R.*, 144 N. C., 323; *Beach v. R. R.*, 148 N. C., 164; *Strickland v. R. R.*, 150 N. C., 8; *Stine v. R. R., ib.*, 109; *Exum v. R. R.*, 154 N. C., 411, 413; *Patterson v. Power Co.*, 160 N. C., 580; *Talley v. R. R.*, 163 N. C., 572, 575; *Abernathy v. R. R.*, 164 N. C., 95, 98; *Ward v. R. R.*, 167 N. C., 152, 156, 160; *Treadwell v. R. R.*, 169 N. C., 699; *Davis v. R. R.*, 170 N. C., 584; *Horne v. R. R., ib.*, 656.

(391)

C. W. LAWSON v. RICHMOND AND DANVILLE RAILROAD COMPANY AND THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Removal of Causes—Diverse Citizenship—Jurisdiction—Order of Federal Judge—Rights of State Courts.

1. The act of Congress of 1887 as amended by that of 1888, which provides that "where a suit is pending or may hereafter be brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Cir-

cuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court," does not authorize the removal of a cause pending in a Superior Court of this State between a citizen of another State as plaintiff, and a resident corporation and a foreign corporation, doing business and having property in this State, as defendants.

2. Where the prerequisites for removal under the act of Congress do not exist, the federal tribunal has no jurisdiction to remove or try a case, and where such court makes an order that the case be certified thereto, the State court may decline to permit the removal.

3. The mere filing of a petition for removal of a suit from the State to the Federal court does not work a transfer, but the suit must be one that may be removed and the petition must show the petitioner's right to demand a removal. Until these prerequisites appear the State court is not ousted of its jurisdiction, and its orders and proceedings must be respected.

MOTION by defendant, Richmond and Danville Railroad Company, heard at August Term, 1892, of IREDELL, before *Boykin, J.*

The motion was that the court sign the following order:

"It appearing that defendant, the Richmond and Danville Railroad Company, has obtained an order for the removal of this cause into the Circuit Court of the United States for the Western District of North Carolina, all of which appears from the petition, affidavits and bond of said defendant and the order of said court duly certified to this court, it is considered and adjudged that this court will proceed no further in this cause, and that the clerk of this court certify to said Circuit Court, before the next term thereof, a copy of the record in this cause."

This motion was founded upon the petition, affidavits, and bond of said defendant, and the order of the Circuit Court of the United States for the Western District of North Carolina.

(392) The plaintiff was at the commencement of this action, and now is, a citizen and resident of the State of Kentucky.

The court declined to sign the order, and made the following entry on the docket, to wit:

"The court declined to permit the removal of this cause to the Circuit Court of the United States, and declines to sign the order presented by the defendant."

And from this judgment the defendant, the Richmond and Danville Railroad Company, appealed.

The affidavit for removal of cause upon which the motion was founded was as follows:

"A. B. Andrews, Vice-President of the Richmond and Danville Railroad Company, being duly sworn, does say that the Richmond and Danville Railroad Company is one of the defendants in the above entitled

cause which is now pending for trial in the Superior Court of Iredell County, in the State of North Carolina, and that from prejudice and local influence the said defendant shall not be able to obtain justice in the said State court, nor in any other State court to which the said defendant may, under the laws of the said State of North Carolina, have the right, on account of such prejudice or local influence, to remove said cause; that by the accident which occurred on the railroad of this defendant on 26 August, 1891, and which is the basis of this action, a number of persons, passengers, and employees on the train of the said defendant, were either killed or wounded, as many as twenty-two being killed, or having died from injuries received, and about twenty-seven injured, and that the said accident was at a place called Bostian Bridge, in the county of Iredell, in said State, on the date above mentioned; that the report of said accident was at once widely circulated, and many persons from the county of Iredell came to witness the scene of the accident, and also many persons from the adjoining counties to Iredell; that the dead and wounded were carried to Statesville, the county-site of Iredell County, where the dead (393) bodies were viewed by numerous citizens from the locality, and where many of the wounded were taken into the houses of citizens of said town; that great indignation was expressed by numbers of persons in the community on account of the great loss of life and injuries resulting from the accident, and many harsh and unjust criticisms were made upon the said defendant and the alleged careless manner in which it had operated its said railroad; many leading citizens going so far as to charge publicly that the destruction of life and injuries to the persons were the result of the recklessness of the said defendant and its wanton disregard of human safety and human life; that a newspaper published in Statesville called the *Landmark,* generally circulated in the county of Iredell and circulating also widely in the counties and localities adjoining and around Iredell County, which said newspaper has great influence in its circulation, published articles adverse to the said defendant on account of said accident, bitterly arraying the defendant before the readers of said paper and the public on account of the said accident, whereby, and on account of which, much prejudice was aroused against the said defendant and which still exists; that many of the persons killed or injured in the said accident were residents of the said county of Iredell and the adjoining counties, where their families, relatives, friends, and associates reside, all of whom are or have been active and zealous in denouncing and criticising the said defendant, and exciting against the defendant much ill and prejudicial feeling; that other newspapers than the *Landmark* above named, published and circulated in North Carolina and in the county aforesaid, and the adjoining coun-

ties, have published and circulated articles bitterly denouncing the said defendant on account of the said accident, using such expressions
(394) as rotten sills, loose rails, negligent employees and other like expressions to convey to the public the impression that the said accident was due to the gross and inexcusable negligence of the said defendant; that by reason of these things a strong public sentiment, prejudicial to the defendant, has been manufactured and matured, so much so that this affiant verily believes that the said defendant cannot obtain justice in the State courts aforesaid; that a number of suits have been brought in the State courts of North Carolina upon the alleged cause of action aforesaid, there being as many as twelve or fifteen in the county of Iredell, as many as ten in the county of Buncombe and several in other counties, and affiant is informed and believes that the parties plaintiff have made common cause in all the cases, and that they and their friends have been active in prejudicing the public mind against the said defendant with a view of placing it at a disadvantage in trials of said causes in the State courts."

A certified copy of the record of the Circuit Court, showing the petition and order of said court, was filed in the Superior Court. One of of the allegations in the petition for removal was as follows: "Your petitioner further shows that in said suit there is a controversy between a citizen of Kentucky and a citizen or Virginia, as it is informed and believes, the plaintiff's pleadings in the action, however, not showing of what State the plaintiff is a resident or citizen. The plaintiff and the petitioner are citizens of different States, and the controversy between your petitioner, which avers that it was, at the time of bringing said suit and still is, a citizen of Virginia, and that this action is brought in the State of North Carolina."

Armfield & Turner for plaintiff.
D. Schenck and F. H. Busbee for defendants.

(395) AVERY, J. The right of removal depends upon the construction of the act of 1887 as amended in 1888, the pertinent portion of which is as follows: "And where a suit is now pending or may be hereafter brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or any other State court to which the said defendant may, under the laws

of the State, have a right on account of such prejudice or local influence to remove said cause." Foster Fed. Pr., 386; *Malone v. R. R.*, 33 Fed., 631. The privilege of removal on account of prejudice or local influence is granted to defendants who are citizens of a State other than that in which the suit is brought, and the Richmond and Danville Railroad Company is entitled to the benefits of its citizenship in Virginia. But the action here is brought in the Superior Court of North Carolina by a citizen of Kentucky against a resident corporation and a foreign corporation, and is not, therefore, a controversy "between a citizen of the State in which suit is brought" and the citizen of a State, who as defendant, seeks to remove the cause. A citizen of a State other than this has sued a resident corporation in our State court, which, under our statutes, has cognizance of such a suit against it, and joins a nonresident corporation having property and conducting business within the State. The facts bring this case neither within the letter nor the spirit of the act of 1888. It does not come within the language of the law, because the plaintiff is a citizen of Kentucky and not of the district in which the action was brought. On the other hand, the mischief (396) evidently intended to be remedied in the enactment of the statute was the procurement of verdicts in State courts by bringing local influence to bear and engendering prejudice against nonresidents who have no community of interest with the jurors of the vicinage and in favor of persons who reside amongst and are identified with them. It will not be contended for the plaintiff, we suppose, that the fact of the existence of local prejudice or the exertion of such influence is a jurisdictional question, since it seems to be settled that it is within the sound discretion of the Federal court, to which removal is asked, to determine whether sufficient evidence has been offered to establish the truth of the allegation as to local influence and prejudice. *In re Pennsylvania Co.*, 137 U. S., 451.

It is conceded, too, that under the act of 1888 the practice as to removal for local prejudice differs from that where the application is founded upon diverse citizenship, in that the motion in the one case must originate in the Federal, and in the other in the State courts. *Foster, supra,* sec. 386; 20 A. & E., 1000, note 2; *Fisk v. Henarie,* 142 U. S., 468.

The affidavit filed in this case seems to be sufficiently full to meet the requirements of the more rigid, but apparently more just, rule adopted in some of the circuits, that the petition should set forth specifically the evidence of the existence of local prejudice. *Foster, supra,* p. 578; *In re Pennsylvania Co., supra; Malone v. R. R.*, 35 Fed., 625. If, therefore, the only contested point were whether the defendant had offered

sufficient proof of the existence of local prejudice, we would hold, without hesitation, that the plaintiff can contest that question only by a motion to remand made in the Federal court.

(397) The questions presented here, however, are, first, whether it was made to appear to the judge below that the Circuit Court of the United States would have jurisdiction to try the suit upon removal; second, whether on the failure of a petitioner to show from the affidavits and record the legal power of the Federal court, or where it appears affirmatively from inspecting them that the court in which the action is pending alone has cognizance, the State court, must, without contesting the right to subject litigants to the delay and expense incident to an appeal to the Supreme Court of the United States, submit to the usurpation of authority, send up the transcript and await the action of the appellate court for redress of the grievance.

It is settled beyond all reasonable controversy that the Federal tribunals can take jurisdiction not at the discretion of a circuit judge, but upon defendant's adducing not only proof satisfactory to such judge of the existence of local prejudice and influence, but at least *prima facie* evidence that, both as to the parties and subject-matter, such court has the legal authority to order the removal and take cognizance of the suit. In our case one of the plain prerequisites to removal is that the petitioner shall show by affidavit, or the record, that all of the plaintiffs are "citizens of the State where the suit is brought." 20 A. & E., 999; *Foster, supra,* 579; *Pike v. Floyd,* 42 Fed., 247; *Niblack v. Alexander,* 44 Fed., 306; *Anderson v. Bowers,* 43 Fed., 321; *Young v. Parker,* 132 U. S., 267; *Jefferson v. Driver,* 117 U. S., 272.

Where causes have been inconsiderately removed to the circuit courts by order of the State courts on affidavits purporting but failing to show diverse citizenship, the Supreme Court has invariably remanded them to the circuit courts, with directions to send them back to the State courts, with costs. *Stevens v. Nichols,* 130 U. S., 230; *Mansfield*

(398) *R. R. Co. v. Swan,* 111 U. S., 379; *Gibson v. Bruce,* 108 U. S., 561.

The case of *Young v. Parker, supra,* was removed from the State court of West Virginia to the Circuit Court of the District of West Virginia upon the ground that the defendant petitioner would not be able to obtain justice on account of prejudice and local influence, and is, therefore, in point, except that it was a construction of Revised Statutes, 639. *Fuller, C. J.,* delivering the opinion of the Court, said: "It was and is *essential* in order to such removal, where there are several plaintiffs, or several defendants, that all of the necessary parties on the one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another State or States.

. . . It does not appear from either of these petitions and affidavits, or elsewhere in the record, that diverse citizenship, as to the parties therein named, existed at the time of the commencement of the suit, nor that diverse citizenship existed between the complainant and all the necessary defendants at the time the petition and affidavits were filed. The cause was not properly removed, and the State court has never lost jurisdiction." *Stevens v. Nichols, supra; Cretrove v. R. R.,* 131 U. S., 240. So far as the principle involved in this appeal is affected, the only change made by the act of 1887, as amended by the act of 1888, was to limit the right of removal to the defendants and to require additional allegations in the petition or affidavit. 20 A. & E., 999; *Tullock v. Webster,* 40 Fed., 706.

Since, therefore, the defendant sets forth in its petition the fact that the plaintiff is a citizen of Kentucky, and it appears from the statement of case on appeal that "the plaintiff was at the commencement of this action and now is a citizen and resident of the State of Kentucky," it is clear not only that the defendant has failed to show affirmatively what is essential to give the Federal court power to remove (399) and try, but that in fact the Federal court has never had and the State court has never been ousted of the jurisdiction to hear and determine the cause. The State court is not bound to stay proceedings; nor are its orders void except where the Circuit Court of the United States has rightfully assumed cognizance. The Supreme Court of the United States has repeatedly held, in that class of cases where the affidavit for removal must be filed in the State courts, that after the requisite bond and affidavit are filed "in a suit that is removable, the State court is absolutely divested of jurisdiction and its subsequent orders are *coram non judice,* unless its jurisdiction be in some form restored." *Steamship Co. v. Tugman,* 106 U. S., 118; *Ins. Co. v. Dunn,* 19 Wall., 214; *Marshall v. Holmes,* 141 U. S., 589.

But in all these cases it was conceded, either directly or by implication, that if the requisite petition and bond had not been filed, the State courts would still have had rightful cognizance to finally hear and determine the cause. In *Steamship Co. v. Tugman, supra,* the Court (at page 122) said: "The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed is shown affirmatively by the record of the case." *E converso,* if the statute requires, as a prerequisite to removal, that the plaintiff shall be a citizen of the State in which the suit is brought, when it appears of record that he is a citizen and resident of a different State, the jurisdiction of the State court must remain undisturbed, and its orders made in the exercise of its rightful authority must be valid. In the earliest case in which this

doctrine was distinctly announced, *Swayne, J.,* for the Court, said, in discussing the question whether the removal was made within the time prescribed by the statute, viz., before final trial: "It is main-
(400) tained by counsel for the administratrix that the order of removal by the common pleas was erroneously made, the first verdict and judgment being final within the meaning of the act of Congress and the laws of Ohio. If the point be well taken the judgment must be affirmed, otherwise reversed."

In *Marshall v. Holmes, supra* (cited by counsel for defendant), the Court said: *"If under the act of Congress the cause was removable,* then, upon the filing of the above petition and bond, it was in law removed, so as to be docketed in that court, notwithstanding the order of the State court refusing to recognize the right of removal."

In every case relied upon it will appear that the exclusive jurisdiction of the Federal court was made to depend on compliance with the act of Congress. The Federal court has no jurisdiction till the State court acts on a sufficient affidavit. *Hall v. Chattanooga,* 48 Fed., 599.

But in *Stone v. South Carolina,* 117 U. S., 430, *Waite, C. J.,* lays down the rule for which the plaintiff contends in very clear and unmistakable language, when he says: "A State court is not bound to surrender its jurisdiction of a suit on petition for removal until a case has been made, which on its face shows that the petitioner has a right to the transfer. . . . If he fails in this, he has not in law shown to the court that it cannot proceed further with the suit. Having acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended. The mere filing of a petition for removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed and the petition must show a right in the petitioner to demand removal. This being made to appear on record and the necessary security having been given, the power of the State court ends and that of the
(401) circuit court begins." It is manifest, therefore, that under this rule the case is still pending in the State court, and its orders and proceedings must be respected until the Federal court shall make an order upon a petition or record showing at least *prima facie* its rightful authority to make it. *Thompson v. R. R.,* 38 Fed., 673.

The Constitution and statutes made in pursuance thereof fix the bounds of the concurrent jurisdiction of the Federal courts and provide the machinery for a transfer where it is lawful to remove, but no judicial officer, however exalted his position, has the power to invest his own court with jurisdiction not recognized by law, or to suspend the legal authority which another court is rightfully exercising. An inadvertent

order of a Federal officer cannot, for the mere sake of harmonious action between the two governments, be allowed to subject suitors to needless delay in prosecuting causes before the proper tribunal in a State.

The case of *Fisk v. Henarie, supra,* establishes only what has been admitted, that it was within the discretion of the circuit court to pass upon the evidence of prejudice, but it has no bearing upon the other question, whether the action shall be considered as removed by an order of a Federal judge upon an affidavit plainly insufficient to authorize the order.

Upon a careful consideration of the authorities the refusal to remove is

AFFIRMED.

In *Bowley v.* same defendants:

AVERY, J. This appeal involves precisely the same question discussed in *Lawson's case, supra,* and for the reasons given in the opinion in that case

AFFIRMED.

In *Weber v.* same defendants: (402)

AVERY, J. This case involves precisely the same question presented in *Lawson's case, supra.* For the reasons given in the opinion in that case

AFFIRMED.

In *Moore v.* same defendants:

AVERY, J. It having been agreed that the decision in this case was to depend upon that in *Lawson's case, supra,* and the two cases involving the same question, we conclude, for the reasons set forth in the opinion in the last named case, that the order is

AFFIRMED.

Cited: Tucker v. Life Assn., post, 797; *Baird v. R. R.,* 113 N. C., 607; *Howard v. R. R.,* 122 N. C., 954; *Beach v. R. R.,* 131 N. C., 400; *Higson v. Ins. Co.,* 153 N. C., 42.

DERASTUS LEWIS v. R. A. FOARD.

Practice—Judgment Non Obstante Veredicto—Exception—Certiorari.

1. Where an issue distinctly raised by the pleadings is submitted to the jury without objection, a motion by plaintiff after verdict for the defendant for judgment on the pleadings cannot be entertained.

2. In such case a *certiorari* to correct the case on appeal by having it to state that the motion for judgment after verdict was made on admissions in the testimony of the defendant on the trial as well as on the pleadings, will be denied where it appears that plaintiff did not ask for instructions on that aspect of the case, nor file any exceptions to the judge's charge.

3. A motion for judgment *non obstante veredicto* can only be made on the face of the pleadings.

APPEAL from the court of a justice of the peace, tried at August Term, 1892, of GUILFORD, before *Connor, J.*, and a jury.

Testimony was introduced by both parties and the issues submitted to the jury under the charge of the court, to which no exception
(403) was made. After verdict and judgment for the defendant, plaintiff appealed.

J. A. Barringer for plaintiff.
J. T. Morehead for defendant.

CLARK, J. The plaintiff, after verdict, moved for judgment upon the pleadings. This was properly denied, because an issue was distinctly raised by the answer, and was submitted to the jury without objection.

The plaintiff also moved for a *certiorari* to correct the case on appeal by setting out that the motion for judgment by plaintiff, after the verdict against him, was made "upon admissions in the testimony of the defendant upon the trial" as well as "upon the pleadings." The plaintiff avers that the judge is willing to make the correction. But if such correction of the case were made we cannot see how it would benefit the plaintiff. If admissions were made by the defendant in his testimony, as alleged, the plaintiff should have asked for instructions upon that aspect of the case. He did not do so, nor did he file any exceptions to the charge. We do not understand how he can get the benefit of an objection for an omission to charge by a motion *non obstante veredicto*. Indeed, that motion can only be made on the face of the pleadings. *Walker v. Scott*, 106 N. C., 56. There was no exception for omission to charge, and, besides, that is not ground for exception, unless there was

a prayer for instruction refused. *Boon v. Murphy,* 108 N. C., 187, and other cases cited. Clark's Code (2 Ed.), p. 382. The motion for *certiorari* must be denied, and the judgment below is

AFFIRMED.

(404)

*W. H. RUSSELL v. JOHN CAMPBELL.

Appeal, Dismissal of—Disposal of Subject-matter.

Where, after an appeal from the refusal of judgment for the restitution of personal property, the appellant has come into possession of the property, or its equivalent, this Court will not hear the matter merely to adjudicate the costs, but will dismiss the appeal.

CLAIM AND DELIVERY to recover possession of an engine. Defendant replevied, and plaintiff and his servants proceeded to remove the property (the defendant being present and objecting), and sold and delivered it to a purchaser in Robeson County. At May Term, 1892, of CUMBERLAND, the defendant moved for an order requiring plaintiff to return the property forthwith to defendant. His Honor, *Boykin, J.,* refused to grant the same, and defendant appealed.

Upon the call of the case in this Court it appeared from statement of counsel that the matter had been settled, "and that no rights of parties would be affected by the determination of this case, and that the only matter involved is the costs of the action."

Plaintiff's counsel moved to dismiss.

H. L. Cook and S. H. MacRae for plaintiff.
N. W. Ray for defendant.

CLARK, J. This was an appeal from the refusal of a judgment for the restitution of certain personal property. Since the appeal was taken, the appellant has come into possession of the property, or its equivalent. The Court will not hear a matter merely to adjudicate the costs when the subject-matter of the appeal has been disposed of. *S. v.* (405) *R. R.,* 74 N. C., 287; *Hasty v. Funderburk,* 89 N. C., 93; *Pritchard v. Baxter,* 108 N. C., 129.

APPEAL DISMISSED.

Cited: Elliott v. Tyson, 117 N. C., 115; *Herring v. Pugh,* 125 N. C., 438; *Van Dyke v. Ins. Co.,* 174 N. C., 81.

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

J. C. PASS v. C. C. CRITCHER ET AL.

Arbitration Bond—Award—Liability of Surety.

Where a surety on an arbitration bond guaranteed in a certain sum that one of the parties to the arbitration would in "all respects fairly and fully abide by the award to be made by the arbitrator": *Held*, that the bond was not simply a guaranty that his principal would not withdraw from the arbitration, but an obligation to see that the award should be in all respects performed, the liability of the surety being limited to the sum named in the bond.

ACTION against C. R. and C. C. Critcher, principals, and J. A. Long, surety, on an arbitration agreement and bond, and heard before *Connor, J.*, at November Term, 1892, of PERSON, on the pleadings, exhibits and admissions.

There was judgment for the plaintiff, and defendants appealed.

The facts are sufficiently stated in the opinion of the Court.

W. W. Kitchin and J. W. Graham for plaintiff.
Boone & Parker and Merritt & Bryant for defendants.

(406) CLARK, J. The plaintiff and the defendants, Critcher Bros., having agreed to submit the matters in dispute between them to arbitration and entered into an arbitration bond, the defendant Long signed the following guaranty:

"As surety in the sum of five hundred dollars, I hereby guarantee that Critcher Bros., the parties of the second part in the foregoing agreement, will in all respects fairly and fully abide by the award to be made by the arbitrator.

"This 23 March, 1892. J. A. LONG."

The arbitrator made his award, adjudging that the defendants, Critcher Bros., pay the plaintiff $887.73. It is not denied that they are liable for the full amount of the award. But it is contended that the defendant Long is not liable upon his guarantee for the payment of $500, said Critcher Bros. having failed to pay the sum adjudged against them or any part thereof.

If the guarantee had been "to abide the arbitration" there would have been some applicability of the authorities cited in support of the contention that the guaranty of Long was merely that Critcher Bros. should not withdraw from the agreement to arbitrate and was not that the award should be paid. But the agreement is not to "abide," but to "abide by," and it is the award and not the submission to arbitration

which is guaranteed. As the award is the consummation and the end of the arbitration, a guarantee to abide by the award cannot mean merely that the party should not withdraw from the submission to arbitration. It means that he shall abide by, stand to and perform the award. The guarantor here carefully limited his liability to $500 if his principals should fail to abide by the award. In some cases the award might be of specific acts which if not done the guarantor should pay $500. But this award being for the payment of money, it can only be performed by payment. Had the sum adjudged the (407) plaintiff been less than $500, the guarantor could have discharged his liability by paying such lesser sum. As it is more than $500, his liability is limited to that sum by the terms of the guarantee.

The words "abide by" have a settled fixed meaning. Webster's International Dictionary says, " 'abide,' when followed by 'by,' as 'abide by,' means to stand to; to conform to, as (giving an example) to 'abide by a decision or an award.' "

Soule's Synonyms gives as synonymous for "abide by" the words "act up to, fulfill, discharge (of promises and the like)."

Roget's Thesaurus, in like manner, gives as synonyms of "abide by," "meet, fulfill, carry out, carry into execution, execute, perform, satisfy, discharge."

In *Kesler v. Kerns,* 50 N. C., 191, where the agreement to arbitrate contained the words, "the decision shall be binding," the defendant contended, as in this case, that this was an obligation to submit to arbitration, and not to perform the award; but this Court (*Pearson, J.*) held that it was an obligation to perform the award. In *Thomson v. Deans,* 59 N. C., 22, where the agreement was to "abide by such lines" as the arbitrators might decide upon, the court decreed specific performance by the execution of deeds of release up to such lines.

In the present case the construction contended for by the defendant would make the guarantee of the award valueless. The other construction gives it force and effect. We are not to presume that the parties did a vain thing. By the settled rules of construction, if the paper were susceptible of two meanings, the court would not place that construction upon it which would render it nugatory and meaning- (408) less. *Hunter v. Anthony,* 53 N. C., 385.

We, however, are clear that the guaranty of the award has here but one construction: *i. e.,* that it shall be in all respects performed (limiting the liability of guarantor, if the award is not fully performed, to $500). To us the words used seem to leave no room for question. We have only been thus explicit out of deference to the earnest and learned argument of the counsel for the defendant.

AFFIRMED.

T. A. McNEILL ET AL. v. D. D. McBRYDE ET AL.

Subjecting Land of Deceased Surety on Guardian Bond to Payment of Ward's Debt—Practice—Parties—Joinder—Petition to Sell Lands for Assets, Requisites of.

1. Where, in an action to subject the land of a deceased surety on a guardian bond to the payment of ward's debt, the amount of damages arising from a breach of the bond is alleged in the complaint and admitted in the demurrer, an objection that judgment has not first been obtained on the guardian bond is untenable.

2. In such case a ward can maintain the action in his own name, and the joinder of the State is a mere matter of surplusage, and not a misjoinder of different causes of action.

3. A petition to subject lands to sale under section 1437 of The Code is defective where it fails to set forth "the value of the personal estate of the intestate and the application thereof," and for such defect it is demurrable.

ACTION heard on demurrer, before *Winston, J.*, at October Term, 1892, of ROBESON. The defendants appealed from judgment of the court overruling the demurrer.

The title of the cause was as follows:

(409) "T. A. McNeill and wife, Caroline E. McNeill, in behalf of themselves and all other creditors of the estate of A. S. McKoy, deceased, and State *ex rel.* T. A. McNeill and wife, Caroline E. McNeill, *v.* J. D. Currie, administrator *d. b. n.* of A. S. McKoy, deceased, D. D. McBryde (and others, heirs at law of A. S. McKoy, deceased)."

The complaint alleged in substance:

That at June Term, 1855, of the Court of Pleas and Quarter Sessions of Cumberland County, one J. P. Hodges qualified as guardian of the minor heirs of William T. Smith, deceased, one of whom was the *feme* plaintiff, and gave bond in the penal sum of $50,000, with one A. S. McKoy and Henry Elliott as sureties; that in May, 1878, a proceeding by the plaintiff and other wards of said Hodges was begun before the Clerk of the Superior Court of Cumberland County for a final account and settlement of the guardian estate, and at May Term, 1890, of the Superior Court of said Cumberland County, judgment was rendered in favor of the plaintiffs T. A. McNeill and wife, Caroline E., against the said Hodges for $1,694.66, with interest from 29 May, 1878; that said Hodges is insolvent; that the *feme* plaintiff, ward of said Hodges, attained her majority in 1871, and in 1877 intermarried with the said plaintiff T. A. McNeill; that the said A. S. McKoy, surety on the guardian bond, died in Alabama in 1865 or 1866, leaving as his heirs

at law certain of the defendants, and owning certain lands in Robeson County, particularly described in the complaint, and in 1879 one McNair qualified as his administrator, but died July, 1890, and in November of that year the defendant J. D. Currie qualified as administrator *de bonis non;* "that the personal estate of the said A. S. McKoy is wholly insufficient to pay his debts and costs and charges of administration"; that the condition of the guardian bond was broken by the failure of said Hodges to render a plain and true account, etc., (410) and to pay to the *feme* plaintiff her share of the guardian estate, and that the damages arising from the said breach were the amount of the judgment obtained as aforesaid.

The complaint further alleged that the defendant Currie failed and refused to apply for an order of court to sell said lands for assets, etc.

The prayers of the complaint were as follows:

1. That an account may be taken of what is due plaintiffs in respect to said debt due by judgment as aforesaid, and that the following further accounts and inquiries may be taken and made, viz.:

2. An inquiry as to what real estate the intestate was seized at the time of his death.

3. That the real estate of the said intestate, or a sufficient part thereof, may be sold under the order of this court to pay the debts of intestate remaining due and unpaid; an account of the proceeds, rents and profits of said real estate coming into the hands of the defendants, or any of them.

The defendants demurred to the complaint, assigning as grounds:

1. That there is a misjoinder of causes of action, in that T. A. McNeill and wife, Caroline E., in behalf of themselves and all other creditors of the estate of A. S. McKoy, are joined with State *ex rel.* T. A. McNeill and wife, Caroline E. McNeill, as plaintiffs.

2. For that the complaint fails to state a cause of action in favor of T. A. McNeill and wife and other creditors of A. S. McKoy and against defendants.

3. For that it does not appear from complaint that plaintiffs have instituted any action on said bond, ascertained amount of damages incurred by breach of same, and caused judgment therefor to be entered. (411)

4. That the complaint fails to show (*a*) what amount or amounts of assets, if any, went into the hands of John McNair, former administrator, and the disposition of the same; (*b*) the amount of debts outstanding against estate of A. S. McKoy; (*c*) the value of the present estate of said McKoy, or the ages and residences of the heirs at law of said McKoy. That this action may be dismissed at cost of plaintiffs.

T. A. McNeill for plaintiffs.
Rowland & McLean and N. W. Ray for defendants.

SHEPHERD, C. J. The objection that the plaintiff Caroline McNeill cannot subject the land of the intestate until a judgment has been obtained upon the guardian bond executed by him as surety would seem to be sustained by the case of *Williams v. McNair,* 98 N. C., 332. But as the amount of damages arising from a breach of the bond is alleged in the complaint and admitted by the demurrer, the present case does not come within the reason of that decision, and the point is therefore untenable.

The amount of damages, then, being admitted, the plaintiff can maintain the present proceeding in her own name, and the joinder of the State is a mere matter of surplusage and not a misjoinder of different causes of action. Being entitled to proceed against the land, she could do so by a proceeding in the nature of a creditors' bill, and the objection upon this ground is also without merit.

We think, however, that the petition is deficient in that it does not comply with section 1437 of The Code, which requires that it shall set forth "the value of the personal estate and the application thereof."

It simply states that the personal estate "is wholly insufficient (412) to pay his (intestate's) debts and the costs and charges of administration." The purpose of the statute, in requiring the particulars therein mentioned to be stated in the petition, was to enable the Court to see whether a sale was necessary; but the present allegation wholly fails to give any such information. It is important that the requirements of the statute should be observed, and we must sustain the demurrer upon this ground. *Shields v. McDowell,* 82 N. C., 137. In other respects the rulings below are affirmed. The plaintiff may apply for leave to amend in the Superior Court.

The costs of this appeal will be equally divided. The Code, sec. 527.

MODIFIED.

Cited: McNeill v. Currie, 117 N. C., 345.

THOMAS D. CLEMENT, ADMR. OF AMOS GOOCH, v. W. W. COZART ET AL.

Fraudulent Conveyances—Action to Set Aside—Issues.

1. A voluntary conveyance is fraudulent in law as to existing creditors when the grantor does not at the time of the conveyance retain property fully sufficient and available for the satisfaction of his then creditors.

2. If a conveyance fraudulent in law be declared void at the suit of an existing creditor, all creditors—those existing at the time of the execution of the conveyance and also subsequent creditors—will be entitled to come in and participate in the fund arising from the sale of the property, subject to existing priorities of lien or those obtained by diligence.

3. A creditor whose debt arose subsequently to the conveyance may bring the action and show the fraud in law; and, further, that there are debts unpaid and capable of being enforced which were in existence at the time of the execution of the voluntary deed.

4. Where a voluntary conveyance is fraudulent in fact (as upon a secret trust for the benefit of the grantor, and for the purpose of hindering and delaying his creditors), the action may be brought by the subsequent as well as the existing creditor, and the subsequent creditor need not allege and prove that one or more of the existing debts is still unpaid.

5. Where, in an action in the form of a creditor's bill to set aside a conveyance is fraudulent, instituted by a creditor whose claim arose subsequent to the conveyance, the allegations were that at the time of the conveyance the grantor was insolvent; that the deed was made with intent to hinder, delay and defraud existing and subsequent creditors, and that the conveyance was voluntary and on some secret trust for the benefit of the grantor, and there was evidence tending to show that the deed was to grantor's children, that it was secretly made and the registration thereof was long delayed, and that grantor remained in possession: *Held*, that the submission to the jury of the single issue as to whether the deed was made by the grantor with intent to hinder, delay or defraud the plaintiff (a subsequent creditor) unduly limited the inquiry to the present intent in grantor's mind, at the time of the execution of the deed, to defraud plaintiff. Such special inquiry would not be necessary if the jury were satisfied that there was a secret trust, a continuing fraud, evidenced by the grantor's remaining in possession, etc.

6. When presumptions of fraud arise, as from dealings between father and son, the jury must, under proper instructions, find the fraudulent intent, unless it is rebutted by proof.

ACTION by plaintiff, as administrator of Amos Gooch, de- (413) ceased, in behalf of himself as administrator and all other creditors of James C. Cozart, against W. W. Cozart, administrator of J. C. Cozart, deceased, and the heirs at law, etc., of said J. C. Cozart, to compel the administrator to sell real estate of deceased for assets to pay his debts.

The plaintiff tendered several issues, all of which were refused, and a single issue was submitted by the court as follows:

"Was the deed executed by James C. Cozart to D. C. Lunsford and Thomas G. Cozart, dated 21 November, 1871, made with intent to hinder, delay or defraud Amos Gooch" (plaintiff's intestate)?

The jury answered "No," and from the judgment thereon for (414) defendants, plaintiff appealed.

The facts necessary to an understanding of the decision of the Court are fully and clearly stated in the opinion of *Associate Justice MacRae.*

Batchelor & Devereux for plaintiff.
J. W. Graham for defendants.

MACRAE, J. Was the one issue submitted by the court such that the appellant was not denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, it being settled that beyond this rule there is no limit to the discretion of the presiding judge in settling issues? *Denmark v. R. R.*, 107 N. C., 185.

The main point in this case was whether the deed was fraudulent as to subsequent creditors as well as to creditors existing at the time of its execution, if it were indeed fraudulent as to the latter class. The plaintiff's intestate was a subsequent creditor.

The issues which arose upon the allegations of the complaint, as to the death of plaintiff's intestate and the appointment of plaintiff as administrator, and the denial of knowledge by defendants, as appear by articles one and two of the complaint and article one of the answer, were not mentioned, and we presume were not insisted upon by defendants.

His Honor submitted but one issue: "Was the deed executed by James C. Cozart to D. C. Lunsford and Thomas G. Cozart, dated 21 November, 1871, made with intent to hinder, delay or defraud Amos Gooch?"

We by no means hold that his Honor was required to submit the issues presented by plaintiff's counsel, although, if he had deemed best to have submitted issues upon several facts alleged and denied (415) in order to bring the principal question the more clearly before the jury, or in order to enable the court upon the ascertainment of facts by the jury to declare the law, he might have done so. The decisions are becoming quite numerous on this subject. The question, What are the material issues? arises in each case. We refer to *Braswell v. Johnson,* 108 N. C., 150, and to Clark's Code, sec. 393.

The execution of the deed was admitted. The complaint alleged that at the time of its execution the grantor, J. C. Cozart, was insolvent, greatly indebted beyond his ability to pay, and that the deed was exe-

cuted with intent to hinder, delay and defraud the then and all subsequent creditors of said J. C. Cozart, and that the grantees and their alleged *cestuis que trustent* had notice thereof.

It alleged the indebtedness of said J. C. Cozart with other persons upon a bond to plaintiff's intestate, the judgment thereon and a partial payment, and that a large part thereof is still due and unpaid.

It charged that said deed was made upon some secret trust for the use and benefit of the grantees; that no part of the recited consideration had ever been paid nor was ever intended to be paid; and averred that the said deed was intended to be a voluntary conveyance.

It further alleged the death of said J. C. Cozart, the administration by one of the defendants, the want of personal assets, the necessity of a sale of the lands of intestate to pay his debts, the conveyance by D. C. Lunsford and Thomas G. Cozart, the grantees in the deed above named, of the lands described therein for the recited consideration of one dollar, to W. W. Cozart and his heirs in trust for the use and benefit of the said James C. Cozart and his wife for life, and after the death of the survivor to be sold and the proceeds divided among the children and heirs at law of the said James C. Cozart; and that the de- (416) fendants are the only heirs at law of said J. C. Cozart.

The answer admits the judgment in favor of plaintiff as alleged and the payment thereon as alleged, the death of J. C. Cozart and the administration by defendant W. W. Cozart, and the want of personal assets. It denies all fraud, and denies that said J. C. Cozart died seized of the land in question, or that it will be necessary for the defendant administrator to sell lands to pay debts.

The plaintiff undertook and offered evidence tending to prove that at the time of the execution of the deed first mentioned, J. C. Cozart was indebted to several persons and was insolvent. It will be seen by reference to the statement of the case that all of the debts alleged to have been due and owing by the said J. C. Cozart at the time of the execution of the deed were contracted in the years 1857 and 1858, except a judgment rendered against him in 1869, and that upon a bond for $2,000, made by J. C. Cozart and W. W. Cozart on 1 June, 1857, a payment had been made in February, 1870. So that, according to the evidence, there was a large amount of indebtedness of J. C. Cozart at the time of the execution of said deed, but that at the date of the beginning of this action the presumption of payment had arisen if payment were pleaded upon all of the said bonds, and that an action upon the said judgment would be barred if the statute of limitations were pleaded thereto, provided there were no disabilities which prevented the running of the statute.

The plaintiff offered evidence tending to prove that said deed was made to a son and a son-in-law of the grantor; that it was secretly made, and the registration thereof long delayed; that the grantor remained in possession exercising acts of ownership over said land all his life; that some thirteen years after the execution of said deed the grantees
(417) conveyed the said lands to another son of the said J. C. Cozart as trustee for him and his wife, and under such limitation as to render said lands unavailable at the instance of creditors. Plaintiff's counsel contended that the fact proved raised the presumption of a secret trust for the benefit of the grantor and in fraud of his creditors, and that the evidence tended to prove that the $2,000 recited consideration had never been paid, or raised a presumption to that effect which the defendants had failed to rebut. They contended that under the evidence a presumption had arisen which had not been rebutted; that the said deed was fraudulent and void, not only as to those existing at the time of its execution, but as to all subsequent creditors. They further contended that if the deed was made with intent to defraud the then existing creditors it was void, and that as there were still subsisting debts which existed at the time of the execution of the deed, it was void also as to subsequent creditors.

We are of the opinion that, in order to a clear understanding of the matters in controversy, it was necessary to have submitted an issue as to the intent of J. C. Cozart, at the time of the execution of the deed, to hinder, delay or defraud his then existing creditors; for although it might not be clear to the jury that there was an intent in the mind of the donor at the time of the execution of the deed, in 1871, to hinder Amos Gooch, who became a creditor in 1877, yet if they should find that it was executed with the intent to defraud the then existing creditors, and if it should further appear that any of the then existing debts were still in existence and capable of being satisfied out of the lands in question, if said deed should be declared void, in that case the deed being void as to one was void as to all, and the plaintiff is entitled to his relief.
(418) Up to the act of 1840 (section 1547 of The Code), the law was, as laid down in *O'Daniel v. Crawford,* 15 N. C., 197, that no voluntary conveyance of property, even to a child, will be upheld to defeat an existing creditor. *Houston v. Bogle,* 32 N. C., 496; 2 Kent Com., 442. After the act of 1840 he must be careful to retain property sufficient and available to answer all his debts then existing. *Thacker v. Sanders,* 45 N. C., 145. "Apart from the act of 1840, if there be an existing debt and the debtor makes a voluntary conveyance and afterwards becomes insolvent, so that the creditor must lose his money or the donor must give up his property, the latter is required to give way on the ground that one must be honest before he is permitted to be gen-

erous. To effect this such voluntary conveyance is presumed as a matter of law to be fraudulent." *Jones v. Young,* 18 N. C., 352; *Houston v. Bogle, supra.* The act of 1840 makes an important change in the law, and requires the question of fraud to be submitted to the jury as an open question of fact in those cases where, "at the time of the conveyance, property fully sufficient and available for the satisfaction of all his then creditors is retained by the donor." This is made a condition precedent in order to bring a case within the operation of the act. *Black v. Saunders,* 46 N. C., 67; *Pullen v. Hutchins,* 67 N. C., 428. The leading case in this country on the subject of voluntary settlements by one indebted is *Reade v. Livingstone,* 3 Johns. Ch., 481, in which *Chancellor Kent* reviews all the English authorities and reaches the conclusion that they may always be avoided by existing creditors, and that a presumption of fraud arises in favor of subsequent creditors where there were existing debts not inconsiderable, but of sufficient amount to afford reasonable evidence of fraudulent intent. To the same conclusion is *Sexton v. Wheaton,* 8 Wheaton, 239. And the opinions in these cases cite all of the English authorities up to their date, and we take this to be the law of North Carolina, modified, however, by the (419) act of 1840, so as not to apply to cases where the donor retained property fully sufficient and available to pay existing debts. The remark of the late *Smith, C. J.,* in *Worthy v. Brady,* 91 N. C., 265, commenting on *O'Daniel v. Crawford,* that the statute corrects this ruling, does not overrule the last named case, but simply calls attention to the change in the law by reason of the act of 1840.

But the complaint not only alleges the deed to have been fraudulent; it charges that it was executed with intent to hinder, delay, and defraud the then and all subsequent creditors, etc.; and in the eighth article, that it was executed by James C. Cozart and wife "upon some secret trust for the use and benefit of the said grantees (evidently meaning grantors) in some way unknown to plaintiffs."

A clear distinction is made between voluntary deeds where the presumption of fraud in law arises and conveyances void by reason of actual fraud. "When a subsequent creditor seeks to avoid a conveyance upon the ground that it was voluntary and void as to creditors on account of fraud in law as distinguished from actual fraud, he must be able to show that there is some existing debt remaining unpaid, for if all such debts were provided for and paid, or afterwards paid without being provided for, that fact repels the presumption of fraud which the law makes from the mere fact that the conveyance was voluntary. The general expression in *Hoke v. Henderson,* 14 N. C., 12, "that a conveyance void as to one creditor is void as to all creditors," is qualified by what immediately follows: "It is upon this foundation that what are

called *fishing bills* are filed in equity to find out a creditor at the time of the conveyance, and to bring the whole fund into subjection (420) to general creditors, including subsequent creditors." The meaning is there must be one existing creditor unpaid, as to whom the conveyance is void; if so, that will let in all creditors and bring the whole fund into subjection to general creditors. In this case there was an actual fraud. The conveyance was colorable and in trust for the debtor, and being a continuing trust and a continuing fraud, a subsequent creditor can take advantage of it without the aid of an existing creditor whose debt is unpaid."

The distinction is well stated in *Toney v. McGehee,* 38 Ark., 419: "A voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in fraud of existing creditors; but to do so he must show either that actual fraud was intended, or that there were debts still unpaid which the grantor owed at the time of making it." See many cases cited in 8 A. & E., page 751 *et seq.*

When a presumption of a secret trust is raised by the grantor's remaining in possession, it requires proof in rebuttal. *Askew v. Reynolds,* 18 N. C., 367. Under 13 Elizabeth, ch. 5, a conveyance made under a secret trust and with fraudulent intent may be avoided as well by subsequent as by previous creditors. *Pinkston v. Welsh,* 19 Pick., 231.

"If, indeed, there is a design of fraud or collusion or intent to deceive third persons in such conveyances, although the party be not indebted, the conveyance will be held utterly void as to subsequent as well as to present creditors, for it is not *bona fide.*" 1 Story Com. Eq., 352.

The distinction is recognized in Massachusetts: "If the debtor made the voluntary conveyance with 'intent to defraud,' an expression exemplified by a conveyance with a secret trust unexplained in favor of the debtor, or by a conveyance made to avoid a judgment, subsequent creditors and purchasers may avail themselves of the fraud to (421) set aside the deed; but if the conveyance was voluntary only, and made without fraudulent intent, it may be avoided only by creditors of the time of making it." 2 Bigelow on Fraud, p. 103. See the same book, page 88 *et seq.,* for a very thorough discussion of the subject and review of all the authorities upon it.

Littleton v. Littleton, 18 N. C., 327, cited by defendant's counsel, we consider an authority for the distinction. It was a proceeding for dower in lands alleged to have been fraudulently conveyed to the children of a former marriage by the husband about the time of the second marriage, in contravention of the act of 1784. "When secretly made, in contemplation of marriage, that special intent constitutes *express, positive or actual* fraud, as it is indifferently called in the books in contradistinction to that which is implied in law, merely from the tendency of

the act. Express fraud must render everything into which it enters vicious. It consists in meaning, at the time of an act, to produce thereby a particular prejudice to another, and that very consequence will be produced if the act be allowed to stand. The statute, 13 Eliz., makes void only such conveyances as are intended to defeat *creditors,* and, therefore, a voluntary conveyance by one then having no creditor is not apparently in it. Yet, if it be made with a view to becoming indebted, it is fraudulent and void." This opinion was delivered before the act of 1840; since then there must be superadded the failure to retain property fully sufficient and available to pay his debts.

But for the great length to which it would lead us we would be glad, out of respect for the learned counsel of the defendant, to discuss each decision cited by him and point out the difference between it and the one before us. We must content ourselves with remarking, however, that they generally refer to strictly voluntary convey- (422) ances.

To sum up the whole matter: "The law is that a voluntary conveyance, where the grantor did not at the time of the grant retain property fully sufficient and available for the satisfaction of his then creditors, is fraudulent in law as to existing creditors. And if such conveyance shall be declared void at the suit of an existing creditor, all creditors, those existing at the execution of the conveyance, and also subsequent creditors, will be entitled to come in and participate in the fund arising from a sale of the property, subject to priorities and to the maxim *vigilantibus non dormientibus leges subvenient.*

If the action shall be brought in the name of a subsequent creditor, he may show the fraud in law; and further, that there are still debts unpaid and capable of being enforced, which were in existence at the time of the execution of the voluntary deed. Whether debts which upon proper plea would be held barred by the statute of limitations or by presumption of payment can be said to be capable of being enforced, is an interesting question upon which we are not called upon to express an opinion at this time and without further argument; but it would seem that such debts would not be presumed incapable of being enforced until proper pleas raised the question, or until it was shown that no disability prevented the running of the statute.

If, however, there was actual fraud, as distinguished from fraud in law, the presumption of which arises from a voluntary settlement without retaining property fully sufficient and available for the satisfaction of his then creditors, as if the conveyance were upon a secret trust for the benefit of the grantor, and for the purpose of hindering, etc., his creditors (*Hawkins v. Alston,* 39 N. C., 137), the action may be brought by the subsequent as well as by the existing creditor, and if by a

(423) subsequent creditor it would not be necessary for him to allege and prove that one or more of the existing debts was still unpaid. In the case before us actual fraud was charged, and the intent to hinder, etc., not only existing but subsequent creditors; and the action was in form, a creditor's bill. While it may be possible, and we suppose the learned judge who tried this case so intended, under one issue to present every phase of the contention to the jury by appropriate instruction, the tendency was to narrow the inquiry to the question whether there was a present intent in the mind of the grantor at the time of the execution of the deed to defraud the plaintiff's intestate. If the jury was satisfied that there was a secret trust and a continuing fraud, evidenced by a remaining in possession and other acts, it would not be necessary that they should be confined to the inquiry whether the intent was specially to hinder, etc., the plaintiff's intestate.

As the case must go down for a new trial, we do not feel called upon to examine and pass upon *seriatim* the instructions given and the prayers refused. We will only say that when presumptions of fraud arise, as from dealings between father and son, the jury must, under proper instructions, find the fraudulent intent unless it is rebutted by proof. *Banking Co. v. Whitaker,* 110 N. C., 345, and cases cited.

The issues ought to be so framed as to present the questions whether this was a voluntary deed, for upon its face it recites a valuable consideration; whether it was made with the intent to hinder, delay or defraud existing creditors; whether any of the existing debts, if there were any, were still subsisting at the time of the commencement of this action; whether the deed was executed upon a secret trust for the benefit of the grantor; and whether it was intended to hinder, etc., his creditors.

(424) These seem to be the material issues. Possibly the judge who tries the case may find it convenient to present them in a more concise form with proper instruction. We do not propose to invade his province.

We have passed over the first and second exceptions upon the alleged failure of the defendants to prove the registration of the deed, because we think that the plaintiffs are concluded upon this point by the admissions of their pleadings and their issues submitted, in which they admit the registration of the deed five years after its execution. There is error, and we order a

NEW TRIAL.

Cited: Brinkley v. Brinkley, 128 N. C., 513, 514; *Hobbs v. Cashwell,* 152 N. C., 189; *Powell v. Lumber Co.,* 153 N. C., 58; *Aman v. Walker,* 165 N. C., 228; *Bank v. McCaskill,* 174 N. C., 364.

(425)

W. G. WILLIAMS ET AL. v. EMILY JOHNSON ET AL.

Fraudulent Judgment, Sale Thereunder—Unauthorized Appearance of Attorney—Rights of Purchaser Without Notice of Fraud—Inadequacy of Price.

1. Attorneys and solicitors are officers of the courts, expressly empowered to represent litigants, and parties about to acquire rights under the judgments of courts are not bound to inquire into the authority of the attorneys who profess to represent the plaintiffs or petitioners; and where such rights have been acquired by one who had no notice of the lack of authority on the part of an attorney who professed to represent the owners in a proceeding for the sale of land, no evidence tending to disprove the existence of such authority ought to be admitted to overthrow the rights so acquired.

2. A purchaser at an execution sale, a stranger to, and having no notice of, any irregularity or fraud in the judgment under which he buys, has only to inquire if the court from which the execution issued had jurisdiction of the parties and the subject-matter.

3. While creditors of an execution debtor may use inadequacy of price bid as an evidence of fraud and collusion between the purchaser and the debtor, the latter cannot make it the ground of contesting the title of the purchaser at an execution sale against him.

4. In an action to recover land and to set aside as fraudulent a judgment under which it had been sold, it appeared that a widow, the mother of plaintiffs, had procured an *ex parte* proceeding to be brought in the name of herself and children for the sale of the land in which she had dower and which she had contracted to sell and have conveyed by good title to the defendant or one under whom the latter claimed. The proceedings were not conducted to a decree for sale, but a judgment for court costs was taken therein against the petitioners, and the land was sold under execution issued thereon, and defendant became a purchaser at an insignificant price. The plaintiffs (heirs of the decedent) testified that they were not cognizant of the proceedings, and that the attorney who conducted the same for their mother had no authority to represent them, but there was no evidence that the defendant (the purchaser) knew that the attorney had no such authority: *Held*, that the facts that defendant was distantly connected with the widow (mother of plaintiffs) and occupied the *locus* as a renter for two years and during the time when the *ex parte* petition was filed, and that before she purchased at the execution sale she held the land under, and had possession of, deeds which contained recitals showing that the widow had no authority to sell the fee, were not evidence from which the jury might infer that the defendant had notice of the fraudulent purpose and character of the *ex parte* proceedings in which the judgment for costs, under which she now claims, was rendered.

CLARK, J., dissenting.

ACTION tried before *Connor, J.*, and a jury, at April Term, 1892, of WAKE, the object being to set aside a judgment as fraudulent and to recover the land sold under execution issued thereon.

The facts necessary to an understanding of the decision of the Court are sufficiently stated in the opinion of *Associate Justice Burwell.*

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

(426) *George H. Snow and Battle & Mordecai for plaintiffs.*
Batchelor & Devereux and Armistead Jones for defendants.

BURWELL, J. The lot of land in controversy in this action was owned at the time of his death, in 1851, by S. W. Williams, to whose widow, Polly Williams, it was assigned as dower. She died in 1886. His heirs at law were his six children, three of whom, to wit, W. Gaston Williams, Frank N. Williams and Mary J. Smith, are plaintiffs, each claiming one-sixth part of said lot. The children of a daughter, who died in 1878, and who was the wife of the plaintiff, E. Jefferson Smith, are also plaintiffs and claim one-sixth part of said lot as heirs of their mother. The other two children of S. W. Williams are not parties to this action.

It is alleged in the complaint that the defendants hold said lot under the widow, who died as above stated in 1886, and also under a deed made to the defendant, Emily Johnson, by T. F. Lee, sheriff of Wake County, dated 26 April, 1873, he having sold the lot according to law on 7 April, 1873, under an execution issued to him from the Superior Court of said county against the widow and children of S. W. Williams and also against I. J. Flowers, the husband of one of the daughters, and Jefferson Smith (one of the plaintiffs in this action), the husband of another daughter, for a bill of costs amounting to $16.10, the consideration expressed in said deed being $18.05, bid by said defendant.

It is further alleged that the judgment for costs upon which the said execution was issued, was irregular and fraudulent. And the plaintiffs demand judgment, first, that the said judgment "be set aside as to these plaintiffs as being irregular and fraudulent"; second, that the
(427) deed from T. F. Lee, sheriff, to Emily Johnson be delivered up for cancellation, and third, that they are the owners of the land described in the complaint.

The primary object of this action is, therefore, to have a judgment rendered against the plaintiffs in the Superior Court of Wake County in 1872 declared void because of fraud, and thus destroy the force and validity of defendant's title under the deed made to her by the sheriff.

In the complaint first filed the plaintiffs only alleged their ownership of the lot in controversy, and that defendants unlawfully withheld the

same from them and demanded possession thereof. The amended complaint changes the object of their suit to that above stated, their learned counsel thus conceding, as it seems, that they cannot oust the defendant from the land until they have first had vacated and set aside the judgment, execution and sheriff's deed thereunder, which constitute, as we think, the defendant's only muniment of title.

Upon the evidence adduced and under the instructions of his Honor, the jury have found that this judgment against the plaintiffs was procured by the fraud of the widow, the life tenant, and that the defendant, Emily Johnson, had notice of this fraud when she bought the land at the execution sale made under said judgment; and because of this fraud and defendant's notice thereof it was adjudged that the judgment, execution and deed were void.

Upon the trial the counsel for the defendants contended that there was no evidence that their clients had any notice of the alleged fraudulent conduct of the widow, and that the evidence offered to establish that fraud was incompetent against them.

His Honor decided that the evidence offered to establish the (428) alleged fraud was competent against the defendants, and that there was evidence from which the jury might infer that defendants had notice of that fraud, and he so instructed the jury.

In these respects we think he erred.

There seems to be little conflict in the testimony offered by the parties on the trial, and the conflict is about matter that appears to us immaterial.

It is alleged in the complaint and admitted in the answer that at Fall Term, 1863, of the Court of Equity of Wake County, an *ex parte* petition was filed by the late Sion H. Rogers, a practicing attorney of that court, in behalf of the widow and heirs of S. W. Williams (the husbands of the *femes covert* being also parties), asking that a sale of the lot here in controversy be made, in order that the fund arising from such sale might be reinvested in a tract of land to be held by the widow for life, and then to each of the other petitioners as tenants in common, according to their rights in the lot sold. This was accompanied by an affidavit of two persons that it was for the interest of all the parties that the sale should be made and the fund invested as proposed. No orders or decrees seem to have been made while the cause was pending in the Court of Equity, but it was transferred to the Superior Court in 1868, and was continued from term to term till Fall Term, 1872, when a judgment was entered against the petitioners for costs amounting to $16.10, and execution was issued and a sale was made to defendant, Emily Johnson, as heretofore stated. She was in possession of the premises at the time of the sale, and had been in possession since November, 1863, when

she had purchased the lot at the price of $2,500 from one Overby, who had bought it from W. H. High on 3 November, 1863. High had purchased it on 2 August, 1863, from one Harris Flowers, and the
(429) latter held it under the following contract:

"Whereas the undersigned have this day sold to Harris Flowers and his heirs a lot of ground near the city of Raleigh . . . for the sum of $1,400; and whereas, some of the parties interested are under age; Now, know ye, that the undersigned Polly Williams, David Williams and S. N. Williams bind themselves, their heirs, executors and administrators, to make to the said Harris Flowers and his heirs a good and indefeasible title to the same, or cause to be made such title by procuring a decree of the Court of Equity securing said title, or by procuring the execution of a proper deed from the parties interested, whether of age now, or of nonage; and in default thereof we bind ourselves, our heirs, executors and administrators, in the full and just sum of $1,400, and all interest from this date, and all such costs as he may be put to by reason of a failure to have said title made as above obligated. In witness whereof," etc.

This contract was executed in July, 1863, and was registered soon after its execution, and the recitals in her deed were such as to give notice to her that those under whom she held claimed under this contract.

It was also proved that for two years prior to her purchase of the lot in 1863 the defendant, Emily Johnson, had occupied it as tenant of the widow, Polly Williams, to whom she was connected by marriage, her brother having married a sister of Polly Williams.

Such being the relation of the parties to one another and to the matter in controversy, the plaintiffs insist that they shall be permitted to prove that the petition in the Court of Equity of Wake County for the sale of the lot and the reinvestment of the fund was filed by Sion H. Rogers at the instance and request of the widow, and that neither he nor she had any authority from the plaintiffs to file that petition,
(430) and that they had never ratified their action—that they were indeed ignorant of the fact that such a petition had been filed, or that any judgment for costs had been entered against them, or that any sale had been made thereunder till shortly before the bringing of this action, and that this petition was filed by the widow without the knowledge or consent of the heirs, and this judgment for costs, that had not been earned, was entered, and this sale under execution was made to cheat and defraud the heirs of S. W. Williams of the reversion in this lot.

The charge of fraud brought at this late day by the plaintiffs against their mother is founded upon the idea not that she did directly any act

to deprive them of their title, but that, without any authority from them, she employed a most respectable solicitor, able and faithful, to ask a Court of Equity to sell the lot and itself invest the proceeds in other real estate.

We deem it unnecessary to discuss the evidence that tends to prove or disprove this charge of fraud, for we find no testimony that in our opinion in any way goes to show that the defendant, Emily Johnson, knew that the solicitor who filed the petition was acting without authority from the clients he professed to represent, or that the widow was contriving to cheat and defraud her own children. The facts that she was distantly connected with the widow by marriage and that she and her husband had occupied the lot from 1861 to 1863 as her tenants go for nothing. The recitals in her deed pointing, as plaintiffs contend, to the contract made by the widow and set out above in full, seem to us rather an assurance that the proceeding to perfect the title through the intervention of a Court of Equity was properly instituted, and that all the parties to the petition had come in that court and (431) submitted themselves to its jurisdiction, than the contrary.

As the defendant had no notice that the solicitor had no authority to represent the petitioners, it is conclusively presumed as to her that he did have such authority, and no evidence tending to disprove the existence of such authority should have been admitted to overthrow rights which she had acquired while ignorant of such want of authority.

Attorneys and solicitors are officers of the courts. They are expressly empowered to represent litigants, plaintiffs and defendants, and parties who are about to acquire rights under the judgments of courts are not at all bound to inquire into the authority of the attorneys who profess to represent the plaintiffs or petitioners. It is said of such persons that they "come into court by their attorney"; it is not permitted to them to say that they did not so come when the rights of innocent third persons have intervened.

So far, then, as concerns the defendants, the Court of Equity of Wake County and its successor, the Superior Court, had jurisdiction of the persons named as petitioners in the petition for the sale of the lot, and, if it is conceded, as plaintiffs contend, that there was no decree for the sale of the lot, still a judgment against the petitioners for costs, not excepted to or appealed from, was binding upon them; for they were to all intents and purposes present in court and subject to its orders and judgments made in that proceeding. Upon this judgment for costs, which the plaintiffs now say they did not owe, but to which they then, though in theory present in court, offered no objection, an execution was issued and a sale was made. To that sale the defendant went in the person of her agent. She and the heirs were antagonists. Their inter-

ests required that they should pay off this judgment for costs, and thus save their reversionary interests from sale. Her interests de-
(432) manded that she should perfect her defective title at as little cost to herself as possible. She had a right to presume that the sheriff had notified each one of the heirs of the sale, for the law (Laws 1868-69, ch. 237, sec. 11) required him to do so, and he was liable for damages if, through his failure to so notify them, any loss came to them. Being a stranger to the judgment, all that she was required to ascertain was that an officer was making the sale and that he was empowered to do so by a court of competent jurisdiction. *Burton v. Spiers,* 92 N. C., 503. She was not called upon to bid against herself, and, under the circumstances that surrounded her, she acquired by her bid and the deed made pursuant thereto a good title against the heirs of S. W. Williams named in the execution, and their heirs; for, having no notice of any irregularity or fraud in the judgment under which she bought, as we have seen, she had only to inquire if the court from which the execution issued had jurisdiction of the parties and the subject-matter. *England v. Garner,* 90 N. C., 197, and the cases there cited.

And as she was, as we have seen, in no way connected with the alleged fraud, the smallness of the price at which the lot was bid off by her cannot affect her title. These plaintiffs cannot be heard to complain that their property, sold under an execution of which they had notice (and as to these defendants such notice is conclusively presumed), brought too little. In *Durant v. Crowell,* 97 N. C., 367, the inadequacy of the price bid by the defendant, and at which the sale was confirmed to her, was held to be a fact from which she should have inferred that the title of the party whose title she acquired was not free from equities of the plaintiffs, but no such contention was made as that she did not acquire for the small sum bid the title of the party whose interest in the land was offered for sale. Creditors of the execution debtor may use inadequacy of price bid as evidence of fraud and collusion be-
(433) tween the purchaser and the debtor, as in *Osborn v. Wilkes,* 108 N. C., 671, but no case can be found, we think, that sustains the plaintiffs in their contention that they can use the inadequacy of price to destroy the title of one who bought their land at execution sale.

Taking this view of the matter in controversy, we do not deem it necessary to consider *seriatim* all the exceptions taken by defendants. They are entitled to a

NEW TRIAL.

CLARK, J., dissenting: The land was sold under a judgment for costs rendered at Fall Term, 1872, in a proceeding which had been instituted in equity in 1863 by Polly Williams. It was bought by the defendant

at the price of $18.05. The jury find that the said proceedings, including the judgment for costs at Fall Term, 1872, were procured by the fraud of Polly Williams; that the defendants had notice of the fraud when she bought at the sale under the execution for costs in April, 1873; that none of the plaintiffs had notice of the rendition of such judgment; that the guardian of those of the plaintiffs who were at that time minors, did not employ counsel in said proceedings in equity, and none of these plaintiffs had knowledge of said proceedings being pending; that the land was sold under the judgment for costs and not under a decree in said cause, and that two of the plaintiffs were *femes covert* when the judgment was entered. Upon these findings the plaintiffs were unquestionably entitled to recover. But it is contended that there was not evidence sufficient to go to a jury to show knowledge of fraud on the part of the defendant, and this is the principal point presented by the appeal.

As to Polly Williams, the evidence that she procured counsel to file a petition in the names of plaintiffs, some of whom were then adults and some minors, without their knowledge and consent, and that these plaintiffs never heard of the pendency of such proceedings or the judgment and sale thereunder, is evidence of fraud on her part (434) sufficient certainly to be submitted to the jury in connection with the other testimony in the case, especially in view of the further evidence that two years before the alleged proceedings in equity was begun, Polly Williams had bought land (and taken the deed in fee therefor to herself) with money received by her from the sale by her of this land, for which she attempted to obtain title to the purchaser (under whom the defendant claims) by filing this proceeding to have it sold in the name of the plaintiffs, used without their knowledge and consent. The contract by Polly Williams with Harris Flowers for the sale to him, shows on its face that she had no right to convey the land. This contract was not only referred to in the *mesne* conveyances, under which the defendant claims, and, indeed, in the very deed to her, but the contract itself was in the possession of defendant and was produced at the trial. She was living on the lot in 1861 as a tenant of Polly Williams, and up to November, 1863, when she took the deed for it. She was related to Polly Williams, and was fixed, as we have seen, with notice that this proceeding was instituted to perfect a title out of these plaintiffs and that the payment, by the recitals in the deeds under which she claims, had been made, not to them, but to Polly Williams. She knew also that no decree of sale had been made in the cause, and she buys under an incidental judgment for costs rendered, as the jury find, without knowledge on the part of the plaintiffs of the proceedings, the judgment or sale, and buys a valuable tract of land without any consideration moving from her to the true owners, nor indeed to any one, beyond a trivial sum ($18.05)

to pay costs. All these things taken together surely were sufficient evi-
dence to be submitted to a jury, from which a jury would be
(435) authorized to draw an inference that the defendant had notice of
the fraud perpetrated by Polly Williams on these plaintiffs. If
so, the judge properly submitted that issue to them.

Aside from this, the land certainly belonged to these plaintiffs, subject to the dower right of Polly Williams. The title has not been divested out of them by possession and the lapse of time, since Polly Williams did not die till 1886; nor has the title of the plaintiffs passed by any deed executed by them, and the jury find upon testimony that the title has not passed from them by virtue of any sale or decree made in any cause in court to which the plaintiffs were parties, or of which they had any notice. There was no estoppel, nor can the plaintiffs be affected by the judgment and sale for costs in an action to which they were not parties. They were entitled to their day in court. They have not had it. It is as old as the twelfth section of *Magna Carta*—indeed, far older—as old indeed as the first perception of the principles of natural justice—that "no man shall be disseized of his freehold or deprived of his life, liberty or property, except by the law of the land." This is incorporated in section 17, Article I, Constitution of North Carolina. One of the latest amendments to the Constitution of the United States (the fourteenth) provides in like manner: "Nor shall any State deprive any person of life, liberty or property without due process of law."

As just said, the plaintiffs once owned this land. They have not parted with it by conveyance. They have received nothing for it. There is no presumption or limitation against them by possession and lapse of time, nor are they in any way estopped. They have been deprived of the property upon the evidence adduced and according to the facts found by the jury, by a judgment, execution and sale in a cause to which they
were not parties. They have not had "due process of law," nor
(436) has there been any judgment against them according to "the law
of the land."

It is true courts lean, and properly, too, to upholding the integrity of legal proceedings. The plaintiffs having been named as parties to the legal proceedings in which the judgment for costs was rendered under which the land was sold, every presumption is that they were parties. But they have conclusively rebutted that presumption. The jury have found that they were not only not parties to the action, but never had any notice of the proceedings, or the judgment and sale.

Under these circumstances the plaintiffs should recover the land which has never legally passed from them. It is true that when counsel, who are able to respond in damages, represent parties to an action with-

out their authority, the court may uphold the title of an innocent purchaser at a sale under a decree in the cause, because then the owner of the land is not deprived of his property without compensation. *University v. Lassiter,* 83 N. C., 38. But here the counsel is dead, and the essential fact that the plaintiffs can get compensation for their property out of his estate does not appear. They have no remedy except to regain their own. Doubtless the counsel, misled by Polly Williams, honestly thought he represented these parties. Nor is this like the case where there is defective service upon a minor who appears by guardian, which defect is cured by statute. The Code, sec. 387; *Harrison v. Harrison,* 106 N. C., 282. The proceeding here was not merely irregular; it was void.

It should be further noted that in *University v. Lassiter, supra,* the defendant had been served with process, and being thereby fixed with notice of all orders and decrees in the cause, he was bound by them, and it was his own negligence that he allowed an attorney to appear for him whom he had not authorized. Here, these plaintiffs were neither parties nor had any notice of the pendency of such pro- (437) ceeding.

In *Grantham v. Kennedy,* 91 N. C., 148, it is said that a judgment obtained by fraud is not, strictly speaking, a judgment of the court. There is also another principle still older and fully as well recognized, that a judgment binds only parties and privies, and these plaintiffs were neither.

Sumner v. Sessoms, 94 N. C., 371, holds that where it appears from the record that a person was a party to an action, the legal presumption that he was a party is conclusive until removed by a direct, not a collateral attack. Here we have the attack made directly. It is the foundation of the action. That such direct attack may be made is also recognized in *Edwards v. Moore,* 99 N. C., 1, and *Brittain v. Mull, ib.,* 483.

Grimes v. Taft, 98 N. C., 193, decides only that purchasers at judicial sales will be protected against the errors and irregularities of the court and the laches of the parties. Here there was none. The plaintiffs were not parties at all.

In the latest case on the subject, *Harrison v. Hargrove,* 109 N. C., 346, the Court held the purchaser protected only by reason of the notice which the complainants had of the purchase of the land and of its long occupation by the purchaser—seventeen years. Here there was no "long delay or unexplained laches on the part of the complainants." It is found as a fact that they had no knowledge of the sale and purchase, nor were they put on notice by possession of the defendant, inasmuch as the defendant was in possession of the land by virtue of the purchase

of the dower-right, and after the death of the doweress they moved in apt time to obtain possession. Upon discovery of the defense of the alleged decree and sale they were properly allowed by the court to amend this proceeding so as to attack the former proceedings
(438) directly and to pray for possession as one of the consequent reliefs asked.

Morris v. Gentry, 89 N. C., 248, was a case in which the court appointed a next friend without notice to the infants or the next friend. This was treated as an irregularity, and the purchaser at the sale under the decree without notice of the irregularity was held to have a good title. It will be noted there was an order or judgment of the court that the infants were parties by such appointment of next friend. There is nothing of the kind in this case as to the adults whose names appear without their authority or any order of court.

The only direct authority in our Reports that the owner of property can be deprived of it by virtue of the decree of a court in a cause to which he is not in fact a party or privy and of which he has not notice, is *England v. Garner,* 90 N. C., 197. That proceeds upon the argument *ab inconvenienti* of throwing doubt upon judicial proceedings apparently regular. But in such cases we should follow the plain language of the Constitution rather than a decision of a court, else we would "make the word of no effect by our traditions." But, indeed, exactly the opposite of *England v. Garner* is held in *Doyle v. Brown,* 72 N. C., 393, which is, besides, supported by the express provisions of both the State and Federal Constitutions, and by the immutable principles of natural justice that property shall not be taken from its owner by virtue of the decree of any court unless he has opportunity to be heard.

In 1 Freeman on Judgments, sec. 120a, it is said: "Any judgment rendered against one who has neither voluntarily appeared nor been served with process must be treated as void."
(439) In same volume, section 117: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. The purchaser at a sale by virtue of its authority finds himself without title and without redress."

In section 128 the learned author discusses the effect of the unauthorized appearance by attorney, and holds that by the weight of authority a judgment based on that ground can be impeached even collaterally. It would be strange if this were not so, since the attorney cannot by acceptance of process bring his recognized client into court. *A fortiori* he cannot by a simple entry on the docket bring in as a party one who is in fact not a client.

As to the argument *ab inconvenienti,* it is true opportunities for fraud may arise if judgment in cases in which parties are apparently regularly in court may be impeached by showing that in fact and in truth they were not parties at all and had no knowledge of the proceedings. But equal or greater frauds will follow if persons can be made parties in proceedings affecting their rights without service of process and be absolutely bound by decrees therein when they are in total ignorance of the pendency of the action. The constitutional guarantee that no one shall be deprived of his property or privileges or liberty, except by the law of the land, protects such persons. Whom else could it protect? What use of the provision unless it applied to such? Mr. Webster, in his argument in the *Dartmouth College case,* thus defines the "law of the land" and "due process of law," and his definition has often been quoted by the Courts with approval: "The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

In 2 Freeman on Judgments, sec. 499, the doctrine of the bind- (440) ing effect of the unauthorized appearance of counsel is shown to be repudiated by all of the later cases as subversive of natural justice.

As to Mary J. Smith, who, though an infant, appeared as a party by her general guardian, the proceedings would be binding as to her but for the finding of the jury that the judgment and proceedings were had by fraud of which the defendant had knowledge, for she could look to her guardian if, by his neglect, counsel were not retained. *University v. Lassiter,* 83 N. C., 38; The Code, sec. 387.

As to the other plaintiffs, never having been made parties, they are not bound by the decree, even in the absence of knowledge by defendant of the fraud.

Cited: Dickens v. Long, post, 317; *Carraway v. Lassiter,* 139 N. C., 155; *Rackley v. Roberts,* 147 N. C., 208; *Yarborough v. Moore,* 151 N. C., 121; *Credle v. Baugham,* 152 N. C., 20.

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(441)

DURHAM FERTILIZER COMPANY v. G. A. CLUTE ET AL.

Joint Stock Association—Corporation—Acceptance of Charter—Liability of Members.

1. A corporation being a creation of law, whose foundation is the grant of a franchise, there must be an *acceptance* of the grant or charter before it can take effect; therefore, where the act of Assembly (Private Acts 1889,

ch. 105) incorporated "The Farmers State Alliance" and declared "each county alliance which has been or may hereafter be organized to be a body politic and corporate," and provided that the "officers of the said several alliances now existing may immediately accept and adopt this act of incorporation, and thereupon they shall severally be invested with the corporate powers conferred by this act under their present plan and management": *Held*, that the simple continuance in business by an alliance after the passage of said act, without signifying in any unequivocal way its acceptance thereof, did not relieve it of its character of a joint stock association or copartnership.

2. Where a county alliance which, subsequent to, but without mentioning the act of Assembly authorizing it to become incorporated, adopted a resolution declaring that the alliance "will organize a stock company to enlarge the facilities of the alliance store," etc.: *Held*, that such resolution constituted an acceptance of the act of incorporation, and rendered the alliance a body corporate from the date of such resolution.

3. Members of a joint stock association (unincorporated) are individually liable, jointly and severally, for its debts, and the acceptance by such association of an act of the General Assembly authorizing it to become a corporation does not relieve its members from liability for debts contracted by it before such acceptance; otherwise as to debts contracted after the acceptance.

4. Notes given by an agent of a corporation in pursuance of a contract made by him in behalf of a joint stock association, before the act of incorporation was accepted, are binding upon those who were members before such acceptance.

5. Where an agent of a corporation, under a contract made by him with a fertilizer company on behalf of a joint stock association before acceptance of an act of incorporation, took notes from those to whom he sold guano and turned them over to the fertilizer company, which afterwards returned them to him for collection, and the amount collected was mingled with the funds of the corporation and applied to its use: *Held*, that the members of the association who were such before the act of incorporation was accepted are not personally liable for the amounts so collected and converted.

ACTION by the Durham Fertilizer Company against G. A. Clute and others, members of the Sampson County Alliance, heard before *Connor, J.*, and a jury, at October Term, 1892, of DURHAM.

The substance of the pleadings and the facts necessary to an understanding of the decision of the Court are fully set out in the opinion of *Associate Justice MacRae.*

The resolution of Sampson County Alliance, adopted 10 April, 1891, and referred to in the opinion, provided as follows: "That we organize a stock company to enlarge the facilities of the Alliance store; that the

County Alliance, the suballiances and the individual members of (442) the alliance be eligible to take stock," etc.

The certificate issued to certain of the defendants under the plan of February, 1889, also referred to in the opinion, was as follows: "This certifies that.....has contributed to the County Business Agency Fund the sum of.....dollars, with the privilege of drawing the same out after sixty days' notice, with eight per cent interest."

His Honor, *Connor, J.*, adopting the verdict in response to the issues submitted, by consent found and declared the facts pertinent to the decision of the cause, and gave judgment against certain of the defendants and in favor of others, as referred to in the opinion, and both plaintiff and defendants appealed.

Fuller & Fuller and W. A. Guthrie for plaintiff.
Boone & Parker, D. B. Nicholson and John D. Kerr for defendants.

MACRAE, J. The plaintiff seeks to charge the defendants, twenty in number, and the other defendant, Herring, as their assignee, as copartners in a mercantile venture, under the name of "Sampson County Alliance Store," with the defendant Clute as manager, for the price of certain guano sold by plaintiff to said Clute, as plaintiff alleges, for and in behalf of his codefendants, except Herring, in the years 1890 and 1891. The amount alleged to be due is said to be evidenced by certain notes executed to plaintiff by said Clute in his own name, but, as plaintiff alleges, for and in behalf of his codefendants, and after giving all proper credits, amounting to the sum of $2,908.16, and interest. Plaintiff further alleges that as collateral security for the said indebtedness the defendant Clute, manager and agent as aforesaid, turned over to the plaintiff certain claims for fertilizers sold by defendants through their aforesaid manager and agent, and at the maturity thereof (443) said defendant Clute, manager and agent, collected thereon sundry amounts, aggregating the sum of $1,600, which he did not pay over to the plaintiff, but used for his copartners in their business. And plaintiff further alleges that defendants voluntarily surrendered all the effects, property and *choses in action* of said copartnership to defendant Herring, and that said Herring has in his hands, as trustee, more than sufficient to pay plaintiff's debt, and plaintiff alleges a demand and refusal by said Herring so to pay.

Plaintiff demands judgment against all the defendants for $2,908.16, and interest, and against Herring that he account for and pay over to plaintiff out of the effects so received by him the said sum. The defendant Clute makes no answer. The other defendants deny the copartnership as alleged, and the giving of any notes by said Clute in their behalf or as their agent, or the purchase by them of any guano from plaintiff, or their liability upon any note or otherwise for said guano.

They deny that they turned over any property to defendant Herring, as alleged, but admit that defendant Clute, as business agent of the Sampson County Farmers' Alliance Store, and certain of the directors thereof executed to defendant Herring, trustee, a deed as assignment conveying to him all the assets of said store for the benefit of its creditors. They further allege that the defendant Clute was the agent of plaintiff in the sale of the fertilizers, and they deny that any note, account or other thing of value arising from the sale of any commercial fertilizers sold by plaintiff to said Clute ever came into the hands of the defendant Herring, trustee, or any of these defendants.

(444) And defendants, as a second defense, allege that said Clute was agent for plaintiff in the sale of the fertilizers, and not of defendants; that the said fertilizers were delivered by plaintiff to defendant Clute to be sold for the plaintiff; that said Clute did sell said fertilizers for plaintiff and took notes for the same, payable to plaintiff, and said notes were the property of plaintiff in the hands of said Clute as its agent, and that plaintiff took out of the hands of said Clute certain of said notes amounting to about $1,400, and put them in the hands of an attorney for collection. Some of the defendants filed answers denying that they were stockholders in the said store, and one denying that he was a member of the alliance. Two issues were submitted to the jury, and answered as follows:

"1. Did the defendant, G. A. Clute, contract with the plaintiff company in respect to the guano as the agent of the Sampson County Farmers' Alliance Store, or on his individual account?" Answer. "As the agent of Sampson County Farmers' Alliance Store up to 15 July 1891."

"2. What amount, if any, of the proceeds of sales of the guano furnished by the plaintiff company, collected by the defendant, G. A. Clute, was used in the business of the said Alliance Store?" Answer. "$1,658.58."

His Honor, adopting the verdict upon said issues, by consent found other facts, as are set out, and rendered judgment.

The principal contention before us was concerning the act to which we shall presently refer, and from which we shall cite such parts as are pertinent to our inquiry, and its effect upon the organization existing at the time of its passage.

By force of the provisions of chapter 105, Private Acts of 1889, certain persons, their associates and successors, are incorporated under the name and style of "The Farmers' State Alliance of North Carolina," with the corporate powers and privileges therein declared. Section 6 provides "That each County Alliance which has been or may here-

after be organized is declared to be a body politic and corpo- (445) rate under the name and style of the Farmers' Alliance of the particular county in which said alliance is located," with rights, powers and privileges, among which it "may establish, conduct and prosecute such mercantile and manufacturing business and such other enterprises as will promote the interests and welfare of the said alliance and its members in the county in which it is located."

By section 8 the subordinate alliances which are now or may hereafter be organized in the several counties of the State are created bodies politic and corporate under such name and style, etc.

"Sec. 9. That the County Alliances and subordinate alliances, the incorporation of which is provided for in this act, may succeed to the rights and privileges, adopt the present organization, assume the liability and continue to develop and execute the general plan and purposes of the associations respectively known as the County Alliances and subordinate alliances as now existing and organized under their constitution, by-laws, rules and regulations; shall be corporate bodies and invested with the corporate powers, rights and privileges herein granted to county and subordinate alliances, subject to the supervision and control of the Farmers' State Alliance."

"Sec. 11. That the president, secretary and treasurer or other chief officers of the said several alliances now existing in this State, with the executive committee of each, may immediately accept and adopt this act of incorporation, and thereupon they shall severally be invested with the corporate powers, rights and privileges conferred by this act under their present plan and organization; provided that the failure or refusal of any one or more of the said alliances to accept this charter or act shall not affect or prejudice those which do accept, nor prevent (446) them from becoming incorporated under this act and enjoying the rights and privileges therein conferred." This act was ratified 7 March, 1889, and took effect from and after its ratification.

The defendants contend that the Sampson County Alliance, which had already been organized and begun to carry on a general merchandise business in February, 1889, became a corporation by force of the statute on 7 March, 1889, and, therefore, that for any obligation contracted in said business the members, being stockholders, are not personally liable.

But a corporation being an artificial person, a creation of law, whose foundation is the grant of a franchise, it follows manifestly that there must be an acceptance of the grant or charter before the same can take effect. One cannot be made a corporator without his consent. 1 Lawson R. & R., sec 338 *et seq.;* Angell & Ames on Corp., sec. 81 *et seq.* The

form or manner of such acceptance depends in a great degree upon the charter or grant. There is abundant authority to the effect that no particular form of acceptance is necessary, but any act unequivocally showing an intention to accept the charter is sufficient. 1 Morawetz Pr. Corp., sec. 23; *Bank v. Dandridge,* 12 Wheat., 64; Angell & Ames, *supra,* 83. It is not every slight deviation from the requirements of a special act of incorporation, in regard to acceptance or organization, which will avoid the charter and make the individual members liable as partners, although as a rule a strict compliance with the enabling act is required in the formation of corporations under general laws. It is said in 1 Beach Pri. Corp., sec. 16: "And there should seem to be a distinction between a case where the plea of *nul tiel* corporation is set up in a suit between a corporation and a stockholder or other
(447) individuals to defeat an alleged liability and the case of a suit against individuals who claim exemption from individual liability on the ground of having become a corporation under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory provisions will be required than in the former."

We were at first strongly inclined to the conclusion that a presumption had arisen of acceptance of the charter by the Sampson County Farmers' Alliance immediately upon the ratification of the act; but upon a closer examination of the act in question we find that by section 11 some unequivocal act of acceptance is required, something further than simply a continuance of the business under the then existing plan, which might well have warranted the conclusion of an acceptance but for the provision of said section 11. It was in contemplation that those already organized should signify their acceptance of the corporate powers through their chief officers and executive committee, and the failure or refusal so to do by one or more of these organizations was not to prejudice those who did accept. This leaves no room for that latitude of construction which would presume an acceptance by reason of a continuance to carry on business as it had been done before the act.

It may be considered well settled that as the acts of private persons, even of the most solemn nature, may be presumed or proved by presumptive evidence, so, as to the acts of a corporation, if they cannot be reasonably accounted for but on the supposition of other acts done to make them legally operative and binding, they are presumptive proofs of such other acts. *Middlesex v. Davis,* 3 Met., 135; *Bank v. Dandridge, supra;* 1 Waterman Corporations, p. 137. In this case, however, the reasonable inference from the failure to take any steps under the act of incorporation, and a continuance of the business precisely as before, was that this association preferred not to accept the proffered
(448) charter.

We are brought, then, to the conclusion that up to 10 April, 1891, there was no act on the part of the Farmers' Alliance of Sampson County from which we may presume an acceptance of the corporate franchises tendered by the act of 7 March, 1889.

On 10 April, 1891, this association indicated its acceptance by a resolution which, although it did not mention the act, plainly shows that its authors had the act before them when the resolution was drawn. This resolution was followed by a reorganization on 15 July, 1891, and the business was continued until 15 January, 1892, when an assignment was made for the benefit of creditors.

We are of the opinion, and so hold, that the resolution of 10 April, 1891, was an acceptance of the charter, and that the members of the corporation are not personally liable for the debts incurred by the corporation.

And we also hold that before 10 April, 1891, the business was a copartnership, a joint-stock company, which, in North Carolina, in its relation with creditors, is none other than a copartnership, and that all those persons who were members of the said association before the date last named are liable jointly and severally for the debts contracted by the said association while such persons were members thereof.

We concur with his Honor that the certificates issued to certain of the defendants under the plan of February, 1889, did not constitute them copartners with the Sampson County Alliance, for the reasons stated, and "that the plaintiff company is entitled to judgment against the defendant Clute for the total amount due upon said notes, for want of an answer."

His Honor, by consent, adopting the response of the jury to (449) the issues submitted, found the facts upon which he based his judgment, and by those facts we are bound. *Fertilizer Co. v. Reams,* 105 N. C., 283.

There was no evidence to show that either of the defendants, except R. M. Crumpler and W. E. Stevens, were members of the Sampson County Alliance between February, 1889, and July, 1891, during which time the indebtedness was contracted, and, therefore, as his Honor held, they are not liable upon such indebtedness.

His Honor also found that defendants R. M. Crumpler and W. E. Stevens were members of the Sampson County Farmers' Alliance between February, 1889, and 15 July, 1890. It will follow, as was held by him, that they are liable upon the debt contracted in May, 1889. And upon the finding that W. E. Stevens was a member of said alliance between 15 July, 1890, and 15 July, 1891, he is liable upon all indebtedness contracted by said alliance, or by its agent, Clute, in its behalf, before the acceptance of the charter on 10 April, 1891.

The notes given the plaintiff by said Clute on 1 May and 1 June, 1891, were after said acceptance, and, therefore, in behalf of the corporation, whose stockholders were not personally liable for its debts, but they were given in pursuance of the contract of 26 January, 1891, made by said Clute with the plaintiff "for the sale of guano." As the contract of sale was made with the copartnership, or, rather, with Clute as agent for his undiscovered principal, the Sampson County Farmers' Alliance, it could not be that the copartners, at the time of the contract, could rid themselves of the obligation by reason of said contract by accepting a charter of incorporation, and becoming a corporation whose members were not individually liable for its debts.

His Honor holds that the said joint stock company (referring
(450) to the organization pursuant to the resolution of 10 April, 1891), and the members thereof, either corporate or natural persons, became liable for the amount collected on account of said guano, the notes returned by the plaintiff to the said Clute, agent of said joint stock company, and mingled with its funds and applied to its use. According to the findings of fact these notes were returned by plaintiff to Clute for collection after 15 July, 1891, and he collected $1,658.58 on account thereof, and mingled with the fund and applied to the use of the said Sampson County Alliance Store, of course after the last date and consequently after the acceptance of the incorporation.

We do not concur with his Honor in his conclusion that the members became personally liable on this account for the reason that it was a debt of the corporation, incurred by a reception of the funds arising from collection of notes after the acceptance of the charter. Neither do we concur in the conclusion, if it were so intended to be, that R. M. Crumpler, having become a member of the joint stock company organized 15 January, 1891, became liable for its indebtedness. We see nothing in the findings of fact to indicate that any joint stock company was formed at the last-named date. If it were meant to be the organization under the resolution of 10 April, 1891, we have held that this was an acceptance of the charter and that for any debt contracted after that date the corporators were not personally liable.

We deem it proper to say that, as the argument was entirely upon the construction of the statute as applicable to the contentions of the parties, we have not deemed it necessary to verify the calculation upon which the amounts of the judgments are reached.

The judgments, first, against the defendant Clute for want of
(451) an answer, second, against defendants R. N. Crumpler and W. E. Stevens upon the note given in May, 1890, and against W. E. Stevens upon the notes given in May and June, 1891, are affirmed.

The judgment against R. M. Crumpler for $1,658.58, the amount collected by the defendant Clute upon the notes returned to him by plaintiff, after the acceptance of the act of incorporation, and mingled with the funds of the corporation, is reversed.

The amount which shall be collected from defendant Clute is to be credited *pro rata* upon the judgments against Crumpler and Stevens and W. E. Stevens.

The judgment by consent against defendant Herring, trustee, is affirmed, as also the judgment in favor of the other defendants.

Upon defendants' appeal the judgment is modified as herein directed.

Upon plaintiff's appeal from the judgment in favor of V. J. McArthur and the defendants other than Stevens, Crumpler and Clute, the judgment is

AFFIRMED.

Cited: R. R. v. Olive, 142 N. C., 267.

KELLAM & MOORE v. ISAAC BROWN.

Contract—Sale or Agency.

Where a contract recited that plaintiffs would sell their goods to no one in defendant's town except to defendant, and that defendant would sell no goods of that sort except those manufactured by plaintiffs, and that he would keep his assortment up to the amount of the then order of $100, and would not sell at less than the established price, and the terms of payment for the goods were prescribed: *Held*, that such contract was one of sale, and did not constitute the defendant a factor or commission merchant or agent for the sale of the goods.

ACTION tried before *Whitaker, J.,* and a jury, at December (452) Term, 1892, of DUPLIN, in which plaintiffs sought to recover the value of goods alleged to have been sold to defendant.

Plaintiffs introduced evidence tending to show that Faulkner, Kellam & Moore had delivered certain goods to defendant, Isaac Brown, under the following contract:

This agreement, made and entered into this 5 June, 1891, by and between Faulkner, Kellam & Moore, having a place of business, and now doing business, in the city of Atlanta, State of Georgia, party of the first part, and Isaac Brown, of Warsaw, county of Duplin, State of North Carolina, party of the second part, witnesseth:

1. The party of the first part hereby agrees to sell no other party in Warsaw.

2. In consideration of the party of the first part agreeing to sell no other party in said town, said party of the second part agrees not to sell any spectacles or eyeglasses except the Perfected Crystal Lenses, and other goods manufactured or sold by party of first part.

3. Party of the second part agrees to keep his assortment up to the amount of the present order.

4. Party of the second part shall not sell the Perfected Crystal Lens glasses at less than the established price.

Terms of Sale: This contract calls for a $100 assortment. Terms, one-fifth payable 1 August, 1891; one-fifth payable 1 September, 1891; one-fifth payable 1 October, 1891; one-fifth payable 1 November, 1891; and balance payable 1 December, 1891. Send optimetric free of charge. All future invoices sixty days.

It is fully understood and agreed that this contract between said parties is fully and entirely expressed hereby, and that there is no parol or verbal agreement or understanding of any kind whereby the terms hereof can be changed, modified, or explained in any manner whatever.

In testimony whereof, the said parties have hereunto set their (453) hands and seals, the day and year first above written.

FAULKNER, KELLAM & MOORE.

Witness: ISAAC BROWN.

Please send copy of this with goods.

And that after giving to said defendant all credits to which he was entitled there was a balance due by him for said goods amounting to $86.77, and that prior to the beginning of this action the said claim of $86.77, due by defendant for the goods, had been duly assigned and transferred by Faulkner, Kellam & Moore to the plaintiffs. The defendant admitted the execution by him of the contract with Faulkner, Kellam & Moore, and that he had received of them under said contract the goods as stated in the contract and as claimed by the plaintiffs, and that the balance due by him, if anything, was $86.77, but he further testified that prior to the beginning of this action he shipped by express to Kellam & Moore these goods, amounting at the contract price to $86.77, and that the said goods have never been returned to him by the plaintiffs or the express company; that he wrote to Kellam & Moore, asking their permission to return the goods, but that he had never received their permission to do so.

His Honor instructed the jury that the defendant having admitted the execution by him of the contract sued upon and the delivery to him thereunder of the goods, amounting, after deducting all credits, to

$86.77, as claimed by plaintiffs, and the defendant having further admitted that he was never at any time authorized by Faulkner, Kellam & Moore, or by the plaintiffs, to return the goods, if they, the jury, were satisfied by the preponderance of the evidence that prior to the beginning of this action all interest of Faulkner, Kellam & (454) Moore in the contract of 5 June, 1891, and amount due thereunder, had been duly transferred and assigned to plaintiffs, they would find the issues submitted to them in favor of the plaintiffs, unless they should further find that the balance of said goods, amounting to $86.77, had been returned to plaintiffs or their assignees, Faulkner, Kellam & Moore, and had been received by them; that the plaintiffs could not keep the goods and also recover the amount due for them, and if they should find that said goods had been returned and received as just stated, they would find in favor of the defendant. To that part of his Honor's charge which instructed the jury that if they were satisfied by preponderance of evidence that prior to the beginning of this action all interest of Faulkner, Kellam & Moore in said contract of 5 June, 1891, and amount due thereunder had been duly assigned to plaintiffs, they would find the issues submitted to them in favor of plaintiffs, the defendant then and there excepted. The defendant tendered no requests for instruction to jury. There was a verdict for plaintiffs. The defendant moved for a new trial because of error in his Honor's charge as hereinbefore stated, because his Honor ought to have instructed the jury that said contract of 5 June, 1891, was not a contract of sale; that thereunder said defendant did not become a purchaser, but only a factor or commission merchant, with power to return all goods not sold by him, and because his Honor ought to have instructed the jury that said contract of 5 June, 1891, was void.

From the refusal of motion for new trial and judgment for plaintiffs, defendant appealed.

H. R. Kornegay for plaintiffs.
No counsel contra.

MACRAE, J. We have been favored with neither argument (455) nor brief by defendant's counsel. On examination of the record we find certain objections to depositions, and to some of the questions and answers therein, and exceptions noted to his Honor's rulings, but they are not stated in the case on appeal, and we must presume that they are not now insisted on.

The defendant excepts to the instructions given by his Honor as to assignment of the claim sued upon to plaintiffs. Without any suggestion as to the error in this instruction, we have been unable to discover it.

The agreement between the parties is not such as is contended by defendant in that it would constitute the defendant a factor or commission merchant, the agent of the plaintiff for the sale of the goods mentioned, but clearly contemplates a sale. We concur in the views of his Honor as expressed in his instructions to the jury. There is

NO ERROR.

ROBERT FALKNER v. H. H. THOMPSON.

Practice—Case on Appeal—Omission and Unintelligible Statement of Facts.

1. Where, in the case on appeal, there is not a sufficient recital of the evidence or of the facts admitted or proven to point the exceptions or to enable the Court to ascertain what errors of law are complained of, this Court will affirm the judgment below.

2. Where the report of a referee, which was set aside below and a jury trial had, is sent up unnecessarily with the transcript, and no intelligible case on appeal is filed, this Court cannot know that the evidence reported by the referee is identically the same as was produced on the trial before the jury, or that the judge's rulings were on the same state of facts; and, could it do so, this Court will not wade through the entire evidence to ascertain what the case on appeal should clearly state.

(456) APPEAL from *Winston, J.,* at November Term, 1891, of ORANGE. The action was tried by a referee. On the coming in of his report the defendant demanded a jury trial, which was granted. The jury returned a verdict for plaintiff. Judgment accordingly. Appeal by defendant.

C. D. Turner for defendant.
No counsel contra.

CLARK, J. The case on appeal is made out by appellant, no countercase, as far as the record shows, having been filed. Three exceptions appear therein, but there is not a sufficient recital of the evidence, or of the facts admitted or proven, to point the exceptions or to enable the Court to declare, otherwise than by way of surmise, what errors of law are alleged to have been committed below. In such case the Court will affirm the judgment below. *Williams v. Whiting,* 92 N. C., 683. Indeed, taking only the facts recited in the case on appeal, the case is unintelligible.

It is possible that the appellant may have conceived that we could take the facts from the evidence before the referee and his findings thereon, as these have been (unnecessarily) sent up in the transcript. But the referee's report was set aside at the appellant's instance. There is nothing to indicate that identically the same evidence was produced on the trial before the jury, nor that the judge's rulings were upon the same state of facts. But were it so, the Court would not wade through the entire evidence to ascertain the particular facts in reference to which the ruling objected to was made. *Wiley v. Logan,* 95 N. C., 358.

NO ERROR.

Cited: S. v. Wilson, 121 N. C., 658.

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(457)

JOSIAH TURNER v. S. McD. TATE.

Motion to Reinstate—Failure to Print Record for Want of Money.

Where an appeal, not filed by appellant as a pauper, was dismissed for failure to print the case on appeal as required by Rules 28 and 29 of this Court, it will not be reinstated on an affidavit and motion of the appellant on the ground that before he could raise the money to print the record the case was reached and dismissed.

MOTION by Josiah Turner against S. McD. Tate for a penalty for failure to appear when summoned as a witness in Orange Superior Court. From the order of the court below setting aside a judgment absolute against the defendant, the plaintiff appealed. The appeal was dismissed on motion of defendant, for failure to print the record. Thereupon plaintiff moved to reinstate the case, alleging that his failure to print was caused by his want of and inability to borrow the necessary money, adding that the illustrious *Badger, J.,* was fond of saying: "While Solomon was wise and Samson was strong, neither nor both united could pay their debts when they had no money."

John W. Graham for defendant.
No counsel contra.

CLARK, J. The appeal was dismissed for failure to print the case on appeal as required by Rules 28 and 29 of this Court. The plaintiff files a motion to reinstate upon the ground that before he could get up the money to have the record printed the case had been reached and dis-

missed. In *Rencher v. Anderson,* 93 N. C., 105, it was held that when the appellant does not appeal as a pauper the rule requiring the record to be printed will not be relaxed because the appellant files an (458) affidavit that he is unable to raise the money necessary to print.

It has since been repeatedly pointed out by the Court that this rule was a necessity to the Court and was beneficial to suitors—aiding in the better and more prompt consideration of causes, and that the Court would not permit the failure of an appellant to observe it to procure for him by reason of his own neglect six months delay with the consequent vexation and increased expense to the appellee. *Stephens v. Koonce,* 106 N. C., 255; *Edwards v. Henderson,* 109 N. C., 83. The appellant did not appeal as a pauper. He shows no sufficient reason for noncompliance with the rule. He should have had his printing done earlier and not have postponed doing so to so late a day. It is to be presumed that if either Solomon or Samson (cited by petitioner) had gone to law, he would have provided beforehand for the costs.

MOTION DENIED.

Cited: Dunn v. Underwood, 116 N. C., 525.

W. G. LEDUC, RECEIVER OF PEOPLES NATIONAL BANK OF FAYETTEVILLE, v. DANIEL BUTLER.

Statute of Limitations—Relation of Payee Endorser to Maker of Note—Part Payment by Payee Endorser, Effect of.

Part payment of a note by the payee who has endorsed it will not repel the bar of the statute of limitations as against the maker, the statute (The Code, sec. 171) confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note.

APPEAL from *Whitaker, J.,* at January Term, 1893, of CUMBERLAND.

The plaintiff sued on a note, with payments endorsed. The names of H. B. Butler and Daniel Butler are signed on the face of the note, and it was payable to the order of E. F. Moore, and was due 17 Janu- (459) ary, 1888, and Moore endorsed it to the bank.

The suit was commenced 8 July, 1891. Daniel Butler, one of the alleged makers, denied signing the note, and pleaded the statute of limitations. The other defendant filed no answer. Moore, endorser, made payments to the endorsee bank, but no payment was made by either of the makers. Defendant appealed from the judgment rendered.

R. P. Buxton for plaintiff.
N. W. Ray for defendant.

MACRAE, J. The question is, Does payment by Moore, the original payee, to the bank, endorsee, repel the bar of the statute as to the makers of the note?

Before the act of 1827 (The Code, sec. 50) the liability of an endorser of a note was the same as that of the drawer of a bill. Presentment and notice of default were necessary to bind him. By force of the act above referred to, unless it was otherwise plainly expressed therein, the endorser became liable as surety to any holder. Soon after its passage a judicial construction became necessary of the words "liable as surety," and it was declared in *Williams v. Irwin,* 20 N. C., 70, that the effect of the act was to dispense with demand upon the maker and notice to the endorser before action against him; and it was said: "It is not necessary to give to those words, *liability as surety,* the meaning that the endorser should be liable as if he had signed a note as a maker with the principal, or sealed and delivered a bond in like manner." The reasons for this construction are fully set forth by *Ruffin, C. J.* This decision was followed in *Ingersoll v. Long,* 20 N. C., 436, in which *Gaston, J.,* says: "The object of the statute in declaring the endorser liable as surety was not to bind him as though he had signed the note with the maker as surety, nor to make him liable to the endorsee (460) if the endorsement were made without consideration, nor to deprive him of the protection which the acts of limitation had extended to endorsers, but simply to change the engagement which the law theretofore implied from an endorsement, not expressed to be without recourse, into an engagement to pay the note to the holder at all events, if the maker did not pay it."

And again, in *Topping v. Blount,* 33 N. C., 62: "The sole purpose of that act was to turn the implied conditional contract between the endorser and holder into an unconditional one; and it was not intended to charge the endorser as if he had executed the bond as co-obligor, or upon an endorsement without consideration, or to deprive him of the benefit of the statute of limitations by exposing him to stale demands kept alive perhaps by collusion between the obligor and holder."

In *Nichols v. Pool,* 47 N. C., 23: "It was insisted that as, by the act of 1827, an endorser is made liable as surety, when he makes the payment the note is extinguished, and he must sue in *assumpsit* for money paid. The statute provides that an endorser shall be liable as surety to the holder of the note, and no demand on the maker shall be necessary previous to an action against the endorser. The object of the statute was to dispense with the necessity of a demand and notice in order to

enable the holder to recover from an endorser, but it does not at all affect the relation of the endorser to the maker; as between themselves their rights remain as they were before the passage of the act."

And it was said in *Johnson v. Hooker,* 47 N. C., 29: "The act of 1827 makes an endorser liable to the holder of a note as surety. The effect is to put him on the footing of a maker of the note, and to make his liability to the holder the same as if his name was on the (461) face of the note instead of being on the back."

A clear distinction is marked in all of these cases, except possibly the last, between the surety and the endorser in their relation to each other. While to the holder their liability was the same, as to each other they were essentially different. If the endorser should pay the note he might still erase the endorsement and sue the surety and maker or the joint-makers upon the note. If, however, the surety should pay the note, he could not call upon the endorser as a co-surety for contribution, but his payment operated as a discharge of the endorser from all liability, although by force of the statute he was liable as surety.

In *Green v. Greensboro College,* 83 N. C., 449, it was held "that payment of interest by the principal upon a note, before it was barred by lapse of time, arrests the operation of the statute of limitation as to all the makers, sureties as well as principal." In that case the sureties were makers of the note as well as the principal; there was no endorser. "The rule is based upon a community of interest in the makers; payment by one was a payment as to all; part payment by one was an acknowledgment of nonpayment of the balance and bound all, as the part payment inured to the benefit of all." 2 Greenleaf Ev., sec. 444; *Woodhouse v. Simmons,* 73 N. C., 30. But, as we have seen, the relation of the surety, who was also one of the makers, and the endorser to each other put them in different classes.

Joint acceptors of a bill constitute a class; drawers another; but there is not such a community of interest between them as that a payment by an acceptor would bind a drawer. The statute confines the act, admission or acknowledgment, as evidence to repel the statute, to the associated partners, obligors and makers of a note. *Wood v. Barber,* 90 N. C., 76.

In *Goodman v. Litaker,* 84 N. C., 8, and *Torrence v. Alexander,* (462) 85 N. C., 143, there were no endorsers. The sureties whose names appeared upon the bond simply as joint-makers desired the benefit of the statute of limitations; and it was held that they must not only prove that they were sureties, but that this fact was known to the obligee or payee.

We conclude that the endorser was not of the same class as the surety, who was a joint-maker with the principal, as between themselves, be-

cause there was not a community of interest between them; and that a payment by the endorser would not repel the bar of the statute as to the makers.

Indeed, the question as to the relation between Moore and Daniel Butler as sureties would not arise, because Daniel Butler's suretyship was not made known to the payee.

The case of *Moore v. Goodwin,* 109 N. C., 218, simply holds that payment made by a principal upon a bond before the cause of action thereon is barred as to the sureties arrests the operation of the statute. There were in that case no endorsers, and the use of the word "endorsers" in connection with sureties, in the opinion, was unnecessary, and could not be an authority for the position that there is a community of interest between the sureties and endorsers by virtue of section 50 of The Code.

The decisions of the Court in this State are not in accord with those of many other States upon the effect of payment or acknowledgment by one co-obligor, joint-maker or surety upon the others. While we have no disposition to unsettle the law as firmly established in North Carolina, we do not wish to widen the breach and extend the power of one party to a note to bind another by payments in respect to the statute of limitations. We think there is

ERROR.

Cited: Harper v. Edwards, 115 N. C., 248; *Moore v. Carr,* 123 N. C., 427; *Garrett v. Reeves,* 125 N. C., 531, 534, 540; *Houser v. Fayssoux,* 168 N. C., 4; *Edwards v. Ins. Co.,* 173 N. C., 617; *Barber v. Absher Co.,* 175 N. C., 605.

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(463)

JOSIAH HAMILTON ET AL. v. JOHN A. BUCHANAN ET AL.

Issues—Parol Trust—Statute of Frauds—Evidence—Statute of Limitations.

1. Where an issue submitted by the court is in entire conformity with the answer and broad enough to comprehend an alleged parol trust set up by the answer as having been made with the defendant or with another in his behalf, and is substantially the same as the issue tendered by defendant, it is not error to refuse to submit the latter.

2. A parol agreement by a purchaser of land, made after the purchase, to hold the land in trust for another, and to convey it to him upon the payment by him of the amount bid, is void under the statute of frauds.

3. In order to establish a parol trust in the purchaser of land for the benefit of another, the proof must not only be strong and convincing, but must also disclose an agreement amounting to a trust existing at the time of the sale.

4. Where a brother of an execution debtor, who was alleged to be insane at the time of the sale, purchased the insane brother's land, and there is no evidence that the purchaser occupied a position of trust to his brother, or took any advantage of his infirmity: *Held*, that no trust grew out of the relationship of the parties, such relationship not being, in itself, a confidential relation to which the equitable doctrine of constructive trust applies.

5. Where defendants in ejectment, alleging as a defense a parol trust by the plaintiff for the benefit of their ancestor, under whom they claim, plead the statute of limitations, but fail to establish the trust or to show any other title, the defendants and their ancestor, under whom they claim, and for whose benefit the alleged trust was made, must be regarded as tenants at sufferance, whose possession cannot be deemed to have been adverse to the purchaser at the execution sale, or to those who claim under him.

ACTION for the recovery of land, tried before *Boykin, J.*, and a jury, at Spring Term, 1892, of ANSON.

This action was originally begun 26 October, 1881, by Wil-
(464) liam E. Horne against Burrell Horne and John A. Buchanan.

William E. died, and his executors, devisees and heirs at law were made parties plaintiff. Burrell also died, and his heirs at law were made parties defendant. The executor of William then died and his personal representative was made a party plaintiff, and under an alleged power contained in the will of W. E. Horne, sold the land in controversy to Josiah Hamilton and others, who were, by order of the court, substituted as plaintiffs in this action.

The plaintiffs claim the land under William E. Horne, who purchased the same at sale under execution against Burrell Horne in 1841—the sheriff's deed being dated January, 1843.

Defendants aver that William E. Horne agreed, before or at the sale, to let his brother have the land or the benefit of it whenever the amount bid by him should be repaid; that he also agreed with Burrell after the sale to the same effect, and also made the same agreement with the father of Burrell for and on behalf of the latter, and that the amount bid by William has been repaid. They also plead the statute of limitations against the present plaintiffs.

A jury being duly impaneled, the defendants tendered and insisted upon the following issues:

1. Did William E. Horne agree by parol, before he bid off the land in controversy at sheriff's sale, that he would take title to said land

and hold the same for Burrell Horne, and that Burrell Horne should have the land or the benefit of the land whenever the bid of William E. Horne on said land was paid?

2. Did William E. Horne agree, after he bid off the land at sheriff's sale, that Burrell Horne should have the land as soon as or whenever he paid back to William E. Horne, or was paid back for him, the amount bid by W. E. Horne for said land? (465)

3. Was it agreed by W. E. Horne and his father, for and in behalf of Burrell Horne, that he, Burrell Horne, should have the land as soon as W. E. Horne was paid back whatever he bid and paid for the land?

4. Was there an agreement between W. E. Horne and Burrell Horne before W. E. Horne bid off the land, and after he bid off the land, and was it part of the purchase of said W. E. Horne that Burrell Horne was to have the land when he, or any one for him, paid the amount bid by W. E. Horne for said land?

5. Was there an agreement between W. E. Horne and his father, acting for Burrell Horne, before and after W. E. Horne bid off the land, that Burrell Horne was to have the land back from W. E. Horne as soon as the land was paid for by Burrell Horne, or by some one acting for him or in his behalf?

6. Has the amount paid for said land, the subject of this action, by W. E. Horne as and for the price of said land, and as and for his bid therefor at said sale, been paid to W. E. Horne, and was it paid to him before this action was commenced for Burrell Horne, or some one acting for Burrell Horne?

7. Was any part of the money paid by W. E. Horne for said land paid back to him, before the suit was begun, by Burrell Horne or some one for him or in his behalf?

8. Does any part of the money paid by W. E. Horne for said land remain unpaid; was W. E. Horne the owner of said land; are the plaintiffs the owners of any part of said land; was the money paid by W. E. Horne for the land paid in full, and W. E. Horne accepted it as such in full payment for the land?

The court refused the foregoing issues tendered by the defend- (466) ants and settled the following as the proper issues:

1. Did William E. Horne purchase the land described in the complaint in trust for Burrell Horne, upon the agreement that on the repayment to William E. Horne by Burrell Horne of the amount of the bid said land should be reconveyed by said William E. Horne to said Burrell Horne?

2. If so, has the said Burrell Horne heretofore paid, or caused to be paid, to said William E. Horne the amount of the said bid?

3. Is the defendant's equitable defense barred by the lapse of time?

4. Is the plaintiff's cause of action barred by the lapse of time?

5. What is the annual rental value of the land described in the complaint?

The defendants excepted to the refusal of the court to adopt their issues tendered and to the issues as framed and settled by the court.

Plaintiffs introduced (1) deed from Joseph White, sheriff of Anson County, to William E. Horne, dated 12 January, 1880, conveying the land in controversy; (2) will of William E. Horne, dated 3 October, 1879, and probated 30 June, 1882; (3) deed from C. N. Simpson, administrator *d. b. n., c. t. a.,* to M. L. Horne and others (plaintiffs), dated 24 February, 1891.

Defendants objected to the introduction of the will on the ground that the land is not described therein, and to the introduction of the deed of Simpson, administrator, etc., on the ground that the same is made to parties not named in the original summons, and because they had no title until it was given in February, 1891, and because the order made at Spring Term, 1891 (substituting the grantees in said deed as plaintiffs), was made contrary to law. Both objections were over-
(467) ruled, and defendants excepted.

It was admitted that William E. Horne was the owner of *locus in quo* when the will was made, if there were no trust relations between him and Burrell Horne.

J. J. Billingsley, for defendants, testified: "In the early part of 1880 had conversation with William E. Horne, about the time Burrell Horne and John A. Buchanan went into the house on the land. He seemed to think it was all right as to Burrell's being there, but not as to Buchanan. Said he came to Wadesboro one day, and after he arrived in town learned that Burrell's land was to be sold by the sheriff. He bid it off and paid the money for it, and took deed for it that same evening. He went home, passed his father's house, took out the deed and said to his father, 'Here, father, you take the deed and pay me back my money, and you do what you please with Burrell's land.' Said he did not want anything to do with it. Said that his father remarked that if he took the deed, paid the money, and gave the deed to Burrell it would be sold again. That his father told him to keep the deed and he would pay him back. W. E. Horne said he had been paid. Old man said he wanted his son Burrell to have a home. W. E. Horne said Burrell had gone crazy and run off, and that he rented the land to get pay on other accounts due him by Burrell. Said Burrell had sold Joel

Gaddy some of the land. That Gaddy came to him to sign the deed. That he told Gaddy it was Burrell's land. Heard W. E. Horne and George W. Little talking about the repair of division fence between Little and *locus in quo*. Horne told Little not to cut any oak for the purpose, as his brother Burrell might come back and want wood. Burrell Horne was insane many years of his life. Don't know how long. He wandered about a great deal. Not competent while in this State to attend to business." (468)

Cross-examined: Witness said William E. Horne had charge of the land a good many years, and rented it to one Tillman. Had it while witness lived at G. W. Little's, and he lived at Little's from 1870 to 1876. W. E. Horne was a man of large estate.

Dilsey Horne testified that she "belonged to Burrell Horne a while, and afterwards to W. E. Horne. Burrell Horne gave me to W. E. Horne to pay for some land. Don't know when it was now, nor for what land."

Cross-examined: Don't know how old I am. Don't know how long I lived with W. E. Horne. Belonged to Ephraim Horne, father of W. E. Horne and Burrell Horne, before I belonged to them. Burrell was mightily in debt. Sheriff was after what he had when he turned me over to W. E. Horne."

J. C. McLaughlin testified: "Knew Burrell Horne since 1865. Since that time he was insane until he died, in 1884. Character of J. J. Billingsley good."

Defendants also introduced deed from Burrell and W. E. Horne to Joel Gaddy, dated 27 January, 1846, conveying five acres alleged to be a part of the land purchased by William at the sheriff's sale.

In reply, plaintiffs introduced a mortgage deed from Burrell Horne to W. E. Horne, dated 13 May, 1843, conveying the crops to be grown on the land on which Burrell lived to secure a loan of $250 from William E.

There was evidence that the land mentioned in this deed is *locus in quo*.

Defendant objected to this deed because it only conveyed personal property, and because there was no allegation in the pleadings that made it competent.

Objection overruled, and exception by defendants.

W. L. White proved handwriting of Sheriff Joseph White, and (469) two receipts of Sheriff White were introduced, reading as follows:

"Received of William Horne one hundred and seventy-four dollars and fifteen cents in part of the purchase of Burrell Horne's land, and

in full of the balance of a *fi. fa.* in my hands, H. B. Hammond *v.* said B. Horne, and a judgment in favor of John B. Cottrell. This 10 March, 1841. J. WHITE, *Sheriff.*"

Above is the date of the sale of the land.

"$73.77.

"Received of William Horne seventy-three dollars and seventy-seven cents, in part payment for the sale of Burrell Horne's land, sold at March court last. 30 May, 1841. J. WHITE, *Sheriff.*"

He further testified that Dilsey Horne, an old negro woman, is very ignorant and feeble-minded, but her character is good.

F. A. Clarke proved handwriting of Y. H. Allen, and receipt was introduced by him as follows:

"Received of J. White, sheriff, fifty-two dollars sixty cents, paid to me by said White for William Horne on account Burrell Horne's land. Sold this court, 14 March, 1841. Y. H. ALLEN."

J. D. Horne testified that the father of W. E. and Burrell Horne died in 1842.

Bill of sale from Burrell Horne to W. E. Horne for Dilsey Horne, the witness, was introduced, dated 3 January, 1843.

To this defendant excepted.

The court directed the jury to answer the first and fourth issues (470) "No," and instructed the jury to assess the damages for plaintiffs.

To the instruction of the court to answer the first issue in the negative the defendants excepted. After verdict and judgment for the plaintiffs, the defendant appealed.

J. A. Lockhart for plaintiffs.

E. C. Smith for defendants.

SHEPHERD, C. J. The plaintiffs claim the land in controversy under William E. Horne, who acquired the legal title by virtue of his purchase at a sale under execution against Burrell Horne in March, 1841, the sheriff having executed a deed on 21 January, 1843. The defendants, who are the heirs at law of the said Burrell Horne, allege that the said William E. Horne purchased the land in trust for their ancestor, and that the terms of the trust having been complied with, they are the equitable owners of and entitled to remain in possession of the same.

We think there was no error in the rejection of the issues tendered by defendants, and that in no view of the case could they have been prejudiced by those submitted by the court. The issue involving the

existence of the trust is in entire conformity with the answer and sufficiently broad to comprehend an agreement made either directly with Burrell Horne or with his father acting in his behalf. As to any parol agreement, made after the sale, to convey to Burrell Horne, it is clear that it would be void under the statute of frauds, and the issue tending to establish the same was immaterial and properly refused. Even had there been error in respect to the issues, it would be no ground for a new trial, as we are of the opinion that his Honor was correct in holding that there was no sufficient evidence to establish the alleged trust.
In order to establish a parol trust, in a case like the present, the (471) proof must not only be strong and convincing (*McNair v. Pope,* 100 N. C., 404), but it must also disclose an agreement amounting to a trust existing at the time of the sale.

Without entering into a discussion of the testimony, we will state our conclusion that we can find nothing which brings the case within the foregoing principle. There is an entire absence of direct testimony tending to show any agreement whatever with Burrell before the sale, and the conversation with the father of Burrell after the sale very clearly fails to disclose the existence of any such agreement made with him in behalf of his said son. The manner in which the parties dealt with the land, taking the most favorable view for the defendants, is not inconsistent with an agreement made subsequently to the sale and similar in terms to that offered to the father, which was that he, the father, should take the sheriff's deed and pay the said William his money.

In view of this defect in their case, the counsel for the defendants advanced the position that the land having been purchased by William, the brother of Burrell, and the latter being insane, a trust grew out of the relationship of the parties. *Huguenin v. Basely,* cited by counsel (2 White & Tudor L. C. Eq., 1156), does not sustain the contention, as there is no evidence of any dealing between the brothers in reference to the sale of the land by the sheriff, and there is no suggestion of fraud or undue influence, even had it been shown that there was any such dealing. The relationship existing between brothers is not in itself a confidential relation to which the equitable doctrine of constructive trusts is applicable, and in the absence of circumstances tending to show that William actually occupied a position of trust to his brother or took a fraudulent advantage of his infirmity, we can see no reason why he should not be permitted to purchase his land at an execu- (472) tion sale as well as any other person. It may also be noted that there is no testimony showing that Burrell was insane at the time of the sale in 1841, the only positive testimony upon the subject being that he was insane after 1865.

As to the statute of limitations, it is sufficient to say that, having failed to establish the alleged trust or to show any other title, the defendants and their ancestor must be deemed to have occupied the land as tenants at sufferance, in which case their possession is not considered as adverse to William E. Horne, the purchaser at the execution sale, or those who claim under him. *Hardy v. Simpson,* 44 N. C., 325; *Spencer v. Weatherly,* 46 N. C., 327.

We have carefully considered all of the other exceptions of the defendants and are of the opinion that they cannot be sustained.

NO ERROR.

Cited: Faison v. Hardy, 114 N. C., 60; *Cobb v. Edwards,* 117 N. C., 250; *Avery v. Stewart,* 136 N. C., 431; *Taylor v. Wahab,* 154 N. C., 223.

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(473)

L. D. LOWE ET AL. v. JAMES HARRIS.

Contract Relating to Land—Statute of Frauds—Uncertain or Vague Description—Retroactive Legislation—Parol Evidence.

1. Where, in an action to recover the possession of land, defendant claimed the same upon an alleged contract embraced in a writing as follows: "Wilkesboro, N. C., 19 April, 1880.—James Harris has paid me $20 on his land; owes me six more on it": *Held,* that the receipt, as a contract to convey land, is void for uncertainty and ineffectual to pass any interest whatever in the land to the defendant, and it was improper to admit parol testimony at the trial for the purpose of explaining what land was referred to therein.

2. While the Legislature has power to modify or repeal the whole of the statute of frauds, in so far as it relates to future contracts for the sale of land, it has no authority to give the repealing statute a retroactive operation so as to affect or destroy rights already vested.

3. An act of the Legislature changing the rules of evidence cannot be construed as operating retrospectively so as to affect existing rights.

4. The power of the Legislature to enact *remedial* statutes giving effect to contracts relating to land extends only to those cases where those claiming under them had, previous to the enactment, an equitable right, and not to cases where the policy of the law, or the express provision of a statute, prevented the transmission of any interest whatever by the agreement or instrument relied on.

5. There is a general presumption against the retroactive operation of statutes where it would impair vested rights; therefore, Laws 1891, ch. 465, pro-

viding that "in all actions for the possession of or title to any real estate, parol testimony may be introduced to identify the land sued for and fit it to the description contained in the paper-writing offered as evidence of title or right of possession," cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of such act of the Legislature. (SHEPHERD, C. J., concurs, but further holds that the act has not the effect of changing the existing law in reference to contracts or deeds relating to land, the word "description" as used in the act meaning a "description" which has a legal susceptibility of being aided by testimony so as to identify the land, and not a "description" which, in law, is no description whatever.)

BURWELL, J., dissents *arguendo*, in which CLARK, J., concurs.

ACTION to recover land, tried at Fall Term, 1892, of WILKES. (478) The jury having found that the land referred to in the paper-writing was the identical land described in the complaint, there was a judgment for the defendant, and plaintiffs appealed.

L. D. Lowe for plaintiffs.
W. W. Barber for defendant.

AVERY, J. The extreme limit of liberality in sanctioning the admission of parol proof to explain ambiguous descriptions in deeds and contracts for the sale and conveyance of land was attained in *Carson v. Ray,* 52 N. C., 609, where the premises were described as "my house and lot in the town of Jefferson," and the plaintiff was permitted to show that the grantor had but one house and lot within the boundaries of that place. In discussing that case and distinguishing it from *Murdock v. Anderson,* 57 N. C., 77, *Battle, J.,* delivering the opinion of the Court, took the ground that in connection with the designation of the town in which the lot was located, given in the deed passed upon in both of them (in the one case Hillsboro and in the other Jefferson), the description had been made more definite by use of the personal pronoun "my," so as to open the way for proof that the grantor had but one lot in that village, which he meant to refer to as the place of his residence.

The contract under consideration is in the following words: "Wilkesboro, N. C., 19 April, 1880.—James Harris has paid me twenty dollars on his land; owes me six more on it."

As the location of the land is not fixed directly or inferentially within the State of North Carolina, or within the United States, the receipt is still more vague than either of the instruments dis- (479) cussed by *Battle, J.,* and it may be assumed that no one will venture to maintain that it was not void for uncertainty before the passage of the act 1891. Indeed, the case of *Fortescue v. Crawford,* 105 N. C.,

29, is authority for holding that no right, title or interest in any land passed to the defendant upon its signature or delivery to him, since the receipt relied on by the defendant was almost identical with that under consideration.

The policy of the law in existence before that statute was enacted was to remove as far as possible the temptation to perjury by permitting parol proof to be used in aid of a defective description only where it pointed by its terms to some extrinsic evidence for explanation of its ambiguous meaning. *Allen v. Chambers,* 39 N. C., 125; *Massey v. Belisle,* 24 N. C., 170; *Leigh v. Crump,* 36 N. C., 299. The principle stated is fully conceded in *Perry v. Scott, supra,* where, though the distinction drawn by *Battle, J.,* between cases where the personal pronoun constitutes or does not form a part of the description is disapproved, the necessity for indicating the locality by some means is clearly recognized. The receipt being utterly ineffectual to transfer any interest whatever to the defendant in 1880, when it was delivered to him, both the legal and equitable estate in the land remained vested in Mrs. A. P. Calloway for life, with remainder in fee in her children.

The Legislature unquestionably had and has the power to modify or repeal the whole of the statute of frauds, in so far as it applies to future contracts for the sale of land; but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule that no law will be allowed to so operate as to disturb or destroy rights already vested. Did the Legislature intend that Laws 1891, ch. 465, should be construed to operate retrospectively, and
(480) if so, is the law in so far as it relates to preëxisting rights unconstitutional?

No law which divests property out of one person and vests it in another for his own private purposes, without the consent of the owner, has ever been held a constitutional exercise of legislative power in any State of the Union. Cooley Const. Lim., star p. 165; *Wilkinson v. Ward,* 2 Peters, 658; *Satterlee v. Matthewson, ib.,* 380; *Hoke v. Henderson,* 15 N. C., 1; *Walter v. Stetson,* 2 Mass., 148; *Colder v. Bull,* 3 Dallas, 394; *Bosh v. Klack,* 7 Johns., 507; Const. U. S., Art. I, sec. 10; Const. of N. C., Art. I, sec. 17; *Butler v. Penn,* 4 How., 416; *Fletcher v. Peck,* 6 Cranch, 137; *Stanmire v. Taylor,* 48 N. C., 207; *ib.,* 214; *King v. Comrs.,* 65 N. C., 603; *Wesson v. Johnson,* 66 N. C., 189; 1 Kent Com., 455; *Stanmire v. Powell,* 35 N. C., 312.

Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and when giving it a retrospective effect may lead to that result it is allowed to operate prospectively only. *Moore v. Phillips,* 7 M. & W., 536; *Cranch v. Jeffries,* 4 Bur., 2462. The radical difference between the rules of con-

struction prevailing in the two countries grows out of the fact that the courts in England are forced to concede the supreme and unlimited power of Parliament, while in the United States, legislatures are bound to observe and the courts to enforce the restrictions imposed upon all the coördinate branches of the government by the Federal and State constitutions. Philosophical writers upon law generally in all countries, however, deny the power of the Legislature to pass statutes that impair a right acquired under the law in force at the time of its enactment, and insist that the right to repeal existing laws does not carry with it the power to take away property, the title to which vested under and is protected by them. But the Legislature of North Carolina is (481) restrained by Article I, section 10, of the Constitution of the United States, and Article I, section 17 of the Constitution of North Carolina, not only from passing any law that will divest title to land out of one person and vest it in another (except where it is taken for public purposes after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Robinson v. Barfield,* 6 N. C., 391; *Butler v. Penn, supra; R. R. v. Nesbit,* 10 Howard, 395; *Fletcher v. Peck, supra; Terrell v. Taylor,* 9 Cranch, 43; *Call v. Woodard,* 4 Wheat., 519.

The first case in which the constitutional inhibition against the passage of a law impairing the obligation of a contract came before the Supreme Court of the United States for construction was *Fletcher v. Peck, supra.* The Legislature of the State of Georgia had, by an act passed in 1795, granted land to Grinn and others, and the defendant Peck was a purchaser for a valuable consideration, holding through several *mesne* conveyances under the patentees named in the act. In 1796 the same body enacted a statute repealing the act of 1795 and declaring it and all grants issued under its provisions null and void, on the ground that its passage was procured by undue influence and corruption. The Court held that the act of 1796 could not be construed to divest the title out of the defendant Peck and invest it in the State, and rested its rulings not only upon the clause of the Constitution mentioned, but also upon more general principles arising out of the organic law of all of the States. The Court said upon this subject: "To the Legislature all legislative power is granted, but the question whether the act of 1796, transferring the property of an individual to the public, be in the nature of a legislative power, is well worthy of serious re- (482) flection." This was the earliest intimation that if the prohibition had been omitted in the Federal Constitution the Legislature of the State would have had no power to revoke its own grant, without the consent of innocent persons holding under it. It has since been held

in the appellate courts of the States generally that a law which provides for the transfer of the interest of an individual in land to another person or to the State, except for public purposes and upon just compensation, is void because it is in conflict with the provisions of the organic law, that the three coördinate branches of the government should be kept forever separate and distinct, and that no person should be deprived of his property but by the law of the land. *Stanmire v. Taylor, Hoke v. Henderson, King v. Comrs.,* and *Wesson v. Johnson, supra.* It is true that the Legislature may alter the remedy if its efficacy is not impaired, or take it away if one that is not calculated to diminish the value of the debt be provided in place of it. *Long v. Walker,* 105 N. C., 90, and the authorities there cited. The rules of evidence may be changed by legislative enactment too; but if by giving a retrospective operation to a statute passed for that purpose it would divest any right of property that had already accrued, it should be construed to operate prospectively only, if at all. Sedgwick on Statute and Constitutional Law, page 195.

Kent (1 Com., 455) says: "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void."

After the legacy had been bequeathed to a married woman and when under the law then in force the husband had a right to it, subject to certain contingencies, the Legislature of New York passed an act declaring that the real and personal property of any female then
(483) married should be her sole and separate property. The appellate court said: "The application of this statute to this case would be a violation of the Constitution of this State, which declares that no person shall be deprived of life, liberty or property without due process of law." *Wisterfell v. Gregg,* 12 N. Y., 202. While acknowledging the right of the law-making power to pass remedial laws and especially statutes of limitation operating prospectively, the Supreme Court of Pennsylvania said, "It would be contrary to the spirit of legislation in Pennsylvania, from the date of its charter to the statute in question, to deprive a man of his land instantaneously under the pretense of limiting the period within which he should bring his action." *Eaken v. Raub,* 12 Serg. & R., 340.

In *Greenough v. Greenough,* 11 Pa. St., 494, *Gibson, C. J.,* discussed a statute which changed the rules of evidence by providing that every last will and testament, made and not finally adjudicated prior to the passage of the act, to which the testator had made his mark or directed his name to be written, should be deemed valid and admitted to probate on proof of the fact. The learned judge said that the law was

"destitute of retroactive force, not only because it was an act of judicial power, but because it contravened the constitutional provision that no man should 'be deprived of life, liberty or property except by the law of the land.'" Our statute is one providing for a different mode of establishing a deed or contract which may infuse life into a contract void at the option of the party to be charged, just as that act proposed to make operative a void will.

In this State it has been settled that the Legislature is not empowered to pass an act that provides for depriving a person of his property in an unexpired term of office even by a general law or amendment to the Constitution prescribing a different mode of election, or (484) by creating a new office and turning over the emoluments and perquisites belonging to the officer during the residue of his term to the incumbent of the newly created place, because an officer has a vested right in his office for the term prescribed by law. *Hoke v. Henderson,* and *King v. Comrs., supra.*

In *University v. Foy,* 5 N. C., 58, this Court held that where escheated land had vested in the trustees of the University the Legislature was restrained by the clause of the Constitution, Art. I, sec. 17, which declared that no person ought to be deprived of property but by the law of the land, from passing an act to take away from that institution the escheated land donated to it by a former statute.

In *Sutton v. Askew,* 66 N. C., 172, and in *Wesson v. Johnson, ib.,* 189, it was held that where the land was acquired by the husband, and the marriage was contracted before the passage of the act of 1868, restoring to married women their common-law right of dower, that statute would not be construed to operate retroactively, because to give such effect to it would interfere with the vested right of the husband to alien without the consent of the wife, and to pass an estate in the land free from encumbrance of an inchoate dower right. So that this Court has, in these cases also, distinctly held that no law can be so construed as to take property from one person, except for public use, and after making just compensation, and give it to another, or to encumber the property of one person by giving another such right or interest in it as will interfere with his preëxisting power to alien. *Hughes v. Hodges,* 102 N. C., 236.

In *Leak v. Gay,* 107 N. C., 468, it was said that "When the (485) effect of a law is to divest the vested right of property, except for the use of the public, and then only after providing for payment of its value, it will be declared void."

In *Stanmire v. Taylor,* 48 N. C., 207, it appeared that the Legislature had passed an act purporting to give validity to a certain grant therefor issued, but which had been declared void by the Court in *Stan-*

mire v. Powell, 35 N. C., 312. The act was passed by the General Assembly in October, 1852 (after this Court in June previous had declared the grant relied on by the plaintiff in the then pending suit to be void), and provided that the grant should be thereby validated and declared "good and effectual to pass all the right of the State in and to the said land, and any law to the contrary notwithstanding." The defendant held under a subsequent valid grant from the State. *Nash, C. J.,* delivering the opinion of the Court, said: "If the act of 1852 (declaring plaintiff's grant valid) was intended to give life to the void grant, under which the plaintiff claims the premises, by giving a construction to it, the act was a judicial one, which it was not in the power of the Legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plaintiff, then it violates the contract it made with the defendant Taylor, and is void."

It is contended, however, that the Legislature has the power to pass remedial acts, and especially is authorized to so alter the rules of evidence as to afford relief to litigants. But the limit to such authority is transcended, said *Seawell, J.;* when a law is enacted which in its enforcement has the effect of depriving "one individual of his property without his consent and without compensation, and transferring it to another." *Robinson v. Barfield, supra.* The principle governing this controversy was as clearly stated by *Daniel, J.,* in an opinion delivered in the same case, when he said that "The transfer of property from one individual, who is the owner, to another individual is a judicial (486) and not a legislative act. When the Legislature presumes to touch private property for any other than public purposes, and then only in case of necessity and upon rendering full compensation, it will behoove the judiciary to check its eccentric course by refusing to give any effect to such acts."

We think that where a deed or contract purporting to convey passes an equitable interest in land it is not upon its face void, and the Legislature has the power to enact remedial laws regulating the probate and registration of such instruments, though the incidental effect may be to admit to registration a deed or contract, which could not previously be proven, and to enable the person claiming under it to use it in establishing his title. It has been suggested, however, that the Legislature has the power to give efficacy retrospectively to contracts like that under consideration, which have been so often declared void for uncertainty, because it has also been held that they were void at the election of the person to be bound thereby (just as in the case where the agreement is merely verbal), and that being voidable the Legislature had the power to impart vitality to them. But we do not think that the line of demarcation, which indicates the limit of legislative au-

thority, can be made to depend upon the question whether the agreement is void or voidable. The deed of a married woman is void; that of an infant void at his option on arriving at maturity, and the leading authorities concur in sustaining the general proposition that the contracts of infants are voidable only; yet it will not be contended that a statute allowing all conveyances theretofore made by infants to be registered and declaring them effectual to pass the land described in them would be held constitutional so as to divest title out of such infants without their consent. How can such a statute be distinguished from one which operates to divest title out of a party against his (487) will because he has signed a paper or entered into a verbal agreement which the laws declares, just as in the case of an infant, has passed no interest, legal or equitable, in the land which purports to be the subject of the agreement?

An unregistered deed, executed with all of the formalities prescribed by law, conveys an equity which would descend to the heirs of the grantee. A law which gives efficacy to the probate of such a deed merely provides for transferring the legal estate by certain proof to the person who had previously been the real owner in equity. It transfers the legal estate to such equitable owner as did the statute of uses, but it does not disturb the vested beneficial right. If in that case the deed were ineffectual upon its face to pass any interest, legal or equitable, no remedial statute could impart efficacy to it. *Robinson v. Barfield, supra.* It would seem, therefore, more accurate to declare that the power to enact remedial statutes giving effect to contracts for the sale and conveyances of land extends only to those cases where the grantee or other person deriving benefit from their enforcement had, previous to the passage of the law, an equitable right, and not to cases where the policy of the law or the express provision of a statute had prevented the transmission of any interest whatever by the instrument or agreement relied on.

Contracts are made with a view to the legislative authority to provide for proving in the readiest manner that the parties actually entered into them, but the parties are not deemed to have acted in reasonable contemplation of such an alteration in the law as to change its policy and thereby transfer both the legal and equitable estate in land without the consent of the owner. As the case involves an important principle, it may not be improper to cite numerous additional authorities from the appellate courts of many of the States in which an effort has been made to fix and determine the limit to the authority to pass reme- (488) dial laws.

In *Alter's Appeal,* 67 Pa. St., 341, the Supreme Court of Pennsylvania declared it incompetent for the Legislature to empower the courts

to correct a mistake in a testator's will which rendered it inoperative, and thereby deprive his heirs at law of property that had descended to them. In another case it was held by the Court of Nevada that where a testator left no heirs the Legislature had power to waive the right of the State to take his property as an escheat by validating a will in favor of his devisees, but could not have divested the title of his heirs at law if any had been known. *Estate of Stickworth,* 7 Nevada, 229. In *Hasbranch v. Milwaukee,* 13 Wis., 37, that eminent jurist, *Dixon, C. J.,* in discussing an act to validate a contract void when executed, for want of power in the city authorities of Milwaukee, said: "A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract. And to admit that the Legislature, of its own choice and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property, and to take the property of one individual or corporation and transfer it to another." It should be noted that the deed in that case was void at the election of the city. See also, *Mills v. Charlton,* 29 Wis., 413. Where a conveyance is void for want of power in the grantor to convey the estate that it purports to pass, it cannot be validated by statute. *Shruk v. Brown,* 61 Pa. St., 327. It has been held that a lease void under the statute cannot be validated by the receipt of rent. Sedgwick & Wait T. T. to R. P., 379, and notes. When the subsequent ratification by the contracting party cannot give validity to an agree-
(489) ment to rent, because it is void under this same statute of frauds, it is difficult to understand how the Legislature, despite the protest of the parties to a deed and their privies, can by altering the rules of evidence restore it to life. In *Underwood v. Tilly,* 10 S. & R., the Supreme Court of Pennsylvania said "that the retrospective operation of laws would be supported when they impair no contract or disturb no vested right, but only vary remedies, cure defects in proceedings, otherwise fair, which do not vary existing obligations contrary to their situation, when entered into and when prosecuted." The Supreme Court of New Hampshire held that the Legislature had no power, as against parties not assenting to validate a fraudulent sale of corporate property. *R. R. v. R. R.,* 50 N. H., 50.

To declare by statute in terms that Mrs. Calloway intended to convey when she actually aliened nothing, would be a legislative usurpation of judicial power, and to change the general remedy applicable to pre-existing contracts so as to pass an estate now, when no equitable right vested in Harris at the time of the execution of the paper, even if it be accomplished by modifying the rules of evidence, would be to disturb a vested right by transferring the land without compensation to the

owner from whom it is taken after it had been aliened to a purchaser for value. *Norman v. Hoist,* 5 W. & S. (Pa.), 17. There is a general presumption against the retroactive operation of statutes, and they will, in cases like that at bar, where it will impair vested rights to apply them to past transactions, be construed to affect rights accruing after their enactment. Endlich, secs. 271 to 274; *Richardson v. Cook,* 3 Vt., 599.

Where deeds are executed by virtue of a judicial decree, and are voidable only, not void, by reason of some irregularity growing out of a failure to follow the mode of procedure prescribed by law in the conduct of the action or proceeding, it is clearly competent to cure such defects by remedial legislation, and where the action or proceeding (490) has been instituted and prosecuted in good faith, it is not only eminently just, but it serves the important end of preserving the public confidence in the stability of judgments of the Courts to resort to the law-making power for such relief. Hence the curative acts, affecting irregularities in special proceedings, have been upheld by the Courts, as they cannot be collaterally impeached, and are voidable only in the absence of such remedial acts at the instance of a party to them, not void. *Edmundson v. Moore,* 99 N. C., 1; *Ward v. Lowndes,* 96 N. C., 367; *Bell v. King,* 70 N. C., 330; *Herring v. Outlaw, ib.,* 334. In such cases the curative statute divests no vested right because the theory of the decisions upon the subject has always been that an estate vests under the decree, subject, however, to be avoided in the absence of legislation on notice of a party to the proceeding, or to be validated and made conclusive on the parties by a proper statute. *Moore v. Gidney,* 75 N. C., 34. Such proceedings differ widely from contracts of infants, or such as are not enforceable under the statute of frauds. In the one instance a *prima facie* title passes, though it is defeasible; in the other the contract is unlawful in its incipiency, passes nothing. The one is valid until it is avoided, the other is void until it is validated. Parties are supposed to contract with reference to the power of the law-makers to withdraw the mere right to avoid, but not in contemplation of the enactment of a statute which would operate as a compulsory ratification, and divest a vested interest without the consent of him who holds it. It is like the distinction between destroying a mere right or possibility, which must have been expected when it was created, and the taking of an interest in land without compensation. *Bass v. Navigation Co.,* 111 N. C., 439. Thus the distinction between this line of cases and those in which the right of recovery depends upon giv- (491) ing effect to a deed or contract, that has once been on its face absolutely void, or voidable at the election of the party to be bound, because executed contrary to the prohibition of a statute, or not in the

only mode declared by it to be sufficient, or in violation of a rule declared by public policy. In *Condry v. Cheshire,* 88 N. C., 375, it was held that a void judgment could be attacked without any direct proceeding to vacate it. *Doyle v. Brown,* 72 N. C., 393; *Stallings v. Gulley,* 48 N. C., 344.

The statutes that provide for supplying lost records are also within the scope of legislative authority, because they only give to certain persons the means of setting up and establishing valid titles, and the parties who actually aliened and passed title to them cannot complain, because all right has already been divested out of them, and they are presumed to have conveyed with reference to the legislative power to provide for restoring the evidence of what had been actually accomplished, not simply attempted in the face of a statute declaring the attempt in advance ineffectual. *Adle v. Sherwood,* 3 Wharton (Pa.), 484.

As we have already stated, after a deed has been executed, if it be valid upon its face, the grantee takes an equitable estate under it, till by force of registration (which is our modern substitute for livery of seizin) the legal estate vests in him. He being the owner in equity, it is no interference with vested right to provide by law a more convenient mode of proving the execution or to ratify a probate that is informal, or was taken by an officer not empowered to do so, but who mistook his power. *Freeman v. Person,* 106 N. C., 251; *White v. Connelly,* 105 N. C., 65; *Young v. Jackson,* 92 N. C., 144; *Tatom v. White,* 95 N. C., 453. The probate is but an *ex parte* ascertainment, by authority of law, that the instrument registered is authentic (*Young v. Jackson,*
(492) *supra*), and does not conclude the parties to it as to its legal effect. It is competent for the Legislature to cure a defective probate where the instrument has already been recorded, as it is to prescribe the mode of proving in future, and parties contract with a view to the possible, if not probable, exercise of this power. The Legislature is empowered, unquestionably, to pass a law extending the statute of limitations or making the time shorter, if a reasonable time is given for the commencement of an action before the bar takes effect. *Strickland v. Draughan,* 91 N. C., 103. The principle announced in this case is not inconsistent with the doctrine (laid down in *Eaken v. Raub, supra*) that a man cannot be deprived of his land "instantaneously under the pretense of limiting the period in which he should bring his action." Neither can he be instantaneously robbed of his property, the possession of which he is about to recover in the courts, under the guise of modifying the rules of evidence. So the principle decided in *Alexander v. Comrs.,* 70 N. C., 208, has no bearing upon this case. Where one holds what purports to be a contract made on behalf of the State by an agent, but which is in reality void for want of authority in the agent to bind

the State, the Legislature has the power to assume the obligation, just as it could have provided for the payment of the claim if no agreement had been entered into. "Municipal corporations are mere agencies of the State through which the sovereign acts in matters of social concern." *Bass v. Navigation Co., supra;* Southerland Stat. Cons., sec. 488. The right to limit involves the power to dispense with limitations. *Ib.* But the Legislature cannot take the property of one man and give it to another, though an attempt may be made to transfer it by a judicial proceeding, as by a sheriff's sale. *Ib.*, sec. 484, and note.

Where a party prays an appeal to an appellate court, the judg- (493) ment of the court below is thereby vacated, subject to the condition that he shall perfect his appeal either under any law existing when he appeals, or that may be enacted before his cause is heard in the appellate court, and a curative act which gives him a status in the higher court is considered to have been in contemplation of the parties at all times and divests no title but simply provides the means of fairly ascertaining the rights of the litigants. *Walker v. Scott,* 104 N. C., 481. *Cooley, J.,* says (Const. Lim., 371), in treating of irregularities that may be cured by statute: "And if the irregularity consists in doing some act, or in the mode or manner of doing same act, which the Legislature might have made immaterial by prior law, it is competent to make the same immaterial by subsequent law." But where the defect which the act seeks to remedy affects the jurisdiction of the court, it is in violation of fundamental principles to give it a retrospective effect. *Ib.* The learned judge must not be understood as maintaining that the Legislature has the power to pass any retroactive remedial law which it would have been within the scope of its authority to have enacted for future operation. Under a principle no man's property would be secure against the judicial authority of the law-making department of the government.

If the receipt was void for uncertainty as a contract, and the defendant acquired no legal or equitable right that could then be enforced, the General Assembly had no more authority, even under the guise of changing the rule of evidence or providing a new remedy to transfer the life estate of Mrs. A. P. Calloway and the remainder in fee of her daughters to the defendant, by a *general* than by a *special* act, naming the parties and setting forth their relation to each other. Such spe- (494) cial acts have been declared by this Court to be in contravention of the organic law, not only as attempts to divest vested individual rights, but as infringements on the part of the Legislature upon the power of the judicial branch of the government. *Stanmire v. Taylor, supra.*

We conclude, therefore, that the Legislature did not intend that the statute should apply to preëxisting contracts, but only to those entered into after its passage.

In permitting the defendant to explain what land was referred to we think there was error.

NEW TRIAL.

SHEPHERD, C. J., concurring: Under the view I have taken it is unnecessary to determine whether the statute in question should be construed as prospective only in its operation, as I am very clearly of the opinion that it did not have the effect of changing the existing law in reference to descriptions contained in deeds or contracts for the conveyance or sale of land. The statute provides that "in all actions for the possession of or title to any real estate, parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or right of possession, and if the jury is satisfied that the land in question is the identical land intended to be conveyed, . . . then the said paper-writing shall be deemed and taken to be sufficient in law to pass such title . . . as it purports to pass," etc. Section 1, chapter 465, Acts 1891.

Whatever may have been the intention of the Legislature, it is, I think, very evident that the foregoing language does not change, in the slightest degree, the existing law upon the subject to which it refers. It is but a plain and concise exposition of the rules of the common law, and if the Legislature intended to abrogate these rules, in whole
(495) or in part, it should have expressed such intention in the clearest and most unmistakable manner. Statutes which "innovate upon the common law rules of evidence," or which "provide for proceedings unknown to or contrary to the common law," are construed strictly (and) "the Courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed." Southerland Stat. Cons., sec. 400.

The same author also declares it to be a cardinal principle of judicial interpretation, that "where a statute uses a word which is well known and has a definite sense at common law, or in the written law, without defining it, it will be restricted to that sense unless it appears that it was not so intended." And he further states that "rules of interpretation and construction are derived from the common law, and, since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed with reference to its cognate principles." Section 253-289.

Keeping in mind these well-settled principles, let us inquire whether there is anything in the statute which sustains the defendant's contention that it was the purpose of the Legislature that the word "description" as therein employed should be so construed as to practically repeal the statute of frauds, and thus destroy in a great measure the stability

of titles to the landed property of the State. We should be loath to attribute to the law-makers a purpose to place our State in a position of such exceptional and unenviable prominence, and I am quite sure that their real object in passing the statute may be explained upon other and more reasonable grounds to which I shall hereafter refer.

The statute provides that parol testimony shall be admissible (496) for the purpose of fitting the land to the description contained in the deed, and the question is whether the word "description" is to be taken in its ordinary and legal signification—that is, a description which has a legal susceptibility of being aided by testimony so as to identify the land, or whether it means a description which in law is no description whatever and is sometimes called an "insufficient description." I am really unable to conceive of any principle upon which the latter proposition can be supported unless it be that the Legislature must have intended something different from the common law and that it is our duty to discover it and, by a process known as judicial legislation, insert it into the statute. This involves not merely the difficulty of departing from the generally accepted meaning of the terms of a statute, but also an absolute contradiction of such terms, resulting in a complete change, in many instances, in the rights of property.

In other words, instead of reading the statute—"that parol testimony may be received for the purpose of fitting the land to such a description as is recognized as legally sufficient"—we are to substitute the words "such a description as is so vague and indefinite as to have been heretofore held to be legally insufficient," or one which, in the language of *Pearson, J.,* in a case similar to this (*Murdock v. Anderson,* 57 N. C., 77), is "no description" at all. I cannot see how a word in a statute having such a plain legal signification can, in the absence of something in the context requiring it, be stricken out and other words of an entirely different signification inserted in its place. The failure of the Legislature to accomplish what it is argued it attempted to do, affords no warrant to the court to supply the supposed omission. Even if the language were not altogether free from ambiguity, we should hesitate to place upon it the construction insisted upon, for it is (497) a universally accepted rule that "a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference." Southerland, *supra,* 323.

If the statute means that testimony may be introduced to the jury in all cases where the description has heretofore been held void by reason of vagueness, it would be exceedingly difficult for any court to determine what is a sufficient "insufficient description" which should be submitted

to the jury. It would seem from the construction insisted upon that if there is a mere semblance of a description, however indefinite it may be, its legal sufficiency is to be determined by the jury; for if they find that the parties intended to convey a certain piece of land the description shall, by reason of such finding, be deemed in law sufficient to pass the title. It is impossible to estimate the confusion which would result from such a substantial reversal of the functions of the court and the jury. I suppose that any attempt at a description would be sufficient to put the jury in full control of the matter without any interference on the part of the court. Thus, if I have ten stores on Fayetteville Street, in the City of Raleigh, and convey to A "a store on Fayetteville Street, in the city of Raleigh," this will be sufficient to go to the jury, and they may determine which of the ten stores was intended to be conveyed. This, of course, would be an abrogation of the statute of frauds. Could the Legislature have intended this? But to go still further—If I should afterwards sell to B one of the stores, specifically describing it, what is to prevent A from identifying it as the one sold to him under his vague and imperfect description? Under the statute there can be no equitable principle asserted for the protection of B, as it contains no sav-
(498) ing in favor of third persons, but expressly provides that in all cases the evidence shall be received, and if the property can be identified by the jury, then the description shall be deemed in law sufficient. If the description is thus made sufficient by the finding of the jury it must be sufficient for all purposes.

That this construction is not the true one is entirely clear by a reference to the second section of the act, which provides "that no deed . . . shall be declared void for vagueness in the description by reason of the use of the word 'adjoining' instead of the words 'bounded by,'" etc. The provision was intended to meet a suggestion that there was a distinction between the words "bounded by" and "adjoining," as affecting the legal sufficiency of a description, and was rendered unnecessary by a subsequent declaration of the Court in *Perry v. Scott,* 109 N. C., 374. It recognizes that there is such a thing as a description which may be declared void by the Court for "vagueness," and enacts that in certain instances it shall not be so declared void. Now, it is asked with absolute confidence, why was it necessary to provide for the cases mentioned in this section, if what had been suggested to be an "insufficient description" for "vagueness" was provided for in the first section, which is the one we have under consideration?

Very clearly there would have been no necessity for such legislation if the present contract, and the similar one in *Fortescue v. Crawford,* 105 N. C., 29, were covered by the first section under the construction

contended for. I think that it was the purpose of the Legislature to meet the suggestion referred to, and this is certainly all that was effected by the terms of the statute.

I do not impute to the Legislature a purpose to enact such a (499) law as to produce the evils which would result from the construction insisted upon, and I am of the opinion that the real object of the statute was such as I have indicated.

The common law, then, not having been changed in respect to this contract, and it being void under the decision in *Fortescue's case, supra,* I concur in the ruling that there should be a new trial.

BURWELL, J., dissenting: The following issue was submitted to the jury without objection on the part of the plaintiffs: "Is the land of which the defendant is now in possession, and which is sued for in this action, the identical land which is referred to in the paper-writing set up in the answer and alleged to have been executed to defendant by A. P. Calloway?"

Defendant offered this writing in evidence, and plaintiffs objected "on the ground that it was too indefinite in describing any land." His Honor overruled the objection and admitted the evidence, and the plaintiff excepted.

The writing referred to is as follows:

"WILKESBORO, N. C., 19 April, 1880.

"James Harris has paid me $20 on his land; owes me six more on it.

"A. P. CALLOWAY."

I assume that the contention of the plaintiffs was that parol evidence was not admissible to locate the land to which the defendant alleged this receipt referred, and show that it was the same land which plaintiffs were seeking to recover of him in this action, she also claiming under A. P. Calloway. Her objection should have been to the parol testimony when it was offered. The writing was clearly admissible in evidence. Its legal effect was a matter to be determined after it was introduced.

But for Laws 1891, ch. 465, sec. 1, the case of *Fortescue v.* (500) *Crawford,* 105 N. C., 29, would be decisive of this controversy, for there, as here, the only words in the receipt descriptive of the land are "his land," and some other words that show that what was there styled his (the defendant's) land was, prior to the alleged sale, the land of the person signing the receipt.

The act referred to seems to have been enacted to meet and avoid the hardship of such cases as that cited above and this one now before us. Whether that legislation is wise or unwise is not for us to say. We should give to it all proper effect.

We have here a memorandum in writing which, under the law as it stood before the act of 1891, would not have availed the defendant because it was not then permissible to show by parol evidence that the land therein designated by the vendor as "his land" was the land in controversy, and for that reason alone. The expression is very vague and indefinite, but it is a "description." In *Bread v. Munger,* 88 N. C., 297, "his 100 acres of land" is called an "insufficient description." In *Fortescue v. Crawford, supra* (the receipt being similar to the one here under consideration), this Court said of the defendant's offer of parol testimony that he was endeavoring "to help out the insufficiency of the description." If, then, there was a written memorandum available and sufficient of itself for defendant's protection in his possession when the action was begun, if the description had not been insufficient and imperfect, that imperfection and insufficiency could be remedied by the verdict of the jury founded upon the writing and parol testimony which the act had made competent "to identify the land and fit it to the description contained in the paper-writing" offered as "evidence of the right of possession."

(501) There was no error, I think, in his Honor's allowing defendant to put the writing in evidence and the introduction of parol evidence to identify the land. The statute is, in my opinion, applicable to all actions to be tried in the courts, no matter when the contract was made. It does not contravene any provision of the Constitution, for it affects a remedy and not the rights of any citizen. "Laws which change the rules of evidence relate to the remedy only." *Tabor v. Ward,* 83 N. C., 291. And such laws are not unconstitutional, though retroactive. *Hinton v. Hinton,* 61 N. C., 410; *Wilkerson v. Buchanan,* 83 N. C., 296; *Phillips v. Cameron,* 48 N. C., 390.

The act now under discussion, if applied to this case, will disturb no vested right of Mrs. Calloway or her vendee with notice. It will merely prevent the perpetration of a wrong by giving to the defendant a preventive for that wrong by changing the rule of evidence so as to allow him, in defense of his possession of his home, to submit to the jury parol testimony that was not admissible when the alleged contract was made. The contract was not void, but only voidable at the option and upon the proper plea of the alleged contractor. *Loughran v. Giles,* 110 N. C., 423, and cases there cited. The act does not assume to make that a contract which was not one, but merely declares that the jury may determine what the contract was, and to that end may hear and consider

certain parol evidence. This will disturb no vested rights nor deprive any one of what is his own. It may be that it is better for the commonwealth that a few should have the privilege of doing what all men feel to be wrong—taking from honest purchasers land sold to them by defective descriptions—than that some should be tempted to swear falsely. Of that we say nothing. All such legislation as that under consideration involves a question of policy and not of constitutional power. Cooley Const. Lim. (6 Ed.), p. 460. (502)

CLARK, J. I concur in the above dissenting opinion.

Cited: Greer v. Asheville, 114 N. C., 681; *Hemphill v. Annis,* 119 N. C., 519; *Lowe v. Harris,* 121 N. C., 287; *Harris v. Woodard,* 130 N. C., 581; *Jones v. Schull,* 153 N. C., 521.

T. S. PARKER ET AL. v. C. A. MCPHAIL ET AL.

Arrest and Bail—Motion to Vacate—Jurisdiction.

1. A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district.
2. The rule that, except by consent or in those cases specially permitted by statute, the judge can make no order in a cause outside of the county where it is pending, applies only to judgments on the merits or to motions in the cause strictly so-called, but does not apply to ancillary proceedings.
3. Where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and cannot be reviewed.

ACTION commenced by a summons returnable to Fall Term, 1892, of STANLY.

An order of arrest was issued by the clerk of said court against the defendant C. A. McPhail. Said defendant was arrested under the order, and bail bond was duly executed.

On 13 September, 1892, a motion, based on affidavits, after proper notice, was heard before *Boykin, J.,* presiding in the courts of the Eighth Judicial District, in the town of Lexington, in the county of Davidson, at chambers, to dismiss the warrant of arrest.

The plaintiff insisted that the judge had no power to hear and dispose of the said motion at chambers, and without and beyond the limits of Stanly County. (503)

The court being of a contrary opinion, after argument of counsel, and a consideration of the affidavits presented, discharged the defendant from arrest, and plaintiffs appealed.

Brown & Jerome for plaintiffs.
P. B. Means and Batchelor & Devereux for defendants.

CLARK, J. Section 316 of The Code provides: "A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest." Section 594 of The Code provides: "(2) Motions may be made to a clerk of the Superior Court, or a judge out of court, except for a new trial on the merits." "(3) Motions must be made within the district in which the action is triable." "(6) Whenever a motion shall be made in any cause or proceeding in any of the courts, to obtain an . . . order of arrest, . . . or a motion to vacate or modify the same is made, it shall be the duty of the judge before whom such motion is made to render and make known his decision on such motion within ten days after the day upon which such motion shall or may be submitted to him for decision." By statute the judge is required to be at certain places in the district at stated times: if the motion, as the law allows, can be made "at any time" to "a judge out of court" "within the district," and "whenever . . . made . . . it shall be the duty of the judge . . . to render a decision on such motion," then it must follow that he can hear such motion anywhere "within the district" that his duties require him to be during the time in which he is assigned to the district.

(504) It is true it has been held that except by consent or in those cases specially permitted by statute the judge can make no orders in a cause outside of the county in which the action is pending. *McNeill v. Hodges,* 99 N. C., 248; *Bynum v. Powe,* 97 N. C., 374; *Gatewood v. Leak,* 99 N. C., 363. But that applies to judgments on the merits or to motions in the cause, strictly so called. It does not apply to ancillary proceedings, as they come within the exception referred to. As to injunctions, authority is conferred to hear them outside of the county where the main action is pending, by The Code, secs. 334-337, and as to receivers by section 379. As to attachments and arrests and bail as well as injunctions, the power to grant, vacate or modify such orders out of the county is recognized by section 594 (6) above cited.

From the nature of all provisional remedies (unlike ordinary motions in the cause) it is better that prompt action should be had by application to the judge wherever he may be found in the district than that there

should be delay out of deference to the convenience of the other party. Especially is this so in view of the greatly improved facilities for traveling by the constantly increasing number of railroads.

It would be perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge, as was done in *Roulhac v. Brown,* 87 N. C., 1. But the clerk might be dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. Laws 1889, ch. 497, is merely permissive and gives the defendant the election to demand a jury trial upon the issues raised by the conflicting affidavits, but this right was not claimed in this case by the defendant. Had he done so, in apt time, the judge would have been compelled to remand the motion to vacate to the county where the action was pending that the issues so arising might be tried at the first term of court.

It is not clear, as it should be, that exception was taken below (505) to anything except the jurisdiction of the judge in vacating the order of arrest out of the county (but within the district) in which the action was brought. But if the exception is broad enough to embrace the correctness of the order itself, the judge has found as a fact that the defendant McPhail has not removed or disposed of, and is not about to remove or dispose of, his property with intent to defraud his creditors. There was evidence to support such finding, and it is final and cannot be reviewed by this Court. *Harris v. Sneeden,* 101 N. C., 273; *Millhiser v. Balsley,* 106 N. C., 433; *Travers v. Deaton,* 107 N. C., 500. This renders it unnecessary to pass upon the regularity of the affidavit upon which the order of arrest was made.

AFFIRMED.

Cited: Fertilizer Co. v. Taylor, ante, 151; *Harper v. Pinkston, ante,* 304; *Zimmerman v. Zimmerman,* 113 N. C., 436; *Whitehead v. Hale,* 118 N. C., 604; *Ledbetter v. Pinner,* 120 N. C., 457; *Moore v. Moore,* 130 N. C., 334; *Bank v. Peregoy,* 147 N. C., 296.

J. H. BENSON v. J. A. BENNETT, ADMINISTRATOR OF JOHN IRVIN.

Claim Against Decedent—Statute of Limitations.

1. Section 164 of The Code is an enabling and not a disabling statute; it applies only in cases where, in regular course, but for the interposition of the section, a claim would become barred in less than one year from the grant of letters of administration, and is not a restriction on the statute

of limitations so that a claim should become barred by the lapse of a year from the grant of letters, where, but for the section, it would not be barred until a later date.

2. Where right of action accrued 24 May, 1884, decedent (debtor) died 9 July, 1885, and letters of administration were granted 21 August, 1885, an action commenced 5 July, 1887, is not barred by the three years statute of limitations, for, excluding the time between the death of debtor and the grant of administration, three years had not elapsed.

(506) APPEAL from *Graves, J.*, at February Term, 1893, of ROCKINGHAM.

It was originally begun by plaintiff against Catherine S. Irvin, administratrix of John Irvin, but she having been removed pending the action, the present defendant, J. A. Bennett, was substituted as administrator in her place. Plaintiff sought, by the action, to have an account stated of dealings between himself and defendant's intestate, as partners in the purchase and sale of real estate at Reidsville and judgment rendered for him for the balance that might be found due him from the proceeds of an auction sale of lots made on 24 May, 1884, which, he alleged, defendant's intestate collected and did not account for. Defendant answered that his intestate died on 9 July, 1885, and letters of administration were granted on 21 August, 1885; that the auction sale of lots, out of which the alleged claim arises, was held on 24 May, 1884, in the lifetime of decedent, and that the action having been commenced on 5 July, 1887, is barred by the general statute of limitations of three years, and also by the lapse of more than one year after grant of administration before suit brought under section 164 of The Code. The facts alleged in the answer being admitted, it was submitted to his Honor, without the intervention of a jury, to decide whether the said plea in bar was effectual. Upon consideration his Honor decided that the statute of limitations under section 164 of The Code was a bar to the plaintiff's action and gave judgment accordingly, from which plaintiff appealed.

Mebane & Scott for plaintiff.
No counsel contra.

(507) CLARK, J. The defendant's intestate died on 9 July, 1885, and administration was granted on his estate on 21 August, 1885. The auction sales, for the balance due from which this action is partly brought, took place on 24 May, 1884, and this action was begun on 5 July, 1887.

As we understand it, the only question presented by the appeal is whether under a proper construction of section 164 of The Code this

demand is barred, for as to the account for goods sold and delivered, if the last item of the account was, as averred, on 6 May, 1876, that part of the plaintiff's demand is clearly barred.

Section 164 of The Code is an enabling not a disabling statute. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases which in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. It was not intended to be a restriction on the statute of limitations so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course, but for this section, it would not be barred till a later date. The object in view is that when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred, action may be brought "after the expiration of the time limited, and within one year." *Coppersmith v. Wilson,* 107 N. C., 31, decides nothing more than the distinction that, though the one year allowed by section 164 is counted from the death of the creditor, it is counted only from the grant of letters when it is the debtor who dies.

Although more than a year had elapsed in this case after the (508) grant of letters of administration before suit brought, yet, excluding the time between the death of the debtor (9 July, 1885) and the issue of letters of administration (21 August, 1885), the time elapsing between the sale (24 May, 1884) and the bringing of this action (5 July, 1887), only two years, eleven months and twenty-nine days had passed, and in no view could the three years' statute of limitations apply. It is only when that might otherwise apply that section 164 can have place and extend the time.

This renders it unnecessary to consider the question raised, whether on the facts of this case a demand was necessary to set the statute in motion.

REVERSED.

Cited: Redmond v. Pippen, 113 N. C., 93; *Hughes v. Boone,* 114 N. C., 56; *Burgwyn v. Daniel,* 115 N. C., 119; *Person v. Montgomery,* 120 N. C., 115; *Winslow v. Benton,* 130 N. C., 59.

JAMES THOMPSON ET AL. v. JAMES NATIONS, ADMR. OF JESSE THOMPSON, ET AL.

Statute of Presumptions and Limitations—Sureties on Administration Bond.

1. The Code (sec. 137) does not postpone the time when causes of action shall accrue, but merely extends the period of limitation or presumption after a cause of action has accrued by omitting from the count the time between 20 May, 1861, and 1 January, 1870.

2. Where a cause of action against an administrator arose in December, 1864, and he filed his account in April, 1891, and suit was brought against him and his sureties in June, 1891: *Held*, that the lapse of twenty years from 1 January, 1870, raised a presumption of settlement or abandonment which was not rebutted, as to the sureties on the administration bond, by the filing of the administrator's account showing a balance due the distributees.

(509) APPEAL from *Boykin, J.*, at Spring Term, 1893, of SURRY.

The complaint alleged that on 10 December, 1862, the defendant Nations, qualified as administrator of Jesse Thompson, deceased, the other defendants being sureties on his administration bond, and that on 13 April, 1891, the administrator filed his account before the clerk of the Superior Court, showing a balance of $466.65 due the plaintiffs as heirs and next of kin of the intestate, a small part only of which had been paid, and judgment was asked against the sureties for the penalty of the bond to be discharged upon payment of the amount due, etc.

The defendant sureties in their answer contended that the action, as to them, was barred by the statute of presumptions and limitations; that more than ten years, and also more than three years, had elapsed since plaintiff's cause of action accrued; that more than seven years had elapsed since the administrator qualified and made advertisement for creditors to present their claims, etc.

The plaintiffs introduced the records of the clerk's office of Surry County showing an account filed by the defendant administrator on 13 April, 1891, and closed their case, asking for judgment against all of the defendants.

Judgment being rendered for the plaintiffs, the defendant sureties appealed.

Glenn & Manly for defendants.
No counsel contra.

CLARK, J. The administration having been taken out 10 December, 1862, a cause of action accrued to plaintiffs two years thereafter. Rev. Code, ch. 46, sec. 24. The Code, sec. 137, does not postpone the time when causes of action shall accrue, but merely extends the period of limitations or presumption after a cause of action has accrued, by omitting from the count the time between 20 May, 1861, and (510) 1 January, 1870. This cause of action having accrued in 1864, the presumption from the lapse of time applies and not the statute of limitations. The Code, sec. 136; *Bushee v. Surles,* 77 N. C., 62. "The lapse of time (under the law prior to C. C. P.) constitutes no bar to the demand of an account by the next of kin against the administrator, but it may raise a presumption (of settlement or abandonment) . . . when there has been an interval of twenty years after the time appointed for settlement with the next of kin." *Bird v. Graham,* 36 N. C., 196; *Salter v. Blount,* 22 N. C., 218.

The account filed by the administrator, 13 April, 1891, was after the presumption from the lapse of twenty years from 1 January, 1870, had arisen and could not rebut it as to these appellants who are the sureties on the administration bond. There being no conflicting evidence, it was the duty of the court to declare that the presumption was not rebutted. *Grant v. Burgwyn,* 84 N. C., 560.

AFFIRMED.

Cited: S. c., 113 N. C., 348; *Outland v. Outland,* 118 N. C., 141; *Edwards v. Lemmonds,* 136 N. C., 331.

RUFFIN LEE v. ANNA B. WILLIAMS.

Practice—Instructions to Jury—Exception—Written Request.

Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel before the close of the evidence as provided by section 415 of The Code.

PETITION of plaintiff to rehear, argued at February Term, (511) 1893, of the Supreme Court.

For former decision, see 111 N. C., 200.

John W. Graham for petitioner.
Batchelor & Devereux and C. D. Turner contra.

MACRAE, J. We have carefully examined the authorities cited by counsel for petitioner upon the reargument, as well as all others bearing upon the point of practice involved, and we are of the opinion that there is no ground upon which the conclusion heretofore reached should be disturbed. There is abundant authority under the very many adjudications upon section 415 of The Code to the effect that instructions prayed must be in writing as the statute requires, and that they must be made in apt time, which has been held to be at or before the close of the evidence, or they may be disregarded by the Court; and under the different subdivisions of section 412 of The Code, that exceptions for error in the charge cannot be made for the first time in this Court, but must be noted in the assignment of error on appeal; and further, that an omission to charge on a particular aspect of the case is not reviewable error unless an instruction was asked and refused, and an exception taken. All of these decisions are very carefully collated in the second edition of Clark's Code, under the sections indicated.

We hesitate to state our grounds for this decision, because it will involve a repetition of the opinion, which is the subject of this inquiry. The Court concurred in the opinion intimated by his Honor below that there was no evidence offered by the caveators which would sustain their contention. It appears that after this intimation by his Honor the caveators "asked to have the jury pass upon the matter any way," to which his Honor assented; and, as the case was to be argued
(512) before the jury, notwithstanding his Honor's opinion, the propounders, unnecessarily, we think, but out of abundant caution, called other witnesses, and the caveators did the same, thus on both sides uselessly consuming the time of the court, unless, indeed, the caveators had found other testimony which, in the opinion of their counsel, tended to support their contention. Upon examination of the additional testimony, we were still of the opinion that there was nothing to go to the jury to sustain the caveators.

The misapprehension of the learned counsel for the petitioner seems to be that the exception of the propounders was to an omission to charge something which they had not asked in writing, while in our view it was an error in a positive instruction based upon the assumption that there was evidence on the part of the caveators which ought to be passed upon by the jury.

His Honor, after instructing the jury that if they believed a certain state of facts to be true they should find for the propounders, added these words by way of qualification: "Unless the caveators have shown

you from the evidence that the will was procured by the undue influence and conduct of the witness Jane Allison exercised over the deceased." To this charge an exception was immediately taken and noted, and was assigned as error for the case on appeal.

The authorities cited by petitioner, upon careful examination, will show no case like the present. They merely hold that a failure to object and except upon the trial precludes one from making the exception for the first time in this Court, or that an omission to charge is not the subject of exception, unless a request had been made to do so, and possibly other kindred examples, all of which we will not attempt to state, for we wish to exclude any conclusion except that which (513) arises from the facts of this case.

"Whenever a point arises on the trial of a cause which it is important to either party to sustain, and there is no evidence offered upon it, it is not only no error in the judge so to inform the jury, but it is his duty." *Satterwaite v. Hicks,* 44 N. C., 105.

It was the duty of his Honor to have told the jury that there was no evidence tending to establish the contention of the caveators, but he presented it to the jury upon the assumption that there was evidence of this character, and the propounder's counsel excepted.

We are not to be understood as holding, however, that such an exception can be taken for the first time in this Court.

It would consume more than our limited time to reduce to a written opinion the analysis of all the cases bearing upon this question, which we have felt impelled to make out of respect for the learned counsel who, upon a like careful investigation, have indicated a different opinion.

PETITION DISMISSED.

(514)

R. N. HACKETT, ADMINISTRATOR, ET AL. v. F. J. MCMILLAN ET AL.

Unauthorized Appearance of Attorney—Combination Against Infants—Insufficient Complaint.

1. In a suit, of the subject-matter of which a court has jurisdiction, appearance by counsel gives jurisdiction of the parties thus appearing, though counsel have no authority to appear, and an innocent purchaser under a judgment rendered therein will be protected.

2. Where, in such case, parties estopped and injured by adjudication lose property to which they are entitled, they may maintain an action for damages against those who combined to procure the adjudication. (CLARK, J., concurring, further contends that, if the property of which the parties

have so been deprived is *in esse*, an action may be maintained by them for its specific recovery, provided they are not barred by the statute of limitations or by an estoppel arising from a judgment in a suit to which they have been made parties by process served upon them or by appearance of attorney actually authorized to appear for them.)

APPEAL from *McIver, J.*, at Fall Term, 1892, of WILKES.

(521) *W. W. Barber, R. N. Hackett and G. N. Folk for plaintiffs.*
D. M. Furches and Glenn & Manly for defendants.

BURWELL, J. The sole question presented in the appeal is this: Does the complaint state facts sufficient to constitute a cause of action?

In *White v. Jones*, 88 N. C., 166, in which case the plaintiffs here were defendants, *Ruffin, J.*, states one of the questions presented by that appeal as follows: "Whether the sums due from the defendant Bledsoe for rents during his occupation of the land are to be appropriated to the satisfaction of the amount ascertained to be due him, or to the debt still due the estate of Mrs. Stokes for the balance of the purchase-money thereof." And, discussing that, in a subsequent part of his opinion, he says: "Virtually the relation subsisting between the plaintiff and the heirs at law of Mrs. Stokes since his purchase of the equitable interest is that of mortgagor and mortgagee, and having by their action evicted him and put the defendant Bledsoe in possession, they are accountable to him for the rents and must look to their tenant Bledsoe for the same." And, announcing the conclusion to which he had come, he says: "It is also declared that the plaintiff is entitled to credit upon the debt due the defendant Neal as the administrator of Mrs. Stokes for the balance of the purchase-money for the rents ascertained to have been received by the defendant Bledsoe."

The allegations of the complaint are to the effect that in the action, called by *Ruffin, J.*, the action of the heirs of Mrs. Stokes, by which Gray was evicted from the land and Bledsoe was put in possession, the
(522) plaintiffs, then infants of tender years, were made parties plaintiff by the defendants here "without lawful authority and for their (defendants') own use and benefit," and that this was done by "combination and agreement" of the defendant and others.

If two or more persons combine and agree to do a wrongful act, they are liable to the person injured by that act for such damages as result. To make a person a party plaintiff to an action, without proper authority so to do, is a wrongful act, for which an action will lie if injury comes thereby to the person whose name was thus improperly used. 3 Blk. Com., 166; *Metcalf v. Alley*, 24 N. C., 38. In the case last cited the injury complained of was the being compelled to pay costs. Here

the injury alleged to have resulted from the unwarranted use of plaintiffs' names was this: they lost a great part of what *Ruffin, J.*, speaking for the Court, said was virtually a mortgage debt due in effect to them, though payable immediately to the administrator of Mrs. Stokes for their benefit. They were estopped to hold him responsible for this loss, for it was caused by their act, and the rents were paid to one who was their tenant, as the law adjudged. For the most potent reasons it is held that an innocent person is protected by the judgment of a court having jurisdiction of the subject-matter and of the parties. Appearance by counsel gives jurisdiction of the persons thus appearing (*England v. Garner,* 90 N. C., 197), though counsel have no authority so to appear. And therefore it comes about that the persons thus estopped and thus injured by an adjudication binding upon them, though made without their knowledge or consent, are driven to seek redress from those who combined and agreed to procure such adjudication.

We are not required now to determine what is the measure of (523) plaintiff's damages, if the commission of the wrongful acts complained of is established. We only decide that the facts set out in the complaint constitute a cause of action.

REVERSED.

CLARK, J., concurring: I concur in the opinion. As the loss was money in this case, there is probably no other remedy, and the plaintiffs could in any event elect to take this recourse. But if the property whose possession is lost is *in esse,* as real estate, for instance, I am of opinion that the owners who are deprived of it by the judgment of the court made in a cause in which their names appear as parties without their knowledge or consent, and without process served on them, are not denied the right of recovery of the specific property, when not barred by the statute of limitations or any act amounting to an estoppel. Certainly this is so when there is no other remedy by reason of those perpetrating the wrong of entering them as parties without authority being insolvent. They cannot be deprived of their property without compensation or due process of law. This is forbidden by both the State and Federal constitutions.

(524)

ELIZA BISHOP v. LEE MINTON ET AL.

Ejectment—Estoppel—Findings of Jury.

1. Where, in ejectment, the jury found that "plaintiff did advise or induce defendant to buy the land before he purchased the same," such finding is not sufficient to create an estoppel against plaintiff when it is not also found that plaintiff knew of her title when she gave the advice, or that defendant did not know of plaintiff's title, or that he was deceived by such advice.

2. A finding by a jury that defendant in ejectment did not purchase from another in good faith and without knowledge of plaintiff, is not inconsistent with another finding that plaintiff advised or induced the defendant to buy the land before he purchased it.

ACTION for recovery of land, tried before *McIver, J.*, and a jury, at Fall Term, 1892, of WILKES.

(528) *Glenn & Manly for defendants.*
No counsel contra.

BURWELL, J. If the first four issues with the findings of the jury are read in connection with the pleadings, we have the following narrative of facts: The land in controversy was owned by one Minton, of whom the plaintiff, Eliza Bishop, was a daughter. Minton conveyed it to James Calloway, who surrendered the deed without having it registered, and also executed a quit-claim deed therefor to Minton, thus putting the title back in him and his heirs. James Calloway, if he subsequently obtained possession of the deeds, got such possession not rightfully. The defendant, Leonidas Minton, purchased the land from the executor of James Calloway and another with knowledge of plaintiff's claim thereto as one of the heirs of her father, and this purchase was not made "in good faith."

Thus it appears that both parties claim title from the same source—the ancestor of plaintiff; and that since, by the finding of the jury, James Calloway is shown to have surrendered what title he had, defendant, who claims through him, cannot hold the land against the plaintiff unless he can show some title derived from her or good against her by estoppel. The fifth issue seems to have been submitted at his instance, so that he might establish an estoppel against her, though it had not been pleaded by him. This was his defense. If he designed to defeat the plaintiff's recovery in this way, it was incumbent on him to have the jury find such facts as would constitute an estoppel against the plaintiff, a married woman. This he has not done. We are informed

by the verdict that the plaintiff did "advise or induce the de- (529) fendant to buy the land before he purchased the same" (fifth issue), but we do not know that plaintiff knew of her title when she gave this advice, or that defendant did not know of plaintiff's title, or that he was deceived by this advice. Hence the facts were not found from which it could be adjudged that plaintiff was estopped, even were she a *feme sole*. *Holmes v. Crowell,* 73 N. C., 623; *Loftin v. Crossland,* 94 N. C., 76; *Estes v. Jackson,* 111 N. C., 145. Therefore it is not necessary to consider under what circumstances, if any, a married woman may be deprived of her realty by estoppel. The defendant cannot be allowed to delay plaintiff in the recovery of her land because he has failed to allege, as well as prove, facts essential to the validity of his defense.

We see no reason why the action should have been dismissed upon defendant's motion, nor do we think the answers to the fourth and fifth issues inconsistent so as to entitle defendant to a new trial.

NO ERROR. AFFIRMED.

(530)

W. B. WILLS v. B. J. FISHER.

Appeal—Pleading and Proof—Variance.

1. Where, by consent of the parties, the judge frames the issue at the close of the testimony, and no exception is made on the trial to such issues or to the evidence or charge, objection cannot be raised on appeal that the issues submitted were not such as arose on the pleadings. Exception to the issues should be made on the trial, so that the judge may, if he thinks proper, revise and correct them.

2. Where the allegations upon which plaintiff's right to recover depended were the payment by plaintiff, at defendant's request, of money for mining stock, the acceptance of stock by defendant, and his promise to repay to plaintiff the money so advanced, and such allegations were denied by defendant; and it appeared that defendant subscribed for the stock and plaintiff paid for and agreed to take it if defendant should not be in a position to take it up himself; that the stock was issued in October and sent to defendant: *Held*, that there was no material variance between the allegations and proof.

ACTION tried at December Term, 1892, of GUILFORD, before (538) *Connor, J.*, and a jury.

James E. Boyd for plaintiff.
J. T. Morehead for defendant.

(539) MACRAE, J. The plaintiff alleges a purchase of certain stock by him for defendant, and at his request; the payment by plaintiff of $500 for said stock at the request of defendant, the issue of the same to defendant and its acceptance by defendant, and his promise to pay plaintiff the sum advanced by him upon the issue of said stock to defendant, and the refusal to pay plaintiff the sum so advanced.

The defendant, in his answer, denies the purchase of the stock for him by plaintiff, or the request by defendant, as alleged. He sets up a different and conditional contract, and he denies his liability upon the same.

The plaintiff tendered the one issue: Is the defendant indebted to the plaintiff, and if so, in what amount? To this issue defendant objected, and it was agreed that the judge should frame the issues at the close of the testimony. The judge did frame the issues at the close of the testimony, the defendant offering no objection. There was no exception to the evidence or to the charge.

On defendant's motion for a new trial he assigned as error that the issues submitted were not such as arose upon the pleadings.

It has been often held that exceptions to the issues must be taken on the trial in order that the presiding judge may have the opportunity to revise and correct them, if he shall deem proper to do so. The reason of this rule is so obvious and has been so frequently stated that we refer only to *Moore v. Hill,* 85 N. C., 218, and the many cases cited in Clark's Code, sec. 395.

The testimony having been closed, the defendant insisted that the proof did not sustain the allegations of the cqmplaint, and that he was entitled to judgment; in other words, that there was a fatal variance between the allegations and the proof. It is true, as defendant contends, that a plaintiff will not be allowed to abandon averments in his (540) complaint and recover upon facts alleged in the answer, but must show that he is entitled upon the ground on which he has placed his claim. But these averments must be material and must constitute an essential element in his right to recover.

Upon inspection of the record, as we are required to do by section 957 of The Code, which, as construed in *Thornton v. Brady,* 100 N. C., 38, "refers only to such constituent matters of the action as must necessarily go upon and constitute the record of it, and which the Court sees and must take notice of, such as pleadings, the verdict and the judgment," we find that the allegations upon which plaintiff's right depended were the payment of money for stock by plaintiff at defendant's request, the acceptance of the stock by defendant and the promise by him to repay to plaintiff the money advanced by him. These allegations were denied by defendant, or so qualified in the averments of the answer

as to amount to a denial. Whether the stock was purchased by plaintiff, or subscribed for by defendant and paid for by plaintiff at defendant's request, were questions which would not affect the liability of defendant in this action. The nature of the cause of action, which, in either case, was for money paid to the use of defendant, was in no way changed by the evidence or the issues.

The issues met the alterations of the parties; they were framed by consent and without objection or exception. "A variance arises where the proofs do not sustain the cause of action alleged in the complaint. If it is immaterial it will be disregarded; if material and misleading, the court may, in its discretion, allow an amendment on just terms; but where the evidence relates to a cause of action entirely different from that stated in the complaint it is not a case of variance at all, and it was never intended by The Code to allow a plaintiff to prove a cause of action which he has not alleged." *Abernathy v. Seagle,* 98 (541) N. C., 553; Clark's Code, sec. 269.

We hold that in this case there was no material variance between the allegation and the proof. The issues were fairly framed after all the evidence was in. It is to be presumed that his Honor's instructions to the jury presented the contentions fully, with the law bearing upon the same. There is

NO ERROR.

Cited: Robinson v. Sampson, 121 N. C., 101.

SIMPSON, BASS & CO. v. T. H. PEGRAM, JR., ET AL.

Written Contract—Construction—Evidence.

1. While the entire construction of a written contract, whose terms are ascertained, that is, the ascertainment of the intention of the parties, is a pure question of law for the court, and the sole office of the jury is to pass on the existence of the alleged agreement, yet, where the language of the written contract is doubtful in the sense of requiring explanation by experts or by evidence of the usage of trade, such testimony is admissible and should be submitted to the jury under proper instructions.

2. Where defendants, in an action on a contract growing out of written correspondence, introduced testimony tending to show the meaning of certain terms used in the contract under the customs and usage of trade, they cannot complain that the trial judge submitted such testimony to the jury for that purpose instead of construing the contract by the written correspondence alone.

3. Nor can the defendant object in such case after having introduced several letters in relation to other transactions between him and the plaintiffs for the purpose of showing the course of dealing between the parties.

ACTION by Simpson, Bass & Co. against T. H. Pegram, Jr., and J. C. Buxton and J. S. Grogan, assignees of Pegram, for the benefit of creditors, to recover the proceeds of the sale of flour alleged to have
(542) been consigned by plaintiffs to Pegram for sale by him on commission, and which passed to the assignees by the assignment of Pegram, and was sold by them. The action was tried before *Armfield, J.*, and a jury, at July (Special) Term, 1892, of FORSYTH.

The plaintiffs sought to follow the proceeds of the sale of the flour in the hands of the assignees.

Defendants admitted the shipment of the flour to Pegram by the plaintiffs, but denied that it was on consignment, and insisted that it was sold to and bought by Pegram.

The issues submitted to the jury and the responses were as follows:

1. Was the flour mentioned in the complaint consigned to defendant Grogan? Answer: "Yes."

2. Was Pegram a purchaser of said flour? Answer: "No."

3. For what amount did defendants, Buxton and Grogan, sell said flour? Answer: "$590."

Plaintiffs introduced a letter from defendant Pegram addressed to them, ordering the flour in controversy, and a statement rendered to defendant Pegram by them marked Exhibit "B."

The letter was as follows:

OFFICE OF T. H. PEGRAM, JR.,
GENERAL MERCHANDISE BROKER,
CONSIGNMENTS SOLICITED,
AND DEALER IN WAGONS, GRAIN, HAY, MILL FEED, ETC.

WINSTON, N. C., 11 November, 1887.

SIMPSON, BASS & Co., *Richmond, Va.*

GENTS:—I enclose order for a carload of "Bob White," which please ship as soon as possible, as I need the goods right now. If you can, please bill the car to railroad at 100 pounds, and let me have the difference in freight, which will enable me to push the goods right off. Would have taken some of the other brand, but cannot use it in barrels.

Yours truly,
T. H. PEGRAM, JR.

The statement (Exhibit "B") sent to Pegram at time of ship-
(543) ment by plaintiffs was as follows:

SIMPSON *v.* PEGRAM

RICHMOND, VA., 17 November, 1887.

MR. T. H. PEGRAM, JR., *Winston, N. C.*

BOUGHT OF SIMPSON, BASS & Co.,

GENERAL COMMISSION MERCHANTS, WHOLESALE DEALERS IN FLOUR, GRAIN, HAY, ETC.

TERMS. Nos. 1205 and 1207 Cary St.

To 50 barrels Bob White,	1-2 sacks,		
" 25 " " "	1-4 "		
" 25 " " "	1-8 "		
" 25 " " "	1-16 "		
125		$4.75	$593.75
Less brokerage, 10 per cent per bbl.,			12.50
			$581.25

Plaintiffs introduced H. E. Fries, who purchased the flour in controversy from the defendants, assignees of defendant Pegram, and proved by him the amount he had paid said assignees for said flour. This witness was asked, on cross-examination, if it was not the custom of trade among mill men (he being one) in shipping flour, as in this case, to use the word "brokerage," as it appeared in statement "B" rendered in this case, in the sense of "discount," and that, looking only at statement "B," if he would declare this transaction a sale, and not a consignment. He answered that he did not know the customs of trade in transactions like this one in controversy, as he never transacted his business in this way, and therefore he could not (544) answer this question.

The defendants introduced J. G. Young, a commission merchant and broker, who, among other things, testified that he was acquainted with the customs of trade in sales of flour by the carload, like the one in controversy, and that a discount was allowed commission merchants and brokers who handled such goods, and that the words "less brokerage or commissions, ten cents per barrel," did not indicate such goods were consigned, if person receiving the goods had the exclusive right to sell that special brand of goods in that market; that in cases of this kind he would understand from Exhibit "B" a sale, and not a consignment. He was asked, on cross-examination, what he would infer from Exhibit "B" if it were a transaction with a general merchant and not with a commission merchant or a broker, and he said he would infer a sale, and not a consignment, and that he would infer the same if the transaction were with a commission merchant or broker, unless he received the goods by the carload, and had the exclusive sale of that brand in that market.

Defendants introduced letters, and copies of letters, passing between plaintiffs and defendant Pegram in regard to the transaction, and other transactions tending to show the course of dealing between them. At the close of the evidence the defendants insisted that, as the whole contract was in writing, its construction was for the court, and not for the jury, and that there was not sufficient evidence of a consignment.

But his Honor submitted the issues to the jury, upon the evidence, and the defendants excepted. There was a verdict for plaintiffs and a rule for a new trial for error in submitting the issues to the jury. Rule discharged; judgment rendered for plaintiffs, and defendants (545) appealed.

Glenn & Manly and Jones & Kerner for plaintiffs.
Watson & Buxton for defendants.

SHEPHERD, C. J. It is unquestionably true, as contended by the defendants' counsel, that where the terms of a contract have been ascertained or where it is evidenced by a written instrument, or, as in this case, by written correspondence between the parties, 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." *Spragins v. White,* 108 N. C., 449.

If, however, the language used is doubtful in the sense that it requires the scientific exposition of experts or explanation by evidence of the usage of trade or other extraneous circumstances, such testimony is admissible and should, under appropriate instructions, be submitted to the jury. 1 Greenleaf Ev., 280.

It seems that the words "less brokerage, ten cents per barrel," as used in the correspondence between the parties, have, under certain circumstances, a meaning peculiar to dealings between commission merchants engaged in the flour business, in so far as they relate to the question of whether there is a sale or a consignment. This at least appears to have been the view of the defendant, who introduced testimony tending to show such meaning under "the customs of trade in sales of flour by the carload like the one in controversy." There may have been phases of the case in which a part of this testimony would have been beneficial to the plaintiffs. Be that as it may, the defendant, having intro- (546) duced it as explanatory of the terms of the contract, cannot complain that it was submitted to the jury for that purpose. Even had it been incompetent, and he had moved to strike it out, a refusal to do so would not have been the subject of review in this Court. *S. v. Efler,* 85 N. C., 585.

The testimony having a tendency to throw some light upon the transaction, we cannot see how the defendant could require the court to exclude it from the consideration of the jury and decide the case upon the written correspondence alone.

Moreover, the defendant introduced several letters in reference to other shipments at various times. We must assume that he did this for the purpose of showing the course of dealing between the parties. This is an additional reason in support of his Honor's refusal to take the case from the jury.

No ERROR.

Cited: White v. McMillan, 114 N. C., 352; *Lindsay v. Ins. Co.,* 115 N. C., 222; *Edwards v. R. R.,* 121 N. C., 491; *Kerr v. Sanders,* 122 N. C., 637; *Blalock v. Clark,* 137 N. C., 142; *Wilson v. Cotton Mills,* 140 N. C., 56; *Neal v. Ferry Co.,* 166 N. C., 566; *Hollifield v. Telephone Co.,* 172 N. C., 725.

(547)

JOHN R. FOSTER ET AL. v. SIDDIA HACKETT.

Deed—Contingent Remainder—Estoppel—Ejectment—Tenants in Common.

1. While one tenant in common suing a trespasser in ejectment and proving title to an undivided interest is entitled to judgment for the possession of the whole land, if the evidence establishing his right demonstrates that others than the defendant hold as cotenants the other undivided interests, and that the action inures to their benefit, yet, when the defendant is a cotenant, the plaintiff should have judgment only for the recovery of the interest to which he shows title.

2. A warranty deed by one having only a contingent remainder in land passes the title, by way of estoppel, to the grantee, as soon as the remainder vests by the happening or the contingency upon which such vesting depends.

3. *Quœre,* whether a conveyance or assignment of a contingent interest in land for a valuable consideration would be upheld by a Court of Equity as an equitable assignment or contract to convey upon the happening of the contingency and the vesting of the estate. In such case, however, the grantee should set forth and plead specifically such equity.

ACTION to recover land, tried at Spring Term, 1892, of WILKES, before *Armfield, J.*

(550) *D. M. Furches for plaintiffs.*
W. W. Barber for defendant.

AVERY, J. Both plaintiffs and defendant claim through Mildred Goforth, who devised the land in controversy to Achilles Foster in trust for her daughters, Anna D. and Pheba Goforth, or to the survivor for life, with remainder to the issue of both or either, but on failure of such issue at the time of the death of the survivor of the two, to her "own lawful heirs."

Mildred Goforth left surviving her eight children, viz.: Anna D., who died without issue in 1886, and Pheba, who died without issue in 1887, and six others who married and are now living or have left children who are still surviving, viz.: John Goforth, William Goforth, Mildred, who married Edmund Tilley; Delpha, who married Wyatt Rose; Lucy, who married Anthony Foster, and who was the mother of the plaintiffs, and Levinia, who married —— Foster.

James Calloway, the executor of Mildred Goforth, assuming that he had power under the will or as attorney for her heirs and devisees, sold and conveyed the land in dispute on 28 June, 1858, while Anna D. and Pheba were living, to the said Levinia Foster, one of the daughters of the testatrix. The defendant claims under a deed from Levinia
(551) Foster, dated 6 October, 1871. It was admitted on the trial that James Calloway had no power under the will to dispose of the land and no instrument was shown constituting him the agent of the heirs and devisees of Mildred Goforth, or any of them, for that purpose. So, if we concede that the deed of Levinia to the defendant precluded her or her heirs, if she is now dead, from setting up any claim to the interest which vested subsequent to the date of her deed or the death of Pheba, in 1887, in the "lawful heirs" of Mildred Goforth, the title to one undivided sixth only of the land in controversy was shown to be in the plaintiffs, while the other four undivided sixths are vested in John Goforth, William Goforth, Mildred Tilley, and Delpha Rose, or their heirs, one-sixth in each.

The plaintiffs have not excepted, but seem to have conceded that the defendant, as the grantee of Levinia Foster, is a tenant in common with the other heirs of Mildred Goforth, holding her undivided sixth interest.

Though the rule has been repudiated in many of the States, it seems to be settled in North Carolina that, in actions for the possession of land, where a plaintiff proves his title to an undivided interest, he can have judgment for the whole if he has shown "on the trial that the same evidence of title or possession that established his own right demonstrated the fact that others than the defendant held as cotenants the other undivided interest and that the action inured to their benefit." *Allen v. Sal-*

linger, 103 N. C., 18; Sedgwick & Wait, sec. 300. The rule is stated by Sedgwick & Wait as follows: "Each cotenant can pursue his remedies independent of the others and may maintain ejectment or trespass to try title alone, and in many States may recover the entire premises and estate from trespassers, strangers, wrong-doers and all persons other than his cotenants and those claiming under them. When his right is recognized he recovers for all. This principle has been expressly recognized in Oregon, Nebraska, Nevada, North Carolina, etc. . . . But the rule has been repudiated in Massachusetts, Penn- (552) sylvania and Missouri."

Where, in the old declaration in ejectment, the demise was laid from one of several tenants in common, the plaintiff could recover his term in the undivided share of that particular tenant (*Godfrey v. Cartwright,* 15 N. C., 487; *Holdfast v. Shepherd,* 28 N. C., 361), and on the joint demise of two or more lessors, who are tenants in common with another or others, a recovery might be had to the extent of their combined interests, unless there was joined with them in the demise a person not shown to have such common interest with them. *Bronson v. Paynter,* 20 N. C., 527; *Hoyle v. Stowe,* 13 N. C., 318. Where in such cases a general verdict of guilty was returned, the plaintiff was entitled to judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeded at his peril. *Holdfast v. Shepherd, supra.* But, as was said by *Daniel, J.,* in *Godfrey v. Cartwright, supra,* "the more correct way of proceeding is for the jury to find the defendant guilty of the trespass and ejectment in the undivided portion of the land described in the declaration to which the lessor proves title on the trial, and then the judgment shall be rendered accordingly," viz., that the plaintiff be let into possession of or as to his undivided interest. In *Lenoir v. South,* 32 N. C., 237, *Ruffin, C. J.,* in speaking of the propriety of returning specific findings as to boundaries or extent of interest, said: "The jury may indeed give a general verdict and it is usual to do so, but when the precise interest of the lessor or lessors of the plaintiff appears, it is generally proper and most for the convenience (553) that the verdict should be according to it."

But, when the fictitious action was abolished and that for possession was substituted for it, it became all-important if title was put in issue, as it generally was, that the plaintiff's judgment should be limited to his actual boundary or to his specific interest, because it was no longer a contest between nominal but real parties, and the decree was conclusive both as to territorial limits and the nature of the seizin. *Withrow v. Biggerstaff,* 82 N. C., 82; *Allen v. Sallinger, supra; Gilchrist v. Middleton,* 107 N. C., 663.

In *Gilchrist v. Middleton, supra,* the Court said: "One tenant in common of land may sue alone and recover the entire interest in the common property against another claiming adversely to his cotenants as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do in order to protect the rights of his cotenants against trespassers and disseizors. But where it appears from the proof offered to show title, or is admitted, as in this case, that a defendant who has confessed ouster by denying plaintiff's title is in reality a tenant in common with the latter, it is the duty of the court to instruct the jury, by a specific finding, to ascertain and determine the undivided interest of the plaintiff. This obviates the danger of concluding the defendant by a general finding that the plaintiff is the owner." It thus appears "how one tenant in common may sue a trespasser who is infringing upon the rights of himself and his cotenants and recover the entire land, or sue his cotenant, who simply refuses to recognize his right in his answer, and recover such interest only as he may establish title for."

The rule which we have been discussing is one peculiarly applicable to actions for the possession of land, being that which obtained in the trial of actions of ejectment modified so far as to accommodate it (554) to the new remedy substituted for the old fictitious suit.

"The exception to the general rule that all persons interested in and to be affected must be made parties on the one side or the other obtained in courts of equity, where they were very numerous or it was impracticable to bring them all before the court." Story Eq. Pl., sec. 122; *Bronson v. Ins. Co.,* 85 N. C., 411. Section 185 of The Code reaffirms this principle and enlarges its operation by allowing one to sue for all others, both where the parties are very numerous and where they have common interests, in all actions without regard to their nature. *Bronson v. Ins. Co., supra;* Pom. Rem., sec. 391; *Thames v. Jones,* 97 N. C., 121; *Glenn v. Bank,* 72 N. C., 626. But where one rests his right to sue alone in behalf of himself and others on the ground that the parties in interest are so numerous that it is impracticable to bring them before the court, he must so allege. *Thomas v. Jones, supra; McMillan v. Reeves,* 102 N. C., 550; Clark's Code, p. 98. It is obvious, therefore, that one of several cotenants, when he brings an action against a trespasser on the common property and proves the title of the other tenants in establishing his own, may, under the common-law practice in ejectment applied to actions for the possession of land, recover the whole though he claim sole seizin in his complaint in himself, just as he can do under the procedure prescribed in The Code by alleging that the action is brought in behalf of himself and others having a common interest, though it has never been determined in this State how far, if at all,

in the action under the provisions of the statute, the cotenants, not actual parties, would be concluded by the judgment. *Thames v. Jones, supra;* Pomeroy Rem., 391. The statutory remedy not being exclusive, the plaintiffs were at liberty after claiming sole seizin to insist upon recovering the whole, if they showed title in themselves and cotenants against a tort feasor in possession.

If, therefore, the deed of Levinia Foster, executed in 1871, (555) when in contemplation of law it was possible that both Anna and Pheba Goforth might still have issue, operated upon the death of the survivor of the two in 1887 to pass the one undivided sixth, that would then have vested in her, to the defendant as her grantee, then the defendant is a tenant in common, and the court should have instructed the jury to find that the plaintiffs were the owners of one undivided sixth, and should have given judgment that they be let into possession according to their interests. Levinia Foster executed the deed in 1871 to a contingent interest which could vest in her only, in case both Anna and Pheba should die without issue, and she should survive them.

2 Blackstone, 290, lays down the rule as follows: "Reversions and vested remainders may be granted, because the possession of the particular tenant is the possession of him in reversion or remainder; but contingencies and mere possibilities, though they may be released or devised by will or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some interest." The ancient policy, which prohibited the sale of a pretended title and adjudged the act to be an unlawful maintenance, it was well said by *Chancellor Kent,* has outlived the reason upon which it was founded in a state of society very different from that now existing in any part of the United States or the British Dominion. 2 Kent Com., 447. The limitation is similar to that discussed in *Watson v. Smith,* 110 N. C., 6, the only difference being that the persons who were to take the contingent interest, on failure of issue of J. W. B. Watson at his death, were in that case designated by name, whereas in our case the contingent interest was to vest in "the lawful heirs" of the devisor, whoever they may be, upon the death of the survivor of the two daughters and failure of issue of both. In some of the States there are statutes ex- (556) pressly providing that such expectancies can be conveyed by deed, but in the absence of such legislation we would be led into a discussion of questions as to which there is some conflict of opinion, if our decision hinged upon the inquiry whether Levinia Foster had the power in 1871 to convey or only to make an assignment of her interest for a valuable consideration, which, as a contract to convey, she would be compelled by a Court of Equity to perform specifically on the happening of the contingency, when her estate should vest, or whether she was prohibited

by public policy on account of the uncertainty of the persons who would fall under the description of lawful heirs, on failure of issue of Anna and Pheba at the death of the survivor, from transferring her interest either in law or equity. Washburn Real Prop., pp. 737, 776, 777; *McDonald v. McDonald,* 58 N. C., 211; *Mastin v. Marlow,* 65 N. C., 695; 20 A. & E., pp. 968, 969, notes; 1 A. & E., p. 830; Shep. Touch., 238; 6 Cruise Dig., 27n. If the deed were upheld only as an equitable assignment, and the defendant wished to rest her defense upon the ground that it passed the equitable interest of Levinia Foster to her, it would be essential that she should set forth and plead specifically her equity. *Geer v. Geer,* 109 N. C., 679.

But in order to obviate the necessity of discussing these intricate and interesting questions, this Court, in the exercise of its discretionary power, has ordered to be certified a copy of the deed from Levinia Foster to Siddia Hackett, from which it appears that the grantor covenanted therein for herself and her heirs to forever warrant and defend the title to the land conveyed to the said Siddia Hackett against the claims of all persons whatsoever. The deed with warranty cer-
(557) tainly took effect upon the death of Pheba, in 1887, so as to pass the title by way of estoppel to the defendant as the grantee of Levinia Foster to the one undivided sixth which then vested in her, as against Levinia Foster or her heirs, if she were then dead. It does not appear positively whether Levinia was living or dead when Pheba died in 1887, but the deed would estop her, or the warranty, her heirs. *Benick v. Bowman,* 56 N. C., 314; Sedgwick & Wait, *supra,* sec. 850; Tiedeman Real Prop., sec. 727; 6 Lawson R. & R., sec. 2701.

The defendant, being the owner of the undivided sixth interest that vested on the death of Pheba in Levinia Foster, or her children and heirs at law, was a tenant in common with the plaintiffs, and not a trespasser. The court below erred, therefore, in instructing the jury to find that the plaintiffs were the owners and entitled to the possession of five undivided sixths of the land lying northeast of the creek. The response to the issue should have been that plaintiffs were the owners of one undivided sixth, and judgment should have been rendered that they be let into possession with defendant according to their interest.

For the error mentioned, a new trial must be granted. Whether the defendant can offer any testimony on the next trial that should be submitted to the jury as tending to show an estoppel *in pais* remains to be seen.

NEW TRIAL.

Cited: Moody v. Johnson, post, 811; *Lenoir v. Mining Co.,* 113 N. C., 519; *Wright v. Brown,* 116 N. C., 29; *Taylor v. Smith, ib.,* 534; *Brown*

v. Dail, 117 N. C., 43; *Blue v. Ritter,* 118 N. C., 582; *Winborne v. Lumber Co.,* 130 N. C., 33; *Hooker v. Greenville, ib.,* 474; *S. v. Crook,* 132 N. C., 1058; *Boles v. Caudle,* 133 N. C., 534; *Allred v. Smith,* 135 N. C., 451; *Kornegay v. Miller,* 137 N. C., 663; *Walker v. Taylor,* 144 N. C., 178; *Hobgood v. Hobgood,* 169 N. C., 490; *Ford v. McBrayer,* 171 N. C., 425; *James v. Hooker,* 172 N. C., 783; *Baker v. Austin,* 174 N. C., 435; *Bourne v. Farrar,* 180 N. C., 137.

(558)

THOMAS MOORE v. N. H. BEAMAN ET AL.

Rehearing on Appeal—Usury.

1. Under Laws 1866, ch. 24, which is essentially the same as the present usury law (section 3836 of The Code), the taking, receiving, charging, etc., a greater rate of interest than the legal rate prescribed by the act is a forfeiture of the entire interest.

2. A loan of money at a greater rate of interest than that allowed by the law (chapter 24, Laws 1866) is, usury being pleaded, simply a loan which, in law, bears no interest, and, payments being made, the law applies them to the only legal indebtedness—the principal sum.

3. Under Laws 1866, ch. 24, which declares that "no interest shall be recoverable at law or in equity" when more than the legal rate has been contracted for, it is immaterial whether the creditor seeks his relief by a proceeding which formerly would have been termed a suit in equity, or by an action at law, or whether the creditor be plaintiff or defendant.

4. Where a point was fully argued, considered and passed on at a former hearing, and no new authority has been cited and no authority or material fact overlooked, the point will not be considered on a rehearing.

5. The fact that all the authorities cited in the argument were not noticed and discussed in the opinion handed down by the Court is no ground for a rehearing of the case.

AVERY, J., dissenting.

PETITON by plaintiff to rehear the case decided at September Term, 1892, of this Court, 111 N. C., 328.

C. B. Aycock, W. C. Munroe and T. C. Wooten for plaintiff.
George M. Lindsay for defendants.

CLARK, J. This is a petition to rehear this case decided 111 N. C., 328. The statute provides (The Code, sec. 3836), "The (560)

taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, or other evidence of debt, carries with it, or which has been agreed to be paid thereon." This is clear, plain and explicit. There is no doubt of the meaning of the law-making power nor of its authority to make the enactment. Nor is it questioned that the plaintiff in this case did contract for a larger rate of interest than that allowed by statute. When, therefore, he comes into court to get the aid of the law he cannot (the defendant having pleaded the usury) get any more than the law allows, *i. e.,* the principal without any interest. This has been recently decided. *Gore v. Lewis,* 109 N. C., 539; *Arrington v. Goodrich,* 95 N. C., 462.

It is entirely immaterial whether the plaintiff creditor has sought his relief by a proceeding which formerly would have been termed a suit in equity or an action at law. The distinction between these modes of procedure is expressly abolished by the Constitution, Art. IV, sec. 1. Besides, the plaintiff is seeking to enforce collection of his debt, that is the substance of it, and he cannot, by skillfully selecting one prayer for relief instead of another, avoid the penalty which the law imposes upon the transaction, which is the basis of his action. Furthermore, the act in force when this debt was contracted (1866, chapter 24) was passed while the distinction still existed between proceedings at law and in equity, and to forbid the plea now set up it is expressly provided that "no interest shall be recoverable at law or in equity" when a greater rate than legal interest is contracted for.

The petitioner contends that *Gore v. Lewis, supra,* was decided (561) under the present usury act, chapter 91, Laws 1876-77 (now The Code, sec. 3836), while this debt was contracted under the law formerly in force, which was chapter 24, Laws 1866. This same point was made before—it was fully argued and was considered and passed upon by the Court. No new authority is now cited, nor was any authority or material fact overlooked. Upon all the precedents the rehearing must be denied. *Hudson v. Jordan,* 110 N. C., 250.

The gravamen of the petition seems to be that the Court did not notice in its opinion all the authorities cited on the argument. But that is not good ground for a rehearing. It is the custom of the Court to examine and consider all the precedents with which we are favored by counsel on the argument or in the printed briefs, and that was done in this case. But to notice, distinguish, criticize or show the inapplicability of each and every case relied on would often draw the opinions out to an unseemly length. We will, however, now notice the three cases which were used by plaintiff on the argument before and which, though considered by the Court, were not referred to by name in the opinion.

Bank v. Lutterloh, 81 N. C., 142, and *Webb v. Bishop,* 101 N. C., 99, were like this case in that the contract was made under the act of 1866 and the action was brought after the act of 1876-77 (now in force). The Court reviewed in those cases the effect of Laws 1874-75 and 1876-77, and clearly recognized that the penalty of forfeiture of interest denounced by the act of 1866 was still enforceable as to contracts made under its operation, but held that the right added by the act of 1876-77 to recover back interest paid (which by the parties themselves had been applied as interest) could not apply to contracts made prior to its passage. But here, there was no application by the parties of any payment to interest, nor is any interest sought to be recovered (562) back. The contract, by the act of 1866, is, usury being pleaded, simply a loan of money which in law bore no interest. When payments were made the law applied them to the only legal indebtedness—the principal sum; for the act of 1866 expressly provides that the usurer shall recover no interest whatever "at law or in equity." This is the general rule. *Kinser v. Bank,* 58 Iowa, 728; *Cheapstead v. Frank,* 71 Ga., 549; 11 A. & E., 411.

Hughes v. Boone, 102 N. C., 137, was like both the last cited cases, and the present one, in that the usurious contract was made under the act of 1866 and action was begun after the adoption of the present act. The plaintiff contended that he could recover twelve per cent interest by the terms of the agreement, because the act of 1874-75 had repealed the act of 1866. The court below allowed six per cent interest. The plaintiff alone appealed. The defendant not having appealed, the validity of the allowance of six per cent was not before the Court, and anything in the opinion which might seem to recognize its validity was mere *obiter dictum,* and is opposed to the decisions above cited. The point was not presented for adjudication and could not have been argued. But the Court did hold against the plaintiff's contention, as we held in this case, that "the act of 1874-75 did not apply to contracts existing" at its adoption, and that the act of 1876-77 was "substituted" for it, and hence that the plaintiff could not recover twelve per cent interest which was forbidden by the act of 1866, which was in force when the debt was contracted.

By the law of 1866, in force when this contract was made, no interest was recoverable in law or equity when a higher rate of interest than the law allowed was agreed upon. By all the authorities above cited, the act of 1866 has not been repealed by either the act of 1874-75 or the act of 1876-77 (now in force), as to contracts made during (563) its operation. No payment has been made and applied to the interest. The creditor has come into court and asked for some remedy which would bring to him payment of his debt, and has obtained judg-

ment for the debt and a decree of foreclosure. The Court can only say to him that as to his debt the act of 1866 is still in force; that the law applies the payments (in the absence of application by the parties to the interest) to the only valid indebtedness, *i. e.*, the principal thereof, and that the Legislature having forbidden the recovery of any interest, the creditor can only have a remedy to the extent of the principal sum remaining unpaid after the application of the payments thereto.

If the plaintiff thinks it hard that he should recover no interest at all, he must remember that the law-making power of this State has always forbidden as high a rate of interest as he exacted and had placed on the statute book at the time he made this contract the enactment that if any one agreed to receive more than the legal interest on a loan he should "recover no interest either in equity or at law." He deliberately violated this law. He took the risk. The courts have neither the power nor the disposition to abrogate a statute in order to relieve him from the consequences of his own act. As we said before, in grasping after illegitimate and forbidden gains, he has lost the legal interest which he could otherwise have recovered.

There are some authorities in our State to the effect that when the debtor brings the action and invokes the equitable jurisdiction of the court, as by an injunction to prevent a sale under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle "who asks equity must do equity." This Court is not now called on to intimate any opinion either way (564) upon those authorities, as the question is not before us for decision, since this action is brought by the creditor. Speaking, therefore, solely for myself, I do not see how the principle cited applies nor the authority of those decisions. At common law all interest was forbidden and its receipt was a punishable offense. 11 A. & E., 379. The common law in this was even more rigid than the Levitical law, which only forbade taking interest from Israelites. All interest with us is purely statutory, and no debt bears interest except when authorized by law. 11 A. & E., 380, and numerous cases cited. It is within the exclusive province of the law-making power to prescribe upon what conditions and at what rate interest can be allowed or contracted for, and what shall be a forfeiture of the right to collect it. It can make no difference whether the debtor is plaintiff or defendant. Whenever there is a controversy in court between the debtor and creditor to adjust the amount of the indebtedness, and it is made to appear that there has been a violation of the terms upon the observance of which the creditor is entitled to the collection of any interest at all, the court has only the authority conferred by law. It can only give judgment for the principal without interest.

Nor can it make any difference that the proceeding is one which would formerly have been upon the equity side of the docket. The grant of an equitable remedy by injunction and the like is not a matter of discretion or favor, but as much a matter of right as any strictly legal remedy. Hence the principle invoked, "he who asks equity must do equity," has no application to a case like this where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. With the policy of the law we have nothing to do. That rests with the people acting through their representatives in the law-making department of the government. That the act may work a hardship in any case gives the courts (565) no authority to disregard the statute or explain it away. The judges cannot be wiser than the law. When, as here, the Legislature has constitutional authority to make the statute, and its meaning is plain, with no limitation making it apply only when the action is brought by the creditor, the courts have not, in my opinion, the power to so restrict it.

Under the usury act in force up to 1866 whenever usury was reserved the entire contract was void, and neither principal nor interest could be recovered. *Ehringhaus v. Ford,* 25 N. C., 522. In *Ballinger v. Edwards,* 39 N. C., 449, this was construed to apply only on the law side of the docket, and when the debtor had to seek the aid of a Court of Equity he was compelled to pay the principal with legal interest. The act of 1866, while reducing the penalty to the loss of interest, seems to have expressly intended to change the doctrine laid down in *Ballinger v. Edwards,* by providing that no interest on usury contracts shall be recovered either "at law or in equity." The subsequent decisions seem to have been inadvertent to the change. The present statute is equally broad, it not being restricted from applying to "cases formerly cognizable in equity." Similar statutory enactments for the same purpose have been passed by New York, New Jersey and other States. Tyler on Usury, 435. In *Bank v. Knox,* 21 N. C., 50, *Gaston, J.,* says: "An usurious contract is regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A Court of Equity cannot, therefore, be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression cannot demand help even against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor or morality." (566)

In the present case, however, there is no fraud charged against the defendant. The creditor, having brought an action to enforce an usurious contract, is entitled to judgment for the principal subject to payments made and without any interest.

PETITION DISMISSED.

AVERY, J., dissents.

Cited: Ward v. Sugg, 113 N. C., 492; *Atkins v. Crumpler,* 118 N. C., 541; *Smith v. Loan Assn.,* 119 N. C., 255; *Churchill v. Turnage,* 122 N. C., 430, 432, 433; *Erwin v. Morris,* 137 N. C., 50; *Owens v. Wright,* 161 N. C., 142; *Whisnant v. Price,* 175 N. C., 614.

THE COUNTY BOARD OF EDUCATION OF DUPLIN COUNTY AND J. R. WELLS, TREASURER, v. JAMES G. KENAN, SHERIFF OF DUPLIN COUNTY.

Controversy Without Action—School Taxes, to Whom Payable—Constitutionality of Statute, Who May Not Attack.

1. Where a controversy without action is submitted for the sole purpose of obtaining the opinion of the court upon a question, the effect of which might be to derange for a time the administration of the public-school system, this Court will decline to entertain the controversy.

2. The school tax raised in a county under chapter 517, Laws 1891 (amending section 2589 of The Code), is payable to the board of education of said county, and the sheriff who has collected it cannot defeat a recovery thereof by such board of education by attacking the constitutionality of the statute and alleging that the fund is payable to some one else, when the fund is claimed only by such board of education.

3. It is not the province or right of a subordinate officer of the State government to assume an act of the General Assembly to be unconstitutional and to refuse to act under it, except only, if at all, in cases of plain and palpable violation of the Constitution, or where irreparable harm will follow the action.

(567) CONTROVERSY submitted without action, heard before *Connor, J.,* at Spring Term, 1893, of DUPLIN.

Allen & Dortch, Busbee & Busbee and Aycock & Daniels for plaintiff.
Battle & Mordecai and A. D. Ward for defendant.

MACRAE, J. This controversy without action, between certain (568) officers of the county of Duplin, is raised for the purpose of invoking the exercise of what is called in *Hoke v. Henderson,* 15 N. C., 1, "The gravest duty of a judge," a decision upon the constitutionality of an act of the General Assembly.

It is well understood that this duty which sometimes devolves upon the courts, not by reason of any superiority in the judicial to the legislative department of the State, but of necessity, when the powers of the people in their Constitution and those reposed in their Legislature are brought in conflict, is to be exercised only as the last resort and when forced upon the court.

The board of education claims the fund in the sheriff's hands arising from the collection of school tax; there is no other claimant of this fund; the law, section 2563 of The Code, expressly requires the sheriff to pay it over to the board of education of the county, under heavy penalties for a failure so to do. These are the words of the statute:

"And on failure so to do (the sheriff) shall be guilty of a misdemeanor, and fined not less than $200 and be liable to an action on his official bond for his default in such sum as will fully cover such default, said action to be brought to the next ensuing term of the Superior Court, and upon the relation of the county board of education for and in behalf of the State."

It will be seen that the mode of procedure in case of failure of the sheriff to pay over the fund as required is prescribed in the statute.

The sheriff, however, at the suggestion of the county commissioners, doubts the constitutionality of the act aforesaid, and is advised that "the State School Fund" should be paid to the public treasurer, and, therefore, refuses to pay it according to the direction of the act.

If the public treasurer were demanding payment of the sheriff (569) it might be that the advice of the court could be required and the question presented in such manner that the court would feel bound to advise the sheriff, in a proper proceeding, all parties interested being before it, as to the disposition of the fund.

But in this case, where there is no controversy between claimants of money in the sheriff's hands, and the proceeding is instituted, as it evidently is, for the sole purpose of obtaining the opinion of the Court upon a most important question, the effect of which opinion, if given in favor of the contention of the sheriff, might be to disorder for the time being the whole administration of the common school system of the State, we cannot hesitate to decline to entertain the controversy.

We may refer to what was recently said by the Court in the case of *Gilmer v. Holton,* 98 N. C., 26, where the clerk of the Superior Court refused to administer the oath of office to a justice of the peace appointed

by the Governor under the act of Assembly, because in the opinion of the clerk the act was unconstitutional: "It is a proper occasion for us to remark that if every subordinate officer in the machinery of the State government is to assume an act of the Legislature to be in violation of the Constitution and refuse to act under it, it might greatly obstruct its operation and lead to most mischievous consequences. This is only permissible, if at all, in cases of plain and palpable violation of the Constitution, or where irreparable harm will follow the action."

AFFIRMED.

Cited: Wilson v. Jordan, 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215; *Campbell v. Cronly,* 150 N. C., 472; *Kistler v. R. R.,* 164 N. C., 366; *S. c.,* 170 N. C., 667.

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(570)

C. M. VARNER, ADMR. OF W. S. STEEL AND J. H. STEEL, DECEASED, v. N. JOHNSTON, ADMR., ETC., OF SARAH JAMISON, DECEASED.

Wills—Probate—Construction of—Restoration of Destroyed Will—Statute of Limitations—Reference.

1. Where a testatrix provided for the sale of a slave and the distribution of proceeds among her grandchildren when the youngest should arrive at a certain age, the fact that such grandchild died before attaining the designated age does not change the time at which the sale and distribution should be made.

2. Where a will provided that at a certain time a slave "shall be put to public sale and the proceeds equally divided between my surviving grandchildren, and in case any of my grandchildren shall die and leave children, their children shall receive the portion which would have been coming to them, provided they had lived until the distribution": *Held,* that the intention of the testatrix was that the fund should be divided among her grandchildren living at the time of the sale, and the children of such as were dead leaving children.

3. Where a will has been admitted to probate, a party claiming property disposed of by it to another cannot, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded, under section 2150 of The Code.

4. Where one claims personal property as the distributee of an ancestor, an action to recover the same can be maintained only by the administrator or executor of the deceased.

5. The limitation of five years, prescribed in section 67 of The Code, as the time in which burnt records may be restored after destruction, as pro-

vided in section 59 of The Code, applies to a proceeding begun in 1886 to restore the record of a will destroyed in 1875, notwithstanding the act of 1893, ch. 295, which amends section 67 by abolishing the limitation.

6. The statutory method of establishing the contents of a lost or destroyed record, as prescribed in section 55 *et seq.* of The Code, does not have the effect to exclude parol evidence to prove such contents; therefore, where, in an action to recover property alleged to have been disposed of by such will, a referee found that the will had been duly probated and the record of it destroyed, and that no copies were extant, but refused to admit testimony as to its contents, the court below should, on the exception of the one offering such evidence, have remanded the case to the referee for his findings as to the contents.

7. W. S., in whom a legacy had vested, died without issue or next of kin, except his father, J. S., who died subsequently; V. was appointed administrator of both, and in both capacities sued to recover the legacy: *Held*, that it is immaterial whether judgment was rendered in favor of V. as administrator of the father or the son, as, in either case, he is bound by the judgment.

8. Where there are conflicting claimants of a fund in the hands of an administrator, and he resists the recovery by one of the claimants for whom judgment is finally given in an action to recover the fund, costs should not be awarded against the administrator personally, but should be paid out of the fund, unless the court should adjudge that there has been mismanagement or bad faith in his defense to the action.

ACTION by C. M. Varner, administrator of W. S. Steel and (571) also of J. H. Steel, deceased, against N. Johnston, administrator of Sarah Jamison, to recover the intestate's share of the proceeds of the sale of a slave sold under the provisions of the will of defendant's testatrix for distribution among her grandchildren. Isabella Gallamore also claimed the fund, and was made a party plaintiff on her motion. The cause was referred to J. C. Gibson, Esq., whose report was excepted to by plaintiff Gallamore and by the defendants, but was in all other respects confirmed by his Honor, *McIver, J.*, at Spring Term, 1892, of CABARRUS, and from the judgment overruling the exceptions and confirming the report, the plaintiff, Isabella Gallamore, and the defendant Johnston, administrator, etc., appealed. The facts are sufficiently stated in the opinion of *Associate Justice Burwell.*

Craige & Clement for plaintiffs.
Paul B. Means for defendants.

BURWELL, J. Sarah Jamison died in Cabarrus County in 1855. She named no executor of her will, which was admitted to probate in "common form" in October of that year. W. W. Rankin (572)

was duly appointed administrator *cum testamento annexo* of her estate, and died without having fully administered his trust. J. C. Cannon was then appointed administrator *de bonis non, c. t. a.,* and in 1864, as such administrator, he sold a slave called Green, on credit, and after 1865 he collected on account of said sale the net sum of $725.94, the proceeds of the sale of the slave. One-half of this fund was paid over to Jacob Blackwelder, who had married Elizabeth, a granddaughter of Sarah Jamison. The other half of this fund came into the hands of the defendant, N. Johnston, in September, 1879, who had been appointed to succeed J. C. Cannon in the administration of the estate of Sarah Jamison. He has, it seems in his hands no money or other assets belonging to that estate, except what is the subject of controversy in this action. He admits that he received this fund from his predecessors in the administration of the estate of Sarah Jamison as the proceeds of the sale of a slave alleged to belong to her and bequeathed by her in her will.

The plaintiff, C. M. Varner, administrator, insists that the facts heretofore stated are true, and contends that under the provisions of the will of Sarah Jamison the fund in the hands of the defendant administrator should be paid to him. He is the administrator of the estate of W. S. Steel, who died 23 December, 1863, intestate and unmarried, and of James H. Steel, the father of W. S. Steel, who died in 1866. W. S. Steel was a son of Sarah Gallamore, one of the granddaughters of Sarah Jamison, and his mother died 30 January, 1836.

We are brought, therefore, to the consideration of the will of Sarah Jamison, which, so far as concerns this controversy, is as follows: "My negro boy, Green, is to remain with my daughter, Isabella Gallamore, until my youngest granddaughter, Frances Lydia Gallamore, arrives to eighteen years of age, when he is to be valued, and one of my grandchildren take him at the valuation and pay over to the other surviving grandchildren their distributive share, and, if none of them will take him at the valuation, then he shall be put to public sale, and the proceeds equally divided between my surviving grandchildren. In case any of my grandchildren shall die and leave living children, their children shall receive the portion which would have been coming to them, provided they had lived until the distribution had taken place."

(573)

Frances Lydia, the granddaughter named in this will, was born 6 November, 1845, and died 25 January, 1863, lacking nine months and twelve days of being eighteen years of age.

We think that the fact that she died before reaching the age of eighteen years could not have the effect of changing the period for which the slave was "to remain with" the daughter of the testatrix, or the

time when he was to be sold and the proceeds distributed according to the provisions of the will. That was to be done when Frances would have arrived at the age of eighteen—6 November, 1863.

We think it very clear that the testatrix intended that the fund to arise from the sale of the slave, at the time designated by her, should be divided among her grandchildren then living and the children of any that had died and left children. The language used seems plainly to express this intention, and is susceptible of no other interpretation.

It is found as a fact that at this date for the sale and distribution (6 November, 1863) all the grandchildren were dead except Elizabeth who had married Jacob Blackwelder, and none of the deceased had left children, except Sarah Steel, the mother of plaintiff's intestate, William S. Steel, he being her only child.

This legacy, the proceeds of the sale of this slave, then became (574) vested in these two persons, Mrs. Elizabeth Blackwelder, and William S. Steel, each being entitled to one-half thereof.

It is conceded that Mrs. Blackwelder's share was paid to her representatives, and no claim is made for that by any one.

It follows, therefore, from the facts stated heretofore and the construction put upon the will of Sarah Jamison, that the administrator of William S. Steel is entitled to recover his share of this vested legacy, which is in the hands of the defendant administrator, unless there is some other claimant to the fund whose rights are superior to his, and who is asserting them against the defendant.

A claimant therefor appears in the person of Isabella Gallamore, the only child of Sarah Jamison, and a granddaughter of one Joseph Rogers, who died about the year 1829. She has been allowed to make herself a party plaintiff to this action, and building up her claim to this fund upon an alleged title to the slave (Green), she elects to follow this fund.

As we learn from an examination of the voluminous record, she asserts three distinct rights to the slave and to this fund which she insists stands in his stead as to her:

First. She alleged and offered to prove that Sarah Jamison died intestate; that at the time she executed the scrip, which had been admitted to probate as her will, her mother was "mentally incompetent" to make a will, and she says that as she is the sole next of kin of her mother the fund should be paid to her.

This claim falls to the ground unless two facts coexist, viz., (575) the intestacy of her mother and her ownership of the slave.

The referee properly excluded all evidence which she offered for the purpose of showing that the scrip, which had been probated as her mother's will, was not a valid will. The Code, secs. 2150, 2158. Hence

the intestacy of Sarah Jamison was not established, and this first assertion of right fails, though the plaintiff Varner admits the second fact, to wit, the ownership by Mrs. Jamison of the slave. *Hampton v. Hardin,* 88 N. C., 592; *London v. R. R., ib.,* 584.

Second. She claims the fund as the sole next of kin of her father, Samuel Jamison, who died in 1830. She says, in support of this second assertion of right, that the testimony shows that the mother of this slave belonged, *jure mariti,* to her father, and that by law the offspring of that slave (the slave Green) became at his birth also a part of her father's estate.

It seems sufficient to say in regard to this assertion of right that only the personal representative of Samuel Jamison can make it. If this fund, which is in all respects and as to all parties personal property, belongs to the estate of Samuel Jamison, only his administrator or his executor can recover it.

Third. She asserts a right to this fund as legatee of her maternal grandfather, under the terms of whose will, as she alleges, the slave (Green) became the property of Sarah Jamison for life only, and upon the death of her mother belonged to her absolutely.

In order to establish this claim the plaintiff, Isabella Gallamore, was required to show the will of Joseph Rogers. This she attempted to do under The Code, sec. 59, for restoring burnt records, by a proceeding instituted before the clerk of the Superior Court, as therein provided.

Section 67 contains a provision that "no petition to declare the
(576) contents of a deed or will shall be filed but within five years next after the loss or destruction thereof." The alleged destruction took place in 1875, while the proceeding to restore it was begun in 1886, and, of course, the proceeding was barred by the prescribed limitation of five years. The referee so ruled, and his Honor sustained the report in that as in other respects. In that we think there was no error.

An act of the General Assembly of 1893 has been brought to our attention by the counsel for the appellant, by which this section of The Code (67) is amended and this limitation is abolished. This can have no application as to the matter before us. As the law was when the case was heard in the Superior Court, the proceeding was barred.

This proceeding was not, however, the only course open to the plaintiff, Isabella Gallamore, in her efforts to prove the contents of the will of Joseph Rogers. In *Mobley v. Watts,* 98 N. C., 284, it was decided that parol evidence is admissible to prove the contents of lost or destroyed records, and that the provision for a statutory method of restoring such records (The Code, sec. 55 *et seq.*) does not have the effect to exclude such proof. On the hearing before the referee it was proved by the production of the proper record that the will had been duly probated,

and it was also proved that it had been destroyed and that there were no copies of it. The referee found these facts, but failed to find what were the contents of that will. Evidence on that subject seems to have been submitted to him, and, upon the appellant's exception and motion, his Honor should have remanded the cause to him to find what were the contents of that will, for until they were ascertained no proper adjudication of the rights of the appellant, who claims under that will, can be made. (If the scrip had not been duly probated, or probated and recorded at all, its contents could not have been shown in this way.)

The referee should also find all such facts as may be proved (577) before him in regard to the slaves disposed of by that will, if any, so that he may draw from the facts he finds the conclusion of law that the slave, Green, did or did not belong to the appellant upon the death of her mother, in 1855, as she alleges he did.

The claim of the appellant to the fund as legatee under the will of Joseph Rogers cannot be passed upon until these facts are found, and the cause is remanded in order that that may be done.

It should also be ascertained whether or not the plaintiff elected to take the legacies bequeathed to her by the will of Sarah Jamison, for it may be that by so doing she has deprived herself of the right now to assert that the testatrix did not own the slave, Green, and have power to dispose of him, as she assumed to do by her will. Bigelow on Estoppel, (5 Ed.), 675; Story Eq. Jur., sec. 1084; *Sigmon v. Hawn,* 87 N. C., 450.

We see no force in the exception to the judgments having been granted to the plaintiff Varner as administrator of James H. Steel, the father, instead of William S. Steel, the child. In both capacities he is a party to the judgment and bound thereby.

Costs should not be awarded against the defendant administrator personally, but should be paid out of the fund, unless the court shall adjudge that there has been mismanagement or bad faith in his defense of the action. The Code, sec. 535. This must be found in order to support a judgment against him personally for costs. *S. v. Roberts,* 106 N. C., 662.

The cause is remanded. The costs of this appeal will be paid out of the fund in the hands of the administrator.

REVERSED. REMANDED.

Cited: Rollins v. Wicker, 154 N. C., 561; *Powell v. Watkins,* 172 N. C., 247; *Starnes v. Thompson,* 173 N. C., 472; *Surety Co. v. Brock,* 176 N. C., 508; *Edwards v. White,* 180 N. C., 58.

(578)

J. L. McMILLAN ET AL. V. D. C. BAXLEY AND WIFE.

Mortgage Sale—Bona Fide Purchaser—Burden of Proof—Evidence—Instructions.

1. In an action to recover land, brought by one who purchased at a mortgage sale, and who, the defendant claimed, was a partner of the mortgagee and knew that the whole amount was not due, as claimed by the mortgagee, a reference to state an account would not be proper until the issues as to the partnership, *bona fides* of the purchaser and his knowledge of the state of account between mortgagee and mortgagor could be determined.

2. Misjoinder of parties must be taken advantage of by demurrer, and not by motion to strike out a party.

3. The misjoinder of unnecessary parties is mere surplusage, under The Code, and not a fatal objection.

4. It is within the discretion of the presiding judge, under The Code, sec. 274, to permit a plaintiff to file a reply, though by reason of laches he may not be entitled to do so.

5. Where, in an action by a purchaser at a mortgage sale to recover the land from the mortgagor (the mortgagee being joined as party plaintiff), the judge presiding at the trial charged the jury that the burden was on the plaintiff to prove everything fair and honest and no advantage taken of defendants, it was not error to refuse to charge the jury that the burden of proof was on the plaintiff to show that he was not the partner or agent of the mortgagee when he bought the land.

6. Where the prayer for an instruction was, "That before a power of sale conferred in a mortgage can have any force it must be shown to the satisfaction of the jury" that the sale was regular and fairly conducted, it was not error for the presiding judge to substitute the words, "by a preponderance of testimony," for the words, "to the satisfaction of the jury."

7. A request to charge the jury is properly refused where there is nothing in the pleadings or evidence upon which to base it.

8. Where a prayer for an instruction does not appear in the record, an exception to the refusal of the judge to give it will not be considered in this Court.

9. An instruction which assumed, as proved, certain facts upon which the testimony was conflicting, was properly refused.

10. The rule requiring the production of a writing itself, as the best evidence, does not apply to notices of sale under a power in a mortgage, and hence parol evidence of the posting of such notices is admissible in an action to recover possession of land sold in pursuance thereof.

11. It is the province of the judge presiding at a trial, and not of the jury, to pass upon the sufficiency of a certificate of probate of a mortgage deed.

12. Where, in an action by the purchaser at a mortgage sale to recover the land from the mortgagor, the mortgagee was joined as plaintiff, and no demurrer was filed, on the ground that the two causes of action were improperly joined, the defendant cannot complain of the inconsistency of two findings of the jury by which they found in answer to one issue that the purchaser was the owner of the land, and in answer to another that the mortgagee was owner; for the only result of the error in submitting the issue as to the ownership of the mortgagee, and an affirmative response thereto, would be a judgment in favor of the purchaser *non obstante* the finding in favor of the mortgagee.

ACTION tried before *Graves, J.*, and a jury, at Fall Term, 1890, (579) of ROBESON.

William Black for defendants. (582)
No counsel contra.

MACRAE, J. As far as the case and the record show, there was no motion for reference to state an account between mortgagors and mortgagee as demanded in the answer. Indeed, as this was an action brought by the alleged purchaser of the land under mortgage sale, and until the issues were determined whether the plaintiff, Paisley McMillan, were a partner or agent of the mortgagee, J. L. McMillan, or a *bona fide* purchaser for value and without notice, it would not have been proper to have ordered an account. If the jury had found that (583) Paisley McMillan was the agent of the mortgagee in making the sale, or was a partner and interested in the mortgage, or was the manager and clerk of the mortgagee and had notice of the state of the account between mortgagors and mortgagee, and that defendants did not owe the amount claimed as the mortgage debt, the sale would have been set aside, and if the two causes of action could be joined, the mortgagee being a party to this action, an account might have been ordered.

On the trial the defendants moved to strike out the name of J. L. McMillan as party plaintiff, and excepted to the denial of their motion. Misjoinder of parties is to be taken advantage of by demurrer. The misjoinder of unnecessary parties is mere surplusage under The Code, and not a fatal objection. Clark's Code, sec. 239, and cases there cited.

The defendants moved to strike out the reply, and this motion being denied, they excepted. According to the record the reply was filed within two days after the answer and apparently at the same term of the court. No reason is given us for striking it out. If the plaintiffs were not entitled to file it on account of laches it was in the discretion of the presiding judge to permit it to be done. The Code, sec. 274; *Mallard v. Patterson,* 108 N. C., 255.

The defendants except for errors in refusing instructions asked by defendants. It is stated in the case that the first instruction was given as asked, except that the words "at once" were omitted. On reference to the first prayer we find no such words as "at once," and defendants' counsel has not pointed out to us the error, if any there were.

The fourth prayer was refused. This was in effect that the burden was on the plaintiffs to prove that Paisley McMillan, the purchaser, was neither the partner nor agent of the mortgagee when he bought the land at the mortgage sale. In the preceding instructions the pre-
(584) siding judge had fully charged the jury that the burden was entirely upon the plaintiffs to prove everything fair and honest, and no advantage taken of defendants; that the law presumed fraud and looked upon the power of sale with suspicion; this was going as far as the defendants could require, and we can see no view of the case which cast the burden upon plaintiff Paisley to prove that he was not the partner or agent of the mortgagee.

The fifth prayer for instruction was, "It being proved and admitted that Paisley McMillan was the clerk and bookkeeper and manager of J. L. McMillan's business, the burden is on plaintiffs to show by a preponderance of the testimony that everything connected with the sale was fair and regular." His Honor had submitted it to the jury to determine whether the plaintiff Paisley was the agent of the mortgagee. He had instructed them that "Even if J. L. McMillan and Paisley McMillan were partners, or if Paisley was his bookkeeper, clerk, and agent in other matters, he would still have the right to purchase at the sale. If Paisley bought the land without any agreement to turn it over to his brother, and paid $150, he is the *bona fide* purchaser for value. If Paisley knew of defendant's claims, he bought subject to defendant's equity, if he had any. One partner is the agent of the other within the scope of the business of the partnership, and not beyond. One partner may act as agent for the other, but he may also act for himself, and the fact that Paisley was clerk in the store and managing the mercantile business of J. L. McMillan is not in any way inconsistent with his right to buy the land for himself." The fifth instruction was refused in the form asked for by defendants, but the jury in the general instructions were told that in the dealings between the mortgagee and mort-
(585) gagor the law required the mortgagee to show that the dealings with the mortgagor in respect to the mortgage were fair.

If the plaintiff Paisley had brought his action alone he would have been governed by the ordinary rule that he should make out his case, as any plaintiff suing for the recovery of land, and all matters of defense should be offered by the defendants; but by reason of his joining the mortgagee, J. L. McMillan, as coplaintiff, his Honor placed the burden

upon the plaintiffs, as in an action for the foreclosure of a mortgage, to show that all was fair and regular; and this mortgage having in it the power of sale, his Honor followed the authorities in instructing the jury that the law looked upon the sale with suspicion; he even told the jury that fraud was presumed and cast the burden upon the plaintiffs of proving that no advantage was taken of the mortgagors. We think that he went as far as the defendants could have required, and that there is no principle which would cast the burden upon plaintiff Paisley to prove that he was not acting as agent of the mortgagor in the sale under the mortgage. This was a matter of defense open to the defendants.

The sixth prayer was, "That before a power of sale conferred in a mortgage can have any force it must be shown *to the satisfaction of the jury* that due advertisement, and everything necessary or required to be done to make the sale fair, was done." His Honor substituted the words "by a preponderance of evidence" for the words in italics. The phrase, "to the satisfaction of the jury," is considered to bear a stronger intensity of proof than that of "by a preponderance of evidence." But we know of no rule of evidence which would require of the plaintiffs a stronger degree of proof than is ordinarily required of the plaintiff in a civil action. The same principle does not apply as is stated in *Ely v. Early,* 94 N. C., 1; *Kornegay v. Everett,* 99 N. C., 30; (586) *Loftin v. Loftin,* 96 N. C., 94, and the cases therein cited, that to correct a mistake in a deed the proof must be full and clear, and not merely preponderate.

The seventh and tenth prayers were predicated upon a charge of surprise or undue influence in procuring the execution of the bond and mortgage by defendants. This charge is not found in the answer nor warranted by the evidence.

The eighth prayer does not appear in the case. If there were error, it was the duty of defendants to point it out, and if necessary they might have applied for a writ of *certiorari.* Not having done so, we may assume that the exception was abandoned. From the hurried manner in which the transcript seems to have been written we think it more than probable it was omitted by the copyist.

The ninth prayer was properly denied, as it assumed, as proved, certain facts upon which the testimony was conflicting.

The defendants further except "for error in refusing to allow amendment of answer to conform to facts proved," and we may comprehend in this exception the refusal to submit the issue as to surprise and undue influence. As we have said, there was no evidence to warrant it.

The plaintiff, Paisley McMillan, was permitted to testify to the posting of notices of sale; defendants objected and excepted, because the notices were in writing and ought to be produced. The rule requiring

the production of the writing itself as the best evidence does not extend to mere notices or to matters collateral. 1 Greenleaf Ev., 561; *Jones v. Call,* 93 N. C., 170; *S. v. Credle,* 91 N. C., 640.

Defendants except "for expression of opinion in regard to issue as to proper probate." When plaintiffs offered in evidence the mortgage from defendants to J. L. McMillan and defendants objected to "proof of execution," they also offered an issue, "Was the mortgage (587) properly probated and acknowledged?" His Honor, upon the objection to the reception in evidence of the mortgage, properly held that the probate was substantially in accord with the requirements of the statute, and we concur with him, upon examination of the certificate. This disposes of the point. It was not a question for the jury; it was the province of the judge to pass upon the sufficiency of the probate before the deed was permitted to be left to the jury. The act of 1796, The Code, sec. 413, has no application here.

His Honor instructed the jury to inquire as to whether the mortgage of 1885 was paid when the mortgage of 1 January, 1886, was given. The defendants excepted upon the ground that it was admitted that the new mortgage was given for the old one. The evident construction of the charge upon this point was that they should inquire whether the former mortgage was paid or satisfied by the latter, and as this was admitted no harm could have come to defendants from the instruction.

Defendants further excepted "for error in permitting the jury to pass on the question of agency, it being admitted that Paisley McMillan was clerk and managing the business for J. L. McMillan." The issue was submitted at the instance of defendants in their fourth issue tendered. His Honor carefully instructed the jury on the point made. He discriminated between such agency as might arise from the fact that Paisley was the clerk or manager or partner of J. L. McMillan in other matters, and an agency to conduct the sale.

The last exception is "for inconsistent findings of the jury." This is directed to their responses to the issues wherein they find that Paisley McMillan is the owner and entitled to the possession of the land, and that J. L. McMillan is the legal owner and entitled to the pos- (588) session of the same land. There is certainly an inconsistency in these findings, but is it such as the defendants can complain of? The action was brought for the recovery of the land by Paisley McMillan as the purchaser at the sale under the mortgage, and the pleader must have joined J. L. McMillan as a plaintiff and presented the issue as to his ownership in order, if it should be held that Paisley was not a purchaser for value, and the relation of mortgagor and mortgagee still subsisted, that J. L. McMillan might recover possession as mortgagor. *Wittkowsky v. Watkins,* 84 N. C., 456. There was no demurrer on the

ground that two causes of action had been improperly united, and, therefore, the objection, if valid, was waived. *Finley v. Hayes,* 81 N. C., 368; *McMillan v. Edwards,* 75 N. C., 81. The jury having found the issues presented in favor of plaintiffs, the only result of an error in submitting an issue as to the ownership of J. L. McMillan and the affirmative response thereto would be a judgment in favor of Paisley McMillan *non obstante* the finding in favor of J. L. McMillan. As neither of the plaintiffs objected to the form of the judgment in favor of both, it is not incumbent upon us to reform it.

We see nothing in the objection to the issues tendered by plaintiffs.

After a careful consideration of the numerous exceptions earnestly pressed by defendants' counsel we see no error of which defendants can complain.

NO ERROR.

Cited: Hocutt v. R. R., 124 N. C., 216; *Cooper v. Express Co.,* 165 N. C., 539; *Petree v. Savage,* 171 N. C., 439.

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(589)

A. J. HAMILTON ET AL. v. JULIUS ICARD ET AL.

Restraining Order—Injunction—Jurisdiction—Appeal, Motion to Dismiss.

1. A restraining order can be issued in any cause by any judge of the Superior Court anywhere in the State and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated.

2. A perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing.

3. The jurisdiction to grant an injunction till the hearing is restricted to the resident judge of the district, or the judge assigned thereto or holding by exchange the courts of the district within which the county wherein the cause is pending is situated.

4. If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days notice to the parties interested.

5. By stipulation in writing, duly signed by the parties or by their attorneys, they may, under section 337, designate any other judge than those indicated by section 336 of The Code to hear the application.

6. By Laws 1885, ch. 180, sec. 8, a judge assigned to a district is the judge thereof for six months, beginning either January or July first, and where a restraining order was made returnable before such judge at a place outside of the district, and after the courts were over, but before the end of the term of assignment to the district, such judge had jurisdiction to hear the application and grant the injunction until the hearing.

7. Failure to settle or furnish a case on appeal is not good ground for a motion to dismiss, but for motion to affirm, since there may be errors on the face of the record, which the Court will inspect of its own motion, and which may entitle the appellant to a reversal.

8. No formal "case on appeal" is required on an appeal from an order granting an injunction until the hearing.

(590) APPLICATION for an injunction before *Armfield, J.*, at chambers at Statesville on 20 December, 1892.

Action was brought in CALDWELL Superior Court (Tenth District); restraining order was issued by *Bynum, J.*, the judge resident in the Eighth District, on 3 December, 1892, and made returnable at Statesville on 20 December, 1892, before *Armfield, J.*, who by assignment held the courts of the Tenth District from 1 July, 1892, to 31 December, 1892.

At the hearing the defendants moved to dismiss the proceedings on the ground that while *Armfield, J.*, was the proper judge to hear the application for an injunction, he should have had the parties before him at some place within the Tenth District.

His Honor refused the motion to dismiss and granted the injunction till the hearing, and defendants appealed.

Edmund Jones for plaintiff.
Lawrence Wakefield for defendant.

CLARK, J. The general jurisdiction of restraining orders and injunctions is vested in the judges of the Superior Court. The Code, sec. 335. In specifying which of these judges has jurisdiction of any specified case it is provided that any of them may grant a restraining order. The Code, sec. 334. This he may, of course, do in any cause and anywhere in the State. This is because a restraining order is granted of urgency upon *ex parte* application usually, and cannot last more than twenty days. The Code, sec. 346. Its object is to preserve matters *in statu quo* until, after notice, upon a hearing of both parties at a time and place designated in the order, an injunction till the hearing may be refused or granted. The jurisdiction of the application for an injunction till the hearing is specifically restricted by The Code, sec. 336, to
(591) "the resident judge of the district, or the judge assigned to the

district or holding by exchange the courts of the district" (The Code, sec. 336), or holding a special term in the county where the cause is pending. *Ib.*, section 335. It is further provided that if the judge before whom the order is made returnable fails to hear it, it shall be competent for any judge resident in, or assigned to, or holding by exchange the courts of some adjoining district to hear it upon giving ten days notice to the parties interested. Under section 337, by stipulation in writing duly signed by the parties or their attorney, they may designate any other judge than the ones indicated by section 336 to hear the application. The above is a summary of the provisions of The Code as to the jurisdiction in such cases. The granting of a perpetual injunction is vested, of course, in the judge who tries the cause at the final hearing.

From the above summary it will be seen that while a restraining order, which can be granted by any judge, can be issued anywhere in the State and a perpetual injunction must be granted only in the county where the cause is pending, since it can only issue upon the final trial of the action, as to injunctions to the hearing, while the law designates what judges may grant them, there is no provision in the statute nor in the nature of the proceeding as to where the judge shall be at such hearing. The restraining order must be made returnable before one of the judges above indicated, and name a time and place for such return, of course, but the selection of the place is left by legislation to the judge who grants the restraining order, and the time also, except that the latter cannot exceed more than twenty days. The selection of the place of hearing is wisely left to the discretion of the judge. Often it might be inconvenient to the parties or the judge before whom (592) the order is made returnable to designate a place in the district in which the cause is pending. Such discretion is not likely to be abused. If it should be, the Legislature can make it requisite to designate a place within the district. The statute does not now so provide. Usually the order is, in fact, made returnable at some point in the district, as the judge to hear the application is either the resident judge or the judge holding courts therein, and it is not usually the case that both of them are absent therefrom at the same time for a longer period than twenty days.

Galbreath v. Everett, 84 N. C., 546, was decided prior to the act of 1885. That act makes the judge assigned to the district, judge thereof for 6 months, beginning either 1 January, or 1 July. As he is still made one of the judges before whom the application is returnable, the statute clearly did not contemplate he should always be in the district, especially at times when the courts are not usually being held, as in the present case, 20 December.

In the present case there is no cause for a complaint, for the judge hearing the application was also one of those designated by the statute to hear such application in case the judge named in the order fails to hear it, to wit, the judge of an adjoining district.

In hearing the application in an adjoining district, at the place designated by the restraining order, there was no error. This is the only exception which comes up to us. But in this Court there is a motion to dismiss the appeal because there was no "case settled" on appeal, nor, indeed, any "case" tendered by appellant. This, in appeals where a "case" is necessary, is not ground for a motion to dismiss, but for a motion to affirm the judgment, since there may still be errors on the face of the record proper entitling the appellant to a reversal of the proceedings below. *Peebles v. Braswell,* 107 N. C., 68; *Manu-*
(593) *facturing Co. v. Simmons,* 97 N. C., 89.

But this being an appeal from the granting of an injunction till the hearing, no formal "case on appeal" is required. The correctness of the ruling in question is tested by the judgment appealed from, which is rendered solely upon the pleadings and affidavits filed in the cause. From the judgment in this case it appears that the defendant objected to the jurisdiction because of the place of hearing, which was in another district; the court overruled the objection, and to such part of the judgment the defendant excepted and appealed.

AFFIRMED.

Cited: Crabtree v. Scheelky, 119 N. C., 58; *Worth v. Bank,* 121 N. C., 347; *Cooper v. Cooper,* 127 N. C., 493; *Wilson v. Rankin,* 129 N. C., 450; *Wallace v. Salisbury,* 147 N. C., 59; *Royal v. Thornton,* 150 N. C., 295; *Moore v. Monument Co.,* 166 N. C., 212.

(594)

S. B. LUTTRELL & CO. v. JOHN L. MARTIN AND THE PIEDMONT LUMBER, RANCH AND MINING COMPANY.

Attachment—Affidavit—Summons—Amendment of Return—Corporations—Powers of Agents of Corporations—Issues.

1. Although an appeal from the refusal of a motion to dismiss an action is premature, the exception, having been noted, will be reviewed on appeal from the final judgment.

2. Where a summons was properly served and the sheriff's return was unsigned, though endorsed in proper form, the judge at the trial did not exceed his powers in permitting the sheriff to sign the return *nunc pro tunc.*

3. To obtain an attachment it is not necessary that the affidavit shall state that the defendant "cannot, after due diligence, be found within this State." Such averment is necessary, however, in an affidavit to procure publication of summons.

4. Where the issues submitted by the court were substantially the same as those offered by a party on the trial, it was not error to refuse to submit the latter.

5. Where a contract of a corporation, not in writing, has been executed and is not executory, it is not invalid, under section 683 of The Code.

6. Where, in an action begun by summons returnable to Fall Term, 1891, of a Superior Court, at which term the complaint was filed, and an *alias* summons returnable to Spring Term, 1892, was served in due time on one of the defendants, such defendant was properly ruled to answer at that term.

7. Where a motion to dismiss an ancillary remedy, as an attachment, is improperly refused, it will not affect the validity of a trial and judgment on the merits.

8. Although a corporation not authorized to build and operate a railroad would be acting *ultra vires* to engage in such business, yet it may render itself liable for "railroad supplies" purchased and used by it, especially where the articles bought were not such that the seller would have notice that the corporation would not have need of them in its business, and where the seller had no notice that the goods were to be used for any other purpose than the regular business of the company.

9. A general agent of a corporation may delegate to another authority to buy supplies for the corporation.

10. Prayers for instructions to the jury, although in writing, not made at or before the close of the evidence, but after argument was begun on the trial, were not in apt time, and it was not error to refuse them.

11. Where the jury found an issue and then separated, and the judge found as a fact that they had not been influenced by what had been said to them after their separation, it was not error to permit them to reassemble and put their finding in writing.

12. Recitals of fact set out by an appellant as grounds for his motion for a new trial will not be considered when they neither appear in the record nor are found as facts by the judge.

ACTION tried at Spring Term, 1893, of BURKE, before *McIver, J.*, and a jury.

The court submitted the following issues:

1. Were the goods purchased for the purpose of being used in (597) the construction of a railroad; and, if so, did plaintiffs know of such purpose at time of purchase?

2. Were said goods ever delivered to the Piedmont Lumber, Ranch and Mining Company?

3. Are the defendants indebted to the plaintiffs, as alleged in the complaint?

(601) The jury found in response to the first issue, "No," and in response to the second issue, "Yes," and did not answer the third issue. The verdict was, by consent, received by the clerk after the adjournment recess of court late in the evening of 24 March for the day and recorded by the clerk as rendered.

On the next morning, when the court assembled pursuant to adjournment, his Honor being informed that the jury had failed to answer the third issue by reason of a misunderstanding, allowed the jury to be recalled (after they had separated) under objection by counsel for defendant corporation. The jury stated to his Honor that they had understood that it was not necessary for them to answer the third issue.

(602) The defendants' counsel objected, stating that the jury had separated the evening before, after returning their verdict, and it was now too late. His Honor inquired of the jury whether they had agreed upon an answer to the third issue before separating in the evening, and all being present they answered that they had agreed, but had not written the answer to this issue because they thought it unnecessary.

(603) These statements were made by the jury in response to questions from his Honor and from the defendants' counsel.

The court found, as a fact, that according to the statement of the jury they had not been influenced by anything said to them after they had separated.

Thereupon his Honor told the jury to retire and answer the third issue.

Thereupon the jury retired, and the defendant corporation excepted to the ruling of the court in permitting them to consider further of their verdict, or to retire and answer the third issue after having separated.

The jury found, in response to the first issue, "The goods were purchased for constructing a railroad, but plaintiffs did not know it."

The response to the second issue was not changed, and in response to the third issue the jury answered, "Yes."

To all of which the defendant corporation excepted.

And thereupon judgment was rendered by the court in favor of the plaintiffs upon the verdict. The defendants thereupon again called up their motion to vacate and dissolve the attachment, which the (604) court disallowed. Defendant corporation appealed.

S. J. Ervin for plaintiffs.

M. Silver and I. T. Avery for defendant.

CLARK, J. The appeal from the refusal to dismiss the action was held premature in this case, 111 N. C., 528. But the exception having been noted, now comes up for review without prejudice on this appeal from the final judgment. *Guilford v. Georgia Co.,* 109 N. C., 310.

It was admitted that the summons had been served on the agent of the defendant corporation 23 February, 1892, but the return of the sheriff was unsigned, though endorsed in proper form on the summons. The judge did not exceed his powers, but exercised them properly in permitting the sheriff to sign the return *nunc pro tunc. Clark v. Hellen,* 23 N. C., 421; *Henderson v. Graham,* 84 N. C., 496; *Walters v. Moore,* 90 N. C., 41; *Williams v. Weaver,* 101 N. C., 1. Indeed, the sheriff had of right till the first day of that term to make the return. The Code, sec. 200. So far as the attachment is considered as the basis of a publication to bring the defendants into court, it is unnecessary to consider whether it was regularly sued out or not, as to the defendant corporation, since the summons was served on its agent. The Code, sec. 217 (1). Nor as to the defendant Martin, for he submitted to the verdict and judgment and has not appealed.

The affidavit to procure publication of summons must contain an averment that the defendant "cannot, after due diligence, be found within this State." The Code, sec. 218. But this is not required for an attachment. The Code, sec. 349. It is because attachments are rarely issued, except against nonresidents, for whom publi- (605) cation must be made, that the two requirements are often confused. It is not requisite, and therefore need not be averred, that the defendant cannot be found in the State in order to procure a warrant of attachment. The headnote in *Sheldon v. Kivett,* 110 N. C., 408, is misleading. It was the order of publication which was there amended. In fact, in some instances, as in the present, an attachment may issue against a resident of the State or a domestic corporation. Even had the motion to dismiss the attachment been improperly refused in this case, merely the judgment in that respect would have been modified. Being an ancillary remedy, this would not have affected the regularity of the proceedings and verdict, nor of the judgment in other respects.

The issues tendered by the defendants were preferable to those actually submitted, but the defendants suffered no prejudice, as every phase of their case could have been and was submitted to the jury. *Humphrey v. Church,* 109 N. C., 132, and cases there cited.

The defense set up in the answer that the contract was invalid as to defendant corporation, under The Code, sec. 683, because not in writing, is not good, because it is an executed and not an executory contract. *Curtis v. Piedmont,* 109 N. C., 401; *Roberts v. Woodworking Co.,* 111 N. C., 432. This section (683) was repealed by the Legislature of 1893.

As to this appellant, certainly the judge properly held that the cause stood for trial at Spring Term, 1893. The other defendant is not complaining. This defendant was not a nonresident, but a domestic corporation, and the affidavit for publication, 1 February, 1893, against the other defendant, Martin, by the recital therein that there was then no agent of the appellant corporation in this State, does not
(606) annul the sheriff's return, and the admission of service upon the agent of such corporation nearly a year before, on 23 February, 1892.

The principal contention on the merits is that the defendant corporation did not buy the goods, but that they were bought by Martin for a railroad company; and further, if bought for this company, it was not bound, because the goods were railroad supplies, and this company could not act *ultra vires*. As to the first proposition, the jury found the fact that the goods were bought by and delivered to the defendant corporation. As to the second proposition, the company would certainly have been acting *ultra vires* had it attempted to build or operate a railroad, but it by no means follows that it would not be liable for railroad supplies if purchased or used by it. It would scarcely be absolved from liability for goods actually bought by it on the ground that it did not need them. But we need not decide this point, for the goods in question—powder, dynamite, etc.—were not such articles that the seller would have notice that the defendant "Lumber, Ranch and Mining Company" would not have need of them in its business. In fact, it might reasonably be supposed that these articles were to be used in mining, and the jury find as a fact that the plaintiffs had no notice that the goods were to be used for any other purpose.

Mr. Wilson was properly allowed to testify that by authority of the treasurer and general agent of the defendant company he bought these goods of the plaintiff for said company. It is not a forbidden delegation of authority, but frequently a necessary exercise of it, when the chief officer of a corporation purchases articles for his company through an agent. The letters of the said treasurer, written subsequently, were competent evidence to corroborate the witness. This is not the case of an attempt to prove an agency by subsequent admissions of an officer.

Here there was direct testimony by Wilson of his purchase of
(607) the goods for the defendant company by authority of its treasurer and general manager, and the subsequent correspondence of that officer with the plaintiffs, signing himself treasurer of such company, acknowledging the receipt of goods, paying for same in part, and asking time for further payment, was corroborative as ratification of the action of the purchasing agent. The last letter of the three in evidence was not signed by him as treasurer, but probably was competent in con-

nection with the other two. At any rate, the exception being a general one as to all three letters, cannot be sustained as to one only. *Smiley v. Pearce,* 98 N. C., 185.

The prayers for instruction, though in writing, were not asked at the close of the evidence, but much later, and were not in apt time, and cannot be considered. *Grubbs v. Ins. Co.,* 108 N. C., 472; *Taylor v. Plummer,* 105 N. C., 56; *Posey v. Patton,* 109 N. C., 455; *Merrill v. Whitmire,* 110 N. C., 367.

The exception that there was no evidence sufficient to go to the jury cannot be sustained. There was the testimony of Wilson that he bought the goods for the defendant company, and the letter from the treasurer of the same afterwards enclosing part payment and asking time on the balance.

The jury having found the third issue before their separation, it was no error to permit them to assemble again and write it down, especially as the judge finds as a fact that the jury had not been influenced by what had been said to them after their separation. *Petty v. Rousseau,* 94 N. C., 355; *S. v. Shelly,* 98 N. C., 673. Indeed, it was, if error, immaterial error, for the response to the third issue was a mere legal sequence, upon the pleadings and admissions, to the findings upon the first and second issues. The jury were right in deeming no response thereto necessary, for the answer admitted the purchase of the goods averred in the complaint by Martin, and merely alleged that they were bought by him for another company and not for the (608) defendant corporation.

The amendment to the response to the first issue could not prejudice the appellant. It is in no worse condition in any respect than if the answer to that issue had stood as first made.

Some of the recitals of fact set out by the appellant as his grounds for the motion for a new trial neither appear in the record nor are found as facts by the judge, and of course we cannot consider them.

NO ERROR.

Cited: Mullen v. Canal Co., 114 N. C., 10; *Alexander v. Alexander,* 120 N. C., 473; *Hahn v. Heath,* 127 N. C., 28; *Moore v. Palmer,* 132 N. C., 976; *Hart v. Cannon,* 133 N. C., 13; *Craddock v. Barnes,* 142 N. C., 99; *Tillett v. R. R.,* 166 N. C., 521; *Zageir v. Express Co.,* 171 N. C., 696; *Grove v. Baker,* 174 N. C., 748; *S. v. Lewis,* 177 N. C., 557.

L. W. LUNSFORD v. RICHMOND SPEAKS.

Sale Under Power in Mortgage—Validity—Notice—Burden of Proof—Estoppel.

1. In an action to recover land by the purchaser thereof at a sale under the power contained in a mortgage given by the defendant, the deed executed by the mortgagee reciting the sale in pursuance of the power is *prima facie* evidence that all the terms of the power and all requirements as to notice have been complied with.
2. Even if a sale under the power in a mortgage should be invalid by reason of a failure on the part of the mortgagee to comply with the directions of the power, yet, as the mortgagee held the legal title, his deed would convey it to the purchaser, subject to the equities of the mortgage.
3. The acquiescence of a mortgagor in the conduct of a sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it.

ACTION to recover land, tried before *McIver, J.*, and a jury, at Fall Term, 1892, of WILKES.

Plaintiff claimed title and possession under a deed executed to
(609) him as purchaser of the land at a sale made under the power in the mortgage given by defendant.

The court told the jury that the burden was upon the plaintiff
(611) to show that the power of sale contained in the mortgage had been complied with, and having failed to do so, he could not recover, and instructed the jury to find the first issue "No."

Plaintiff excepted. There was verdict and judgment for the
(612) defendant, and plaintiff appealed, assigning as error the ruling of the court excepted to.

W. W. Barber for plaintiff.
R. N. Hackett for appellee.

MACRAE, J. The principal question presented is whether in this case the burden is upon the plaintiff to show that the power of sale had been duly executed.

Upon examination we find no express authority on the subject in this State, and the authorities are conflicting elsewhere. All agree that the essential requisites of the power must be strictly complied with (2 Perry on Trusts, sec. 602, p.....), and that courts will strictly scrutinize sales under powers in deed of mortgage.

It is said in the first edition of Jones on Mortgages (1878), at sec. 1830, under the question of burden of proof as to notice: "When the

validity of a sale under a power is questioned by the debtor on the ground that the advertisement of the sale was not made in pursuance of the deed, the burden of proving a proper advertisement rests upon the purchaser or other party insisting upon the sale," and reference is made to *Gibson v. Jones,* 5 Leigh, 370.

The same proposition is laid down in 1 Devlin Deeds, sec. 447: "Compliance with the power where notice is required must be shown by parties relying upon the validity of the sale," and reference is made to *Gibson v. Jones, supra,* and *Hahn v. Tindell,* 1 Bush., 358. And in 2 Perry on Trusts, sec. 782, upon the same authorities, the text says: "If notice is required by the power, those persons relying upon the validity of the sale must show that the power was complied with." To the same effect is *Wood v. Lake,* 62 Ala., 489, citing (613) other authorities. *Chancellor Kent,* however, indicated a different opinion in *Minuse v. Cox,* 5 Johns., ch. 447: "That want of notice would not affect the title of the purchaser, but that the trustee would be liable for the deficiency in the price."

The question was carefully examined in *Savings Society v. Deering,* 66 Cal., 281, and the Court came to the conclusion that in an action of ejectment by the purchaser, evidence *de hors* the deed is not necessary to show title and right of possession in the plaintiff. And in the fourth edition of Jones on Mortgages, sec. 1830, it is said: "When the validity of a sale under a power is questioned on the ground that the advertisement of the sale was not made in pursuance of the deed, the better opinion is that in an action at law it will be presumed, after the execution of the deed under the power of sale to the purchaser, that all the terms of the power and all requirements as to notice have been complied with. Certainly, in an action of ejectment by the purchaser against the grantor or other person in possession, no evidence, aside from the deed to such purchaser and the recitals in it, is necessary to show title and right of possession in the plaintiff." And in the same connection it is said: "It would seem, moreover, that the defendant would not be permitted to show that notice of sale was not given under the power, because the deed would confer upon the purchaser the legal title to the land."

We refer to the note to *Tyler v. Herring,* 19 Am. St., 263, which sustains the conclusion that the title shown by plaintiffs was *prima facie.* It is based upon the general presumption in favor of meritorious parties as purchasers for value that the power has been properly exercised. As we have said, the authorities are all one way, that the power must be exercised in strict accordance with its terms, subject to (614) equitable relief in some cases of defective execution.

But even if the sale had been shown to be invalid by reason of a failure on the part of the mortgagee to comply with the direction of the power, yet the mortgagee held the legal title and his deed to plaintiff conveyed it subject to the equities of the mortgage. 1 Jones Mort., 787-812; 1 Lewin on Trusts, 603(4). It may be that the defendant would have been estopped from taking advantage of an irregularity in the sale, for "the acquiescence of the mortgagor in the conduct of the sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it." 2 Jones Mort., sec. 1866; *Oleutt v. Bynum,* 17 Wall., 44.

But the defendant sets up a counterclaim for substantive relief and will be entitled to have the same passed upon and appropriate relief, if he should be found entitled thereto.

NEW TRIAL.

Cited: Norwood v. Lassiter, 132 N. C., 58; *Brett v. Davenport,* 151 N. C., 59; *Eubanks v. Becton,* 158 N. C., 237; *Troxler v. Gant,* 173 N. C., 425; *Jenkins v. Griffin,* 175 N. C., 186; *Brewington v. Hargrove,* 178 N. C., 145.

(615)

CHEMICAL COMPANY OF CANTON v. T. H. PEGRAM ET AL.

Contract—Surety—Indulgence to Principal Debtor—Release of Surety.

1. A contract made by a creditor with a principal debtor for forbearance to sue for a fixed and limited period, founded on a sufficient consideration, without reserving the right to proceed against the surety, and made without his assent, releases the surety; therefore,

2. Where an agency contract, to which defendants were sureties, provided that the agent of plaintiff (the principal debtor) would give his promissory notes for goods sold by him, payable at the times fixed in said contract, defendant sureties being liable therefor, and said notes were executed, and the creditor at the maturity of said notes had a settlement with the agent (the principal debtor) and surrendered the old notes to him, accepting notes due at future dates in renewal of, and substitution for, the same, without reserving any rights against the sureties or obtaining their consent to the extension: *Held,* that such acceptance of new notes constituted a contract on the part of the creditor to postpone action against the principal debtor until they matured, and hence discharged the sureties.

ACTION heard at July (Special) Term, 1892, of FORSYTH, on the report of referees and exceptions thereto.

The action was brought by the Chemical Company of Canton against their agent, T. H. Pegram, Jr., to recover an alleged balance due by him for fertilizers sold, amounting to $4,140, and against L. W. Pegram and T. H. Pegram, Sr., to recover the penalty ($3,000) of a bond executed by them as sureties for Pegram, Jr.

Upon the hearing of the report and exceptions filed by plaintiff (620) and defendants, the court overruled plaintiff's exceptions and sustained defendants' exceptions, and adjudged that the plaintiff recover of the defendant T. H. Pegram, Jr., the sum of $3,049.33, with interest thereon from 7 March, 1892, until paid, and the costs, and that the defendants L. W. Pegram and T. H. Pegram, Sr., sureties on the bond sued on, go without day.

The plaintiff appealed from so much of the judgment as dismissed the action against the sureties.

Glenn & Manly for plaintiff.
Watson & Buxton for defendants.

BURWELL, J. It was said by *Smith, C. J.,* in *Forbes v. Shepherd,* 98 N. C., 111, that "The effect of a contract for forbearance to sue for a fixed and limited period, founded on a sufficient consideration with the principal, without reserving the right to proceed against the surety and made without his assent, is too well settled to need further discussion." An examination of the record in this case shows that every element necessary to constitute this defense for the defendant sureties concurs here. They undertook that their principal would faithfully perform his contracts with the plaintiff and would meet all their (621) requirements.

By the terms of those contracts, which are set out in the complaint, the principal debtor, plaintiff's agent, agreed that he would pay plaintiff for fertilizers sold by him at times herein specified, and that, as evidence of his liability, he would give to plaintiff his promissory notes for such sums, due and payable on the days fixed in the said contracts. This latter thing he did. It seems to be conceded that the defendants were bound for the payment of those notes at maturity, for their payment then was one of "the requirements of the contracts."

The acceptance of notes due at certain future times in renewal of, and substitution for, the notes then past due, for which these sureties were liable, accompanied by the surrender of the old notes, a settlement being then made, constituted a contract on the part of the plaintiff that it would postpone the assertion of its rights against the principal debtor, the maker of the notes, till they matured. This was founded upon a sufficient consideration, the renewal of the notes and the making the

settlement. There was no reservation of a right to collect the old notes. So far as appears their surrender was without condition. Nor was there any reservation of right against the sureties, nor any evidence that they assented to the extension of time. Hence the sureties were discharged for two reasons: the contract had been materially altered without their consent, and it was no longer the contract for the performance of which they were liable; they had a right, when the debts for which they were bound became due, to pay those debts and immediately proceed against the principal for indemnity—plaintiffs' conduct deprived them of this right.

We are precluded from any consideration of the point made here for the first time, that, as the answer of the defendant sureties did (622) not aver that they had been released from liability by extension of time granted to the principal, they could not avail themselves of that defense, for we can consider only such exceptions when they are first taken in the court below. *Harper v. Dail,* 92 N. C., 394. This is settled by repeated adjudications.

AFFIRMED.

Cited: Sutton v. Walters, 118 N. C., 502; *Bank v. Sumner,* 119 N. C., 595; *Revell v. Thrash,* 132 N. C., 805; *Foster v. Davis,* 175 N. C., 544.

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*T. H. COFFEY ET AL. v. M. G. SHULER.

Married Woman—Charge on Separate Estate—Promise to Pay Debt of Another.

1. Where a married woman promised her husband, in his last sickness, in the presence of his creditor, that she would pay the debt out of moneys received from insurance on his life in her favor, and the creditor, in consideration of such promise, forebore enforcement of his demand: *Held,* that such promise was substantially and in effect a promise to the creditor to pay the debt of her husband, and cannot be enforced against the separate personal estate of the defendant, as it was not in writing, was not made with the written assent of her husband, and did not charge such personal estate.

2. If the promise should be conceded to have been made to the husband, the creditor, not being a party to the contract, could not sue upon it.

ACTION heard on complaint and demurrer, at Spring Term, 1892, of CALDWELL, before *Graves, J.*

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

The complaint alleged in substance that plaintiffs were partners in mercantile business under the name of Coffey & Whidby, and as such deposited in a bank of exchange and deposit established, owned, and operated by one D. W. Shuler, at Hickory, N. C., the sum of $1,275, for which they received a certificate of deposit redeem- (623) able on demand; that about August, 1890, on account of rumors affecting the credit of said bank, plaintiffs became alarmed about the safety of their deposit and one of them, F. H. Coffey, visited Hickory and learning that Shuler was confined to his bed, went to his residence, where he was received by the defendant, the wife of Shuler, to whom he stated the object of his visit to be the getting some money from the bank; that he was admitted to Shuler's room, who told him, in the presence of defendant, that he was sorry that he could not let him have some money that day, that the safe was locked and the clerk did not know its combination, but added: "You shall have every dollar of your money," and then, addressing his wife, said: "You know that I have $43,000 of insurance on my life, and I want you now to promise that you will, when you receive that money, pay out of it Mr. Coffey's money"; that to this request of her husband the defendant at once replied that she would do so, telling him not to worry about it, the money should be paid; that shortly after the interview Shuler died, having made an assignment of all his property for the benefit of his creditors; that the defendant received from insurance companies $43,000 and immediately left the State and became a resident of another State. Plaintiffs prayed that the transaction might be declared an assignment of said sum derived from the policies of insurance or that it might be adjudged to be a declaration of a trust for their benefit or a charge upon the sum received to the amount of their debt.

Defendant demurred to the complaint.

From the judgment sustaining the demurrer the plaintiffs (624) appealed.

G. N. Folk and E. Jones for plaintiffs.
P. D. Walker for defendant.

SHEPHERD, C. J. If the oral promise alleged in the complaint was made by the defendant to the plaintiffs it is plain that it cannot be enforced against the separate personal estate of the defendant, as it is not in writing, is without the written consent of the (625) husband and does not charge such separate estate. *Flaum v. Wallace,* 103 N. C., 296. In order to avoid this difficulty it is insisted that the promise was made to the husband, and therefore the principles laid down in *Flaum's case* do not apply, and that she can charge, in

favor of her husband, a large part of the capital of her personal estate without any formality whatever. By no means admitting such a proposition, but conceding it for the purposes of the argument, we are nevertheless unable to see how the plaintiffs can recover. If, as contended, the promise was made by the wife to the husband, it is well settled that the plaintiffs, if they are not parties to the contract, cannot sue upon it. *Morehead v. Wriston,* 73 N. C., 398; Brown on Actions, 99; Pollock on Contracts, 191. This would seem to put an end to the plaintiff's action, but granting that under the Code of Civil Procedure the action may be maintained by the real parties in interest, which in this case it is claimed are the plaintiffs, for whose benefit it is alleged the contract was made, we must still deny their right to recover.

If, as insisted, the plaintiffs can sue, it is because they are substantially the parties interested in the contract, and as they were present at the time of the promise and impliedly assented to the same, and as they claim that their alleged forbearance constituted the consideration (there really being none moving from the husband), we cannot but regard it, at least in an action of this nature, as substantially an agreement between the plaintiffs and the defendant, and therefore within the case of *Flaum v. Wallace, supra.*

Entertaining these views, it is unnecessary to discuss the other interesting questions raised by the learned counsel.

AFFIRMED.

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(626)

E. B. MILLER v. E. M. CHURCH.

Unrecorded Deed—Equitable Estate—Surrender of Deed, Effect of—Feme Covert.

1. The equitable interest created by an unregistered deed can ordinarily be extinguished by a return of the consideration and a surrender of the deed, but where the grantee is a *feme covert* such equitable estate can only be divested by her deed and privy examination and joinder of her husband; therefore,

2. Where, in an action to recover land, it appeared that plaintiff's grantor had previously conveyed it to his daughter, a *feme covert,* who, after retaining the deed for a year without having it recorded, returned it to her father just before her death, with instructions to destroy it, which he did: *Held,* that plaintiff was not entitled to recover the land from defendants, the heirs of the daughter, who were in possession under the equitable title acquired from her.

ACTION tried at Fall Term, 1892, of WATAUGA, before *Armfield, J.*, and a jury.

Plaintiff introduced in evidence a deed for the land in controversy to himself from one Cleveland Eggers, dated in 1892, purporting to convey said land to plaintiff in fee. Plaintiff as a witness for himself, testified that when he took this deed from Cleveland Eggers he gave his notes to said Eggers for seven hundred dollars as the purchase price of said land; that it was agreed at the time that unless he recovered the land from defendants these notes were to be given up to him by Eggers, and that he was to pay nothing for the land; that Eggers still held these notes, but that he did not expect to pay them, or any part of them, unless he recovered the land.

Plaintiff further testified that at the time he took said deed from Eggers he knew the fact that said Eggers had several years before made and delivered to one Elizabeth Farthing, a daughter of Eggers, a deed of gift, conveying to said Elizabeth the same land in fee, and that she held said deed for about a year, and until a short time be- (627) fore she died; that said Elizabeth was, at the time she received said deed, and up to her death, a *feme covert,* leaving a husband, but no children, surviving her; that said deed to Elizabeth had never been recorded; that he knew when he took the deed from Eggers to himself that the defendants were claiming the land as heirs at law of said Elizabeth under said deed, but that he was also then informed that the said Elizabeth, a short time before her death, had delivered up said deed conveying the land to her to her father, Cleveland Eggers, to be canceled, and that said Cleveland had destroyed it, it never having been registered. He testified that the land was worth $900, or $1,000. The plaintiff then introduced as a witness said Cleveland Eggers, and offered to prove by him that his said daughter Elizabeth, a short time before her death, voluntarily delivered up to witness the same deed which he had made to her for the land, and directed him to destroy the deed, it having never been registered, and that she at the same time declared that she wanted him (Cleveland) to have the land.

The defendants objected to this testimony; the court sustained the objections, and plaintiff excepted. The court then remarked that if all the plaintiff proposed to prove by Cleveland Eggers was proven by a competent witness, he should still instruct the jury that the plaintiff could not recover. In deference to this intimation of the court the plaintiff took a nonsuit and appealed.

G. N. Folk and W. B. Councill for plaintiff.
No counsel contra.

(628) SHEPHERD, C. J. The unregistered deed from Cleveland Eggers to Elizabeth Farthing, his daughter, vested in the latter an equitable freehold estate, and such equitable interest can ordinarily be extinguished by a return of the consideration and a surrender of the deed. *Ray v. Wilcoxon,* 107 N. C., 514; *Davis v. Inscoe,* 84 N. C., 396. In the case, however, of a married woman a different principle applies as to the extinction of her equitable estate in realty. In *Ray v. Wilcoxon, supra,* the Court said: "If the unregistered deed conferred upon her an estate in the land, either legal or equitable, it is plain that there is but one way by which she can convey it, and that is by deed and privy examination with the joinder of the husband. It is a well-recognized principle that the law will not allow that to be done indirectly which it has forbidden to be done directly, and if a married woman can, by the simple redelivery of her unregistered deed, practically convey her equitable estate in realty, the very disability which the law has imposed will to a great extent be removed, and the safeguards which it has carefully thrown around her be broken down and abrogated." This authority is decisive of the present case, and renders it unnecessary to discuss the question presented in the brief of the learned counsel as to whether a Court of Equity should decree a reconveyance of the legal title, the equities being equal, etc. The defendants, who claim under Elizabeth, are not seeking such relief, but defend their possession under the equitable title acquired from her, and this title is all that is necessary for their purpose in this action.

Besides, it may be observed that the plaintiff is, according to his own testimony, a purchaser without value, and with full knowledge of all of the circumstances constituting the defense. It may also be remarked that the execution of the deed was admitted and that there was no
(629) consideration for its surrender.

We concur with his Honor that, admitting to be true all that the plaintiff attempted to prove, he is not entitled to recover.

AFFIRMED.

*J. A. DICKSON ET AL., EXRS. OF JACOB HARSHAW, DECEASED, v. L. A. CRAWLEY, ADMR. OF J. A. DICKSON, DECEASED.

Quando Judgment—Assignment by One Executor—Limitations—Presumption of Payment.

1. A private sale of a *chose in action* by an executor or administrator, if made in good faith, is valid.

2. A sale by one of several executors will pass title to the purchaser.

3. Where a judgment was obtained against an administrator of a decedent and his surety, in 1869, on a cause of action arising, and in a suit commenced before the adoption of the Code of Civil Procedure, the judgment being *quando* as to the administrator and absolute and final as to the surety, an action on the latter was a new *causa litis* and governed by the statute of limitations, as prescribed in The Code, while the statute of presumptions under the prior law is alone applicable to the action on the *quando* judgment against the administrator.

4. Where an administrator against whom a judgment *quando* was taken in 1869, in an action begun prior to the Code of Civil Procedure, died soon thereafter, and administration *de bonis non* was not taken out until 1886, and suit was brought on such judgment in 1890: *Held*, that no presumption of payment can arise, inasmuch as in computing the time under the statute the period during which there was no administration must be excluded.

5. Presumption of payment not having arisen on a judgment *quando accid-erint* taken against an administrator of a deceased principal in an action commenced before The Code, the fact that an action is barred on the judgment absolute and final, taken at the same time against the surety, raises no presumption of payment of the judgment *quando;* for, as the statute of presumptions does not apply to the judgment absolute, the rule that a presumption of payment as to one is a presumption as to all has no application.

ACTION brought in the name of John A. Dickson, J. N. Har- (630) shaw and J. C. Hallyburton, executors of Jacob Harshaw, deceased, against Joseph Brittain, administrator *de bonis non* of John A. Dickson, tried by *Armfield, J.*, and a jury, at Fall Term, 1892, of BURKE.

The plaintiff Dickson declared on a judgment rendered at Spring Term, 1869, of Burke, 29 May, 1896, in favor of Jacob Harshaw against W. S. Moore, administrator of John A. Dickson, and W. F. McKesson for the sum of $480.55, with interest on $300 from said date till paid, which judgment was assigned to plaintiff Dickson. On the call

*AVERY, J., did not sit on the hearing of this cause.

of the case for trial the defendant offered the affidavit of J. T. Perkins for a continuance, and the same was admitted by the plaintiff Dickson, which affidavit reads as follows:

John T. Perkins, being duly sworn, says: "That J. C. Hallyburton, who is the surviving executor of Jacob Harshaw, is an important witness for the defense in this action in that he told the affiant that he never agreed to the assignment of the judgment sued on in said action, and never authorized the bringing of the same; that the said Hallyburton is under subpœna, and absent without the consent of affiant, and affiant believes he will so testify, wherefore affiant prays that cause be continued."

The plaintiff then offered in evidence a paper-writing signed by J. N. Harshaw as executor of Jacob Harshaw, purporting to assign said judgment to plaintiff Dickson for value. The defendant objected to said paper-writing as evidence of the assignment upon the ground that one of two coexecutors could not execute a valid assignment, and that
(631) both the executors together, had they joined, could not execute a valid assignment of this judgment. The objection was overruled by the court, and the defendant excepted.

The plaintiff offered in evidence the judgment docket showing the judgment declared on to be *quando* as to Moore, administrator of J. A. Dickson, and absolute as to McKesson for $480.55.

It was admitted and agreed that John A. Dickson died 18 October, 1861, and that in August, 1862, Moore was appointed his administrator; that Moore died in 1869, and that there was no administrator of the estate of John A. Dickson till the appointment of Joseph Brittain on 23 December, 1886, and that the estate of John A. Dickson was still unsettled, and that this action was brought on 16 May, 1890; that said judgment was not presented to Brittain, administrator *de bonis non.*

It was admitted that Brittain, administrator *de bonis non,* died on .... January, 1891, and that shortly thereafter, in 1891, L. A. Crawley was appointed and qualified as administrator *de bonis non* of said John A. Dickson, and was made a party defendant to this suit and filed an answer.

It was admitted that Joseph Brittain on his appointment gave the notice required by law for creditors to present their claims against his intestate within twelve months from 14 January, 1886.

The defendant asked his Honor to instruct the jury that the action was barred by the statute of limitations, or the statute of presumptions. His Honor declined to give the instruction, but told the jury that the action was not barred, either by the statute of limitations or presumptions, and the defendant excepted. His Honor held that the judgment sued on was a judgment *quando* as to Moore, administrator, and

absolute as to McKesson, and defendant excepted. Under the (632) instructions of his Honor, not excepted to except as above set forth, the jury found the issues submitted to them for the plaintiffs. His Honor gave judgment for plaintiffs and the defendant appealed.

S. J. Ervin for plaintiffs.
J. T. Perkins and I. T. Avery for defendant.

SHEPHERD, C. J. The objection that there was no legal assignment of the judgment to the plaintiff Dickson is without force. A private sale of a *chose in action* by an executor or administrator, if made in good faith, is valid, although, says *Daniel, J.,* it would be well to follow "the direction of the statute; for if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue, he or they would be bound to make good the deficiency out of their own pockets." *Wynns v. Alexander,* 22 N. C., 58; *Gray v. Armistead,* 41 N. C., 74. In the case of several executors (unlike the case of several administrators) a sale made by one will pass the title (*Gordon v. Finlay,* 10 N. C., 239), but we do not see how this latter point arises in the present action, as both of the executors are parties plaintiff and allege that the judgment was assigned to Dickson, their coplaintiff. This would be a ratification of the act of the coexecutor making the sale, had such ratification been necessary.

Neither do we see any error in the ruling of his Honor that the plaintiff was not barred by lapse of time. The judgment was taken against W. S. Moore, administrator of John A. Dickson, deceased, and W. F. McKesson as surety, at Spring Term, 1869, the action having been commenced prior to the adoption of the Code of Civil Procedure.

The judgment as to McKesson was absolute and final, and (633) being a new *causa litis* is governed by the statute of limitations prescribed in The Code. As to the administrator of said Dickson, it was a judgment *quando acciderint,* and the statute of presumptions under the prior law is alone applicable. *Gaither v. Sain,* 91 N. C., 304; *Smith v. Brown,* 99 N. C., 377. The said administrator Moore died in 1869, and there was no administration upon the estate of Dickson until 1886. This suit having been commenced in 1890, it must follow that no presumption of payment has arisen, as it has been decided that in computing the time under the statute the period during which there was no administration must be excluded. *Long v. Clegg,* 94 N. C., 763; *Baird v. Reynolds,* 99 N. C., 469.

It is urged, however, that the law raises a presumption that the judgment has been paid by the cojudgment debtor, McKesson, and that the plaintiff must rebut such presumption. It must be noted that

this action is not against McKesson, but on the *quando* judgment against the representative of Dickson. As we have seen, no presumption of payment has arisen on this *quando* judgment, and as the statute of presumptions was never applicable to the final judgment against McKesson, we are of the opinion that the authorities which hold that a presumption of payment as to one is a presumption of payment as to all have no application to this case. The other exceptions have been examined and are untenable.

NO ERROR.

Cited: Odell v. House, 144 N. C., 649.

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(634)

WILLIAM MONROE, TRUSTEE, ET AL. v. S. D. TRENHOLM.

Trusts—Deed by Husband for Benefit of Wife—Right of Cestui Que Trust to Convey—Action by Grantee of Cestui Que Trust for Possession of Trust Property.

1. Where property has been placed in the hands of a trustee for the sole and separate use of a married woman, she has no power of disposition over it, except such as is clearly given in the instrument creating the trust, and in the manner therein prescribed.

2. If a trustee wrongfully withholds from the *cestui que trust* the benefits of the trust estate, relief will be granted at the request of such *cestui que trust,* but not at the instance of a stranger who volunteers to ask redress, or if the trustee becomes incompetent for any reason to execute the trust, it is the right of the beneficiary, but not of a stranger, to have such trustee removed and another substituted.

3. Where a husband, in order to secure to his wife and children a portion of his real property, conveyed the land to his son, S. D. T., and his heirs in trust for the sole use and benefit of E. B. T. (the grantor's wife), and authorized and empowered the trustee at any time to dispose of any or all of the property "when so required by the said E. B. T., and to invest the proceeds as she may direct": *Held,* that a conveyance of such land by the wife, E. B. T., to a third person in trust for her, the said E. B. T.'s daughter, vested no title or interest in the grantee, and did not entitle him and the daughter to recover possession of the land from S. D. T., the trustee named in the husband's deed, since the latter gave the wife no power to convey the land.

ACTION tried at Fall Term, 1892, of HENDERSON, before *Armfield, J.*

It was agreed that the case should be submitted to the court upon the admissions in the pleadings and the exhibits.

On 1 October, 1867, E. L. Trenholm executed the following (635) deed of settlement:

STATE OF NORTH CAROLINA—*Henderson County.*

Whereas, it is my desire to secure to Eliza Bonsal, my wife, and to her children, a portion of my real property: Now, therefore, in consideration of the sum of one dollar to me in hand paid, and for the purposes above mentioned, I have this day bargained and sold, and by these presents do bargain and sell, unto my son, Savage Deas Trenholm, to him and to his heirs forever, all my right and title and interest in a certain tract of land lying and being in the State and county aforesaid, known as the Mountain Lodge place. . . .

To have and to hold, all and singular, the said three hundred and fifty-nine acres of land, more or less, and all and singular the premises and appurtenances to the said Savage Deas Trenholm, his heirs and assigns forever, in trust, nevertheless, for the following uses and purposes, and no other: In trust for the sole use and benefit of the said Eliza Bonsal Trenholm and her heirs forever, and I do hereby authorize and empower the said Savage Deas Trenholm, the trustee aforesaid, at any time to dispose of all and singular the lands aforementioned, when so required by the said Eliza Bonsal Trenholm, and to invest the proceeds as she may direct.

In witness whereof I have hereunto set my hand and seal, this 1 October, 1867.

E. L. TRENHOLM. [L. S.]

On 14 November, 1889, the said Eliza B. Trenholm, mentioned as beneficiary under the first deed, being then and now a widow, executed a deed for a part of said land to the plaintiff, as trustee for her daughter.

The court rendered judgment that the defendant execute and (639) deliver a deed in fee for the land described in the complaint, to the plaintiff William Monroe, trustee, as prayed for in said complaint, and that the plaintiff recover possession of said land and the costs of this action. And it is further ordered that the effect of this decree shall be to transfer to William Monroe, trustee, the legal title of the said property to be held in the same plight, condition, and estate as though the conveyance ordered was in fact existing, and that the clerk of this court, upon the application of the plaintiff, issue to the sheriff of said county a writ of possession commanding him to put the plaintiff in possession of the said land.

From this judgment the defendant appealed.

W. A. Smith and C. M. Busbee for defendant.
No counsel contra.

(640) AVERY, J., after stating the facts: The deed executed in 1867 was a post-nuptial settlement by which E. L. Trenholm conveyed to his son, S. D. Trenholm, the land in controversy in trust for the sole use and benefit of his wife, Eliza B. Trenholm, and her heirs forever, and authorized and empowered said trustee at any time to dispose of the lands . . . when so required by the said Eliza, and to invest the proceeds as she might direct. It will be observed, also, that the recital with which the deed begins declares that "whereas it is my desire to secure to Eliza Bonsal, my wife, and to her children, a portion of my real property," etc. Whether a conveyance of land or personalty be made before or after marriage, if its purpose is to place the property in the hands of a trustee for the sole and separate use of a married woman, the rule which must govern in passing upon any attempted alienation by her is that she has no power of disposition except such as is clearly given in the instrument. *Kemp v. Kemp,* 85 N. C., 491; *Hardy v. Holly,* 84 N. C., 661; *Mayo v. Farrar, ante* 66; *Knox v. Jordan,* 58 N. C., 175. The power to convey was conferred upon S. D. Trenholm, and was to be exercised by him "when so required" by his mother, the *cestui que trust.* The trustee has never conveyed and she has never, so far as we are informed, requested him to do so. As no authority to dispose of the property is conferred upon her by the deed of settlement, her attempted conveyance to the plaintiff Monroe was clearly ineffectual to transfer any estate, either legal or equitable, to either of the plaintiffs. *Kemp v. Kemp, Hardy v. Holly, Mayo, v. Farrar, supra.*

The cause is entitled "William Monroe, trustee, H. E. Grimball and others against S. D. Trenholm," both in the caption of the summons and complaint, and we have made a fruitless examination of the pleadings to ascertain who were, or were intended to be, the other parties plaintiff.

(641) The inference is fairly deducible from the fact that Mrs. E. B. Trenholm is designated in the complaint not as a plaintiff, but as "his (defendant's) *cestui que trust* mentioned in Exhibit 'B' "; that she, at least has never been made a party at all. As neither of the plaintiffs acquired any interest in the land by the attempted conveyance of Mrs. E. B. Trenholm, in disregard of the mode of alienation pointed out in the instrument under which she held, it is manifest that they are not entitled to recover possession in this action. It is equally clear that the plaintiff Monroe has acquired no right under this pretended or intended conveyance to call upon the defendant to divest himself of the legal title and the trusts coupled with it by his father in the settlement.

If S. D. Trenholm wrongfully withholds the possession or profits of the land from the *cestui que trust,* Mrs. E. B. Trenholm, the courts may discuss or point out her remedy when she alleges and proves that he has so wronged her, but not at the request of a stranger to the instrument, who volunteers to ask redress for her. If by reason of his habits, or for other sufficient cause, the defendant has become incompetent or unfit to execute the trust with which he was clothed by the deed, it is the right of Mrs. E. B. Trenholm, not of one who has no interest in the property, to ask in the way appointed by law for his removal and the substitution of a more suitable person in his place. As she is not before the court complaining of a refusal on the part of the defendant to execute a voluntary conveyance to William Monroe in trust for H. E. Grimball at her request, we are not required, if we are at liberty, to determine whether the deed of settlement restricted her authority to the right to require a sale for reinvestment, or conferred upon her the power to direct and compel the execution by the trustee of a voluntary conveyance to such one of her children as she should select as the object of her bounty.

Upon the admissions in the pleadings the action should have (642) been dismissed and judgment rendered in favor of the defendant for the costs.

REVERSED.

Cited: Broughton v. Lane, 113 N. C., 18; *Monroe v. Trenholm,* 114 N. C., 590; *Kirby v. Boyette,* 116 N. C., 167; *S. c.,* 118 N. C., 257; *Shannon v. Lamb,* 126 N. C., 43; *Cameron v. Hicks,* 141 N. C., 28, 30.

R. D. HICKS v. D. A. BEAM.

Action by Infant—Defense—Waiver of Plea—Practice.

1. The right to avoid a contract on the ground of the disability of nonage is a peculiar personal privilege of the infant, though if he bring suit in his own name, or next friend, for services rendered another, the decree will be conclusive on him as well as the defendant.

2. Where an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, since the infant may repudiate the judgment if rendered before his majority, but such objection must be interposed in apt time and in the prescribed mode, which is by plea in abatement or by defense set up in the answer and before the trial on the merits.

3. Where, in an action by an infant in his own name against defendant for services rendered, the defendant relied upon a general denial of the indebtedness as his sole defense, thereby waiving objection to plaintiff's disability to sue: *Held*, that a motion to dismiss the action after the testimony was all in was made too late to be entertained.

4. Where an infant institutes an action in his own name, and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant.

(643) ACTION tried on appeal from a justice of the peace at the Fall Term, 1892, of CLEVELAND, before *Graves, J.*

The plaintiff complained in the justice's court that the defendant was indebted to him for work and labor done, in the sum of $80. The defendant denied that he owed the plaintiff anything. On the trial in the Superior Court the plaintiff was introduced as a witness in his own behalf, and under cross-examination swore that at the time he instituted this action he was under twenty-one years of age, and had attained his majority only a month or so prior to the trial of the case on appeal in the Superior Court; that he had neither general nor testamentary guardian. On the redirect examination he swore that he was an orphan and had been for some four or five years, and that during that time he had acted as his own man, contracting and attending to his own business. It was admitted that this suit was not brought by a next friend, but in the name of the plaintiff alone.

At the close of the evidence, counsel for the defendant moved to dismiss the action for want of jurisdiction and for failure of plaintiff to institute his suit in proper manner, viz., by a next friend, duly appointed by the court. The motion was denied, and defendant excepted. The jury rendered a verdict for $55.40, and there was judgment accordingly. Motion for a new trial was refused, and defendant appealed.

R. L. Ryburn for defendant.
No counsel contra.

AVERY, J. The defendant, having contracted to compensate the plaintiff for his services, which were subsequently rendered, could not avoid the obligation to pay the debt by setting up the plea of plaintiff's infancy. The right to avoid the contract on that account was a peculiar personal privilege of the infant. Brown's Domestic Rel., p. 106; 10 A. & E., 637.

(644) While the disability continued, therefore, the contract in this case was binding upon the defendant, though the infant was left at liberty to either affirm or repudiate it, at his option, on arriving at full age. Where, however, suit is brought for the services of an infant in his own name by his guardian or next friend, the decree is

conclusive on him, as well as the party for whom he performs the labor, though he might, if no action had been instituted, have disaffirmed the contract on which it was founded, on arriving at maturity. *Webster v. Page,* 54 Iowa, 461.

When the infant, without the intervention of guardian or next friend, undertakes to prosecute his suit in his own name only, the debtor has a right to object to his recovery, because the judgment, like the contract, may be repudiated or affirmed and enforced at the election of the former, if rendered before his majority. Schouler Domestic Rel., sec. 268; *Tate v. Mott,* 96 N. C., 19. But such objection must be interposed in apt time and in the prescribed mode, which is by plea in abatement, so as to afford an opportunity to the plaintiff, on such terms as the court may deem just, to amend by inserting the name of a guardian or next friend, and thus obviating the difficulty. Schouler, *supra,* sec. 449, pp. 449 and 450; *Blood v. Harrington,* 8 Pick. (Mass.), 552; *Young v. Young,* 3 N. H., 345; *Drago v. Moso,* 1 Speer L. (S. C.), 212. The defendant relied upon a general denial, which was equivalent to a plea of *nil debet,* and, the subject-matter of the action being within the jurisdiction of the court, the defendant would have been required, under the old rules of pleading, to have filed a formal plea in abatement, in order to avail himself of the objection to the disability of the plaintiff. *Branch v. Houston,* 44 N. C., 85; *Clark v. Cameron,* 26 N. C., 161. Under the new system, however, such a defense must be in some way (though informally) set up in the answer and insisted on before the trial (645) on the merits, and if not so pleaded it will be considered as waived. *Hawkins v. Hughes,* 87 N. C., 115; *Blackwell v. Dibbrell,* 103 N. C., 270; *Montague v. Brown,* 104 N. C., 161; *Harrison v. Hoff,* 102 N. C., 126; Pom. R. and R., sec. 721.

The defendant in the case under consideration might have set up this preliminary defense along with the general denial, either by *memoranda* in the nature of a plea or by an answer in the justice's court, or after appeal in the Superior Court by leave, and, under the rule laid down in the cases which we have cited, it was his right to demand that the defense be passed upon in some way before the trial on the merits. Following the suggestion made in *Blackwell v. Dibbrell, supra,* the jury might have been instructed that if they should respond to the issue involving the question, whether the plaintiff was an infant, in the affirmative, it would be unnecessary to proceed further and pass upon those involving the merits.

It was too late to raise the question by motion to dismiss after the testimony bearing upon the merits had been heard. The defendant may ordinarily get the benefit of the objection that the plaintiff is an infant by motion to amend at this stage of the proceeding, if the court in its

discretion allows the amendment. *Tredwell v. Broder,* 3 E. D. Smith (N. Y.), 597. But where the disability still continues, when such motion is made, the usual practice of the court is to protect the infant by allowing him also to amend his summons and complaint by inserting the name of a guardian or next friend. Schouler, *supra,* sec. 449. The defendant had waived objection to the disability, while it existed, by entering and relying upon a general denial of indebtedness as his sole defense, and after the evidence had been heard upon the merits it was in this particular case too late to raise it then, even by motion to (646) amend, because, meantime, pending the action, the plaintiff had arrived at full age and had ratified and affirmed all that had been done by his attorney for him in the previous stages of the proceeding by persisting in the prosecution of the action. Where an infant institutes an action in his own name, if before judgment he attains full age, or the court allows an amendment to the pleadings, inserting the name of a guardian or next friend, in either event the judgment is binding, both upon the infant and the defendant. *Reed v. Rossie,* 47 Hun, 153; *Webster v. Page, supra.*

NO ERROR.

Cited: Carroll v. Montgomery, 128 N. C., 279; *Smith v. Lumber Co.,* 140 N. C., 378; *McAfee v. Gregg, ib.,* 449.

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* THOMAS M. YOUNG v. J. B. CONNELLY ET AL.

Judgment—Docketing—Duty of Clerk—Liability of Sureties on Official Bond.

1. Where, by consent of parties, a judge of the Superior Court signed a judgment at chambers after the adjournment of court, leaving blanks for the insertion of the amount of costs and referee's fee, and sent the same to the clerk of the Superior Court, directing him to fill up the blanks and file the judgment, after consulting with counsel as to the amount of the referee's fee, and counsel agreed upon the fee and notified the clerk and requested him to docket the judgment at once, which he failed to do prior to the probate and registration of a deed of conveyance of all of his property by one of the defendants in said judgment: *Held,* that the failure of the clerk, under the circumstances, to docket the judgment was such a breach of official duty as to render the sureties on his official bond liable for any loss resulting to plaintiff therefrom.

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

2. The failure of a judge to adjudicate as to costs does not affect or render invalid as a final judgment an adjudication upon another matter embraced therein.

3. The compensation of a referee is a part of the costs of an action in which a reference has been ordered, and was fixed by statute (C. C. P., sec. 533), unless otherwise agreed upon by the parties; and it was the duty of the clerk to tax such costs, subject, of course, to the revision of the judge.

APPEAL at August Term, 1892, of IREDELL, from *Boykin, J.* (647)

Upon an intimation by his Honor that, upon the evidence introduced, they could not recover, the plaintiffs submitted to a nonsuit, and appealed.

The facts necessary to an understanding of the decision are fully stated in the opinion of *Associate Justice MacRae.*

J. B. Armfield and T. B. Bailey for plaintiff.
Robbins & Long and Bingham & Caldwell for defendants.

MACRAE, J. This was an action upon the official bond of J. B. Connelly, clerk of Iredell Superior Court, to recover damages for the alleged default in said clerk in failing to docket a judgment in favor of the plaintiff and against Margaret J. Young, guardian, J. H. Dalton, and others, it being alleged in substance that the said Dalton was solvent at the time of the rendition of said judgment, but that before the same was docketed, so as to constitute a lien upon his lands, the said Dalton had conveyed and assigned all of his property by deed of trust; that the other defendants are insolvent, and that by reason of the failure of said clerk to docket said judgment, as he was bound by law to do, the plaintiff had lost the fruits of his judgment against the said Dalton. His Honor intimated, after hearing the evidence, that the alleged (648) judgment had never become a judgment of this Court, and that upon the whole evidence the plaintiff could not recover. Whereupon the plaintiff submitted to a nonsuit and appealed.

On a case coming before us in this form it is necessary for us to state the whole evidence in the most favorable light in which it can be viewed for the plaintiff. *Gibbs v. Lyon,* 95 N. C., 146.

It is admitted by the pleadings "that at November Term, 1887, of the Superior Court of Iredell County the plaintiff, Thomas M. Young, recovered a judgment against Margaret J. Young, who was the guardian of the said Thomas M. Young, and John H. Dalton and P. B. Kennedy, guardian of A. L. Young, lunatic, for the sum of $2,793.01, with interest on $2,028.87, principal, from 18 September, 1881, until paid, with costs of the case, amounting to $.....; that said judgment was rendered by *Clark,* then judge of the Superior Court, at chambers in Lexington, on

10 December, 1887, he having heard said action at said time and place, by the consent of the parties, it being heard upon exceptions filed to the report and account stated by the referee theretofore appointed by the court."

The contention of defendants was, that this judgment was never completed; that there were certain blanks to be filled before the paper-writing became the judgment of the court; that said blanks had never been filled, and that it had not become the duty of the clerk to docket the same as a judgment of the court.

We may gather from the testimony, taken most favorably to the plaintiff, the conclusion of the judgment was as follows: "The plaintiff, Thomas M. Young, will recover of defendants $2,793.01, of which $2,028.87 is principal money and draws interest from 18 Septem-
(649) ber, 1881, until paid, together with the costs of this action, to be taxed by the clerk. The referee, A. L. Coble, is allowed the sum of $....., to be paid by....."

No question was made, nor could it have been made, upon the power of the judge, by consent of counsel on each side, to take the papers and render his judgment in another county, to be entered upon the record of the term and of the county at which the case was heard. *Shackelford v. Miller,* 91 N. C., 181; *McDowell v. McDowell,* 92 N. C., 227. His Honor returned the papers, with his judgment, to the clerk of Iredell, and directed the clerk, by a letter, which has been lost, "to see counsel; that he thought referee's fees ought to be divided between the parties; that if they so agreed, insert the same, and docket; if they did not agree to divide the fee, then to charge the fee against defendant, and docket." "He did not instruct the clerk to fill in the blanks and then docket." This is according to the testimony of Mr. Turner, one of plaintiff's counsel.

According to the testimony of defendant Connelly, the letter stated "that I would see in the judgment roll the amount of allowance to referee Coble, ...dollars; that the amount of said allowance was to be agreed upon by attorneys for plaintiff and defendant. In said letter he instructed me when said allowance was agreed upon and inserted, then I should record the judgment roll upon the minutes of the court." The recollection of *Clark, J.,* according to his testimony, was that upon the hearing, counsel stated they would agree upon the compensation of referee, and he left the amount blank in the judgment and wrote Connelly to get consent to fill it up and then file the judgment. While there is no very great difference between the witnesses upon this point, probably the testimony of *Clark, J.,* states it most favorably for plaintiff.

It appears, further, by the testimony that counsel on both
(650) sides went to the clerk's office after the judgment was received,

having agreed upon the amount to fill in the blank, $75; that Mr. Furches, counsel for defendants, suggested that the blank be filled in then; that Mr. Turner, counsel for plaintiff, postponed it until he could consult with his associate counsel, and, after such consultation, on a subsequent day, went to the clerk's office and directed him to fill the blanks and docket it, and he promised to do it.

Mr. Turner further testifies to his having gone to the clerk two or three times before 1 February and requested him to docket the judgment, and the clerk having promised to docket it.

So it seems in this view of the testimony that it was the duty of the clerk to have filled the blanks and docketed the judgment. The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his Honor. The Code, sec. 532. The clerk had been informed of the amount of the fee. There was nothing further to be done than the ministerial act of the clerk to tax costs and docket the judgment. It was the duty of the clerk, when the judgment was received by him, to have taxed the costs. Under the direction of the judge he should have notified counsel, and if they did not agree upon the allowance to the referee he should have fixed it according to the law as it then was (Bat. Rev., ch. 17, sec. 285), and taxed it in the bill of costs, and docketed the judgment. The Code, sec. 433.

According to the approved forms of judgments in North Carolina, as laid down in Eaton's Forms, the standard authority, often approved, the judgment was rendered for the debt or damage, "and for costs." In practice frequently it was added, "to be taxed by the clerk," but whether the last words were used or not, it was the duty of the clerk to tax them, subject, of course, to the revision of the judge, as witness the frequent motions to retax the costs. (651)

The judgment consisted of two several and independent parts. It might have been good as to one and erroneous as to the other. *Moore v. Ingram,* 91 N. C., 376. Even a failure to adjudicate as to costs would not have affected the judgment as a final one. *Peterson v. Vann,* 83 N. C., 118.

At the time of the rendition of this judgment the law fixed the compensation of the referee unless otherwise agreed upon by the parties. C. C. P., sec. 533. There was no ground for delay in docketing in the face of the repeated requests of plaintiff's counsel and the agreement of counsel as to the amount of the allowance.

The defense set up for failure to docket, that the fees were not paid or tendered, was expressly waived in this Court.

The official bonds of the clerk of 1886 and 1887 were conditioned, among other things, for the discharge of all the duties required of him as clerk by law.

If his Honor's opinion, that upon the evidence plaintiff was not entitled to recover, may be construed to mean that the failure on his part to docket the judgment was not such a breach of duty as to render his sureties liable, we cannot concur with him; it was a duty, as we have seen, specially imposed by statute.

There are other questions raised by the pleadings which will necessarily be passed upon in a subsequent trial.

His Honor having erred in his intimation, upon which the judgment of nonsuit was entered, there must be a

NEW TRIAL.

Cited: Daniel v. Grizzard, 117 N. C., 109; *Stanley v. Baird,* 118 N. C., 83; *Bank v. Gilmer, ib.,* 670; *Cobb v. Rhea,* 137 N. C., 298.

(652)

J. H. GARRISON v. J. H. TINLEY AND J. H. JUSTICE.

Ejectment—Evidence—Estoppel.

1. Where, in an action to recover land, a record of proceedings for the sale of land to which plaintiff was a party, was relied upon as an estoppel against the plaintiff, and there was nothing in the record to show that the land to which the proceedings related was the same as the land for which this action was brought: *Held,* that such record cannot be admitted as an estoppel against the plaintiff.

2. Recitals in a deed made by a commissioner of court in proceedings to which plaintiff was a party, containing no reference to the description of the land described in the petition, are not evidence of the identity of the land sued for with that described in the petition.

ACTION for the recovery of land, tried before *Bynum, J.,* and a jury, at the Fall Term, 1891, of HENDERSON.

The plaintiff, by a regular chain of title, showed title in himself and a *prima facie* right to recover.

(653) In his chain of title plaintiff showed a bond for title to his grantor, T. C. Bradley, dated 6 March, 1877, and a deed in pursuance of said bond dated 14 June, 1881, and a deed to himself from T. C. Bradley dated 10 November, 1890.

The defendants introduced a deed from T. J. Rickman, administrator of J. H. Bradley, to J. H. Justice, dated 2 August, 1886, which it was admitted covered the *locus in quo*.

The defendants then offered the records and proceedings of the Superior Court of Henderson County in the case of T. J. Rickman, administrator of J. H. Bradley, against N. H. Bradley and others, including T. C. Bradley, who is admitted to be the same person from whom plaintiff claims title.

These proceedings seem to be regular—all the defendants served with summons and all necessary orders made for the sale of the land of J. H. Bradley, the intestate, for assets, the report of sale to defendant J. H. Justice, and order of confirmation—except the writ of possession issued by the clerk, which the court does not approve, but which has no effect upon the question now before it. (654)

The description in the petition of the land sought to be sold differs from that in the deed made in pursuance thereof. That in the petition is as follows: "A certain lot or parcel of land lying between Broad River and the Asheville and Rutherfordton road (Hickory Nut Gap road), just below Broad River bridge, it being the lot upon which the said J. H. Bradley did business just prior to his death, containing about one-half acre, or thereabout." The description in the deed from T. J. Rickman, administrator, to J. H. Justice is as follows: "A tract or parcel of land in the county of Henderson and State of North Carolina, adjoining the lands of and being part of the John Casey lands, and others, and bounded as follows, viz.: Beginning at a maple on the Broad River, near the Broad River bridge, and runs nearly north to the turnpike road; thence east with the road to the branch; thence with the branch to the river; thence with the river to the beginning, containing one acre, more or less, being the property where the said J. H. Bradley lived up to the time of his death."

The defendants offered the deed and record above for the purpose of showing that the title to the land in dispute had been adjudicated as being in J. H. Bradley, deceased, at his death, and that plaintiff, claiming under T. C. Bradley, subsequent to said proceedings, was bound by them, and estopped to deny the title of J. H. Justice. The plaintiff objected to the introduction of said records upon many grounds not necessary now to be stated.

The defendants failed to show any title either in law or equity to this land in the name of J. H. Bradley, and relied solely upon the estoppel to defeat the plaintiff's claim.

In deference to an intimation of the court the plaintiff suffered a nonsuit and appealed.

(655) *J. M. Gudger, Sr., for plaintiff.*
W. A. Smith and Busbee & Busbee for defendants.

MACRAE, J., after stating the facts as above: There is no testimony to show that the land described in the petition is the same as that for the possession of which this action is brought, unless it be that the recitals in the deed from Rickman, administrator, to Justice, are evidence to connect the two descriptions; and we know of no rule of evidence nor statute, as in the case of burned records (The Code, sec. 69), to impart this extraordinary effect to said recitals, the same making no reference to the description in the petition. It follows that the record relied on as an estoppel may relate to an entirely different tract of land. This renders it unnecessary for us to consider the interesting questions presented on the argument.

Taking the evidence, as we must do, in the most favorable view for the plaintiff in which it could be considered, there was error in the intimation of his Honor. The judgment of nonsuit must be reversed and a new trial granted.

NEW TRIAL.

(656)

LOOKOUT LUMBER COMPANY v. F. T. SANFORD ET AL.

Subcontractor's Lien—Enforcement—Consolidation of Actions.

1. Where a party had obtained in this Court an affirmance of a judgment establishing his subcontractor's lien against the owner of a building, but the cause was remanded for the reason that the contractor was not a party, and the plaintiff thereupon brought another action in which the contractor was made a party defendant: *Held*, that the two actions were properly consolidated by the court below.

2. Where, in an action against the owner of a building and the contractor by a subcontractor to enforce his lien, the contractor admits his liability to plaintiff, and the owner of the building does not resist the judgment adjudicating the lien and ordering its enforcement, the defendant contractor has no right to object to the judgment because the satisfaction of the debt which he admits he owes to the subcontractor is imposed upon his codefendant, the owner of the building.

3. The fact that a subcontractor sought in one action to enforce his lien against the owner of the building without joining the contractor, cannot estop the plaintiff from recovering a judgment against the contractor in another action in which the latter and the owner of the building are parties.

APPEAL at Fall Term, 1892, of MCDOWELL, from *Armfield, J.*

His Honor gave judgment for the plaintiff against the defendant Sanford for $2,774.91, and declared the same to be a lien upon the lot and buildings thereon belonging to the defendant Marion Hotel and Belt Railway Company.

From this judgment defendant Sanford appealed.

The facts necessary to an understanding of the decision are sufficiently stated in the opinion of *Associate Justice Burwell* and in the report of the case of same plaintiff against Marion Hotel and Belt Railway Company, 109 N. C., 658.

J. C. L. Bird for plaintiff.
Cobb & Merrimon for defendant Sanford.

BURWELL, J. When this cause was before the Court at September term, 1891 (109 N. C., 658), it was determined that the plaintiff had a valid lien on the property of the defendant hotel company, described in the complaint, for the sum due to it from the contractor, F. T. Sanford, for materials furnished to him and used in the construction of buildings on the lot of said defendant. (657)

In the opinion then filed, *Chief Justice Merrimon* said: "We think, however, that the contractor, Sanford, should have been made a party defendant, so that the plaintiff might have obtained judgment for its claim against him as well as the defendant. He is the principal debtor, and the plaintiff must establish his claim against him. This it has not done and cannot do until he shall be brought before the court in a proper way and have his day in court. He might be able to allege and prove that the plaintiff's claim is unfounded, that he had paid it in whole or in part, or make other defense, and thus avoid the lien. He should have been, and must yet be, made a party and have opportunity to make defense."

On 16 December, 1891, the plaintiff issued a summons from the Superior Court of McDowell County, returnable to Spring Term, against the hotel company, F. T. Sanford, M. E. Sanford, J. T. Dysart, trustee, and the Marion Manufacturing and Improvement Company, and in the complaint filed in that action the plaintiff, among other allegations, averred (section 2) that the defendant F. T. Sanford owed it "on account of said manufactured lumber, doors, sash, etc., the sum of $2,511.29, with interest thereon from 10 December, 1890," and (section 5) "that on 11 August, 1891, the plaintiff commenced a proceeding to enforce its lien upon said land and the unfinished hotel thereon in the Superior Court of McDowell County, and at Fall Term, 1891, recovered judgment to enforce the same, from which judgment the said Marion Hotel and Belt Railway Company appealed to the Supreme Court,

which declared the rights of the plaintiff under the lien, but held that defendant F. T. Sanford, being the principal debtor, must be brought into court and have his day therein, and the plaintiff must
(658) establish its claim against him. This action has been commenced in aid of the proceedings to enforce the plaintiff's lien in obedience to the rulings of the Supreme Court, and is intended to be joined and consolidated with said proceeding."

At Spring Term, 1892, of the Superior Court of McDowell County, on motion of plaintiff's counsel, the action was "consolidated with and joined to" the cause first instituted by plaintiff (109 N. C., 658), and the plaintiff entered a *nolle prosequi* against M. E. Sanford, J. S. Dysart, trustee, and the Marion Manufacturing and Improvement Company. We think the consolidation of these two actions was entirely proper. The cause of action—against the contractor for the debt and against the owner to enforce the lien in satisfaction of the debt when adjudged—should have been united in one suit. The exception of defendant Sanford to the order consolidating the actions cannot be sustained. *Hartman v. Spiers,* 87 N. C., 28.

The answer of the defendant Sanford, the contractor, expressly admits the truth of the second allegation of the complaint, to wit, that he is indebted to the plaintiff as averred. Upon this admission the plaintiff was certainly entitled to a judgment against him for the debt, and the contractor's liability to the subcontractor, the plaintiff, being thus established, it only remained for his Honor to direct that the lien claimed by the plaintiff and declared valid by the former decision of this Court should be enforced against the property of the defendant hotel company. From this judgment the hotel company has not appealed, recognizing, it seems, that having been notified on 10 December, 1890, of this liability of the contractor to the subcontractor for materials, when it owed the contractor a sum far in excess of the amount sued for in this action, its property, in which plaintiff's ma-
(659) terials were used, is liable therefor under the statute and the decisions of this Court.

But the defendant Sanford, the contractor, having admitted his indebtedness to plaintiff, objects to the judgment, not because it establishes his liability to plaintiff, but because that liability of his is imposed upon the property of his codefendant, and he makes the following assignments of error:

"1. That his Honor erred in finding that any sufficient mechanic's or material man's lien had been filed according to law.

"2. That his Honor erred in not holding that the plaintiff's right of action was barred by the statute of limitations.

"3. That his Honor erred in not holding that the plaintiff was estopped by his former action from setting up any claim in this."

And an able argument has been made here by his counsel against the validity and enforcement of the lien. We do not deem it proper or necessary for us to determine the question presented for the reason that the hotel company, whose property (not the defendant's) is directed to be sold to satisfy the contractor's liability for materials, has taken no exception. There is no contention on the part of any one that the debt is barred. It cannot be seriously contended that plaintiff is estopped to recover a judgment against the defendant contractor for its claim against him, because it sought to enforce its lien without making him a party defendant. The cause was remanded from this Court to the Superior Court in order that the liability of the principal debtor (the contractor), if any, might be fixed, and that then that liability, if adjudged to exist and not paid off by him, might be satisfied by an enforcement of the lien claimed by the plaintiff, the regularity and validity of which were adjudged by this Court at the former hearing of this cause upon the record then presented, which (660) adjudication seems to have been satisfactory to the defendant hotel company, for from his Honor's judgment directing that that lien shall be enforced it does not appeal.

AFFIRMED.

PRICE & HESTER v. F. T. SANFORD (APPELLANT); H. A. McQUADE v. F. T. SANFORD (APPELLANT); T. F. RICHARDSON v. F. T. SANFORD (APPELLANT); J. A. GRAHAM v. F. T. SANFORD (APPELLANT); W. W. WEST v. F. T. SANFORD (APPELLANT); WETZELL & CO. v. F. T. SANFORD (APPELLANT).

PER CURIAM. The judgment in each of the above-entitled cases is affirmed, the matter involved in each of these appeals being determined by the decision rendered in the case of the lumber company against the same defendant. The appellant contractor admits his liability for materials to the plaintiffs, subcontractors. They have established their respective claims against him and they have judgments against the hotel company, the other defendant, that they have liens on its property for the amounts of their respective judgments against the contractor for materials. The hotel company has not appealed.

AFFIRMED.

(661)

THE RALEIGH AND WESTERN RAILWAY COMPANY v. THE GLENDON AND GULF MINING AND MANUFACTURING COMPANY.

Injunction—Right of Way.

1. While the fact of insolvency is not decisive of the right to injunctive relief, yet in some cases it becomes material.

2. The fact that one railroad occupies land which is claimed by another road as its right of way is not in itself an irreparable tort which will justify restraining the defendant from using the land until the question of title can be tried, especially when it is not alleged that the defendant is insolvent, and where it appears that there is room on the disputed territory for the construction of both roads.

MOTION to continue a restraining order to the hearing, heard before *Connor, J.,* at chambers in Oxford, on 28 November, 1892.

The plaintiff filed affidavits tending to show that it was constructing a railroad from Egypt, in Chatham County, to a point in Randolph County, and that for the purpose of a right of way for its road it had obtained title to the land in question from the owners thereof; that its work of construction was progressing, and that it was now necessary that it use the land in dispute to build its road on, as it was completed to this point; that the defendant had, without title, taken forcible possession of the land, and was now engaged in constructing its road on the same land; that at a place on said land it was necessary to cross Tyson's Creek, and that at this point there was not room for both roads to be constructed, and that unless the defendant was enjoined, the plaintiff would be obliged to stop its work, or to abandon its location and select another at very heavy expense.

The defendant denied these allegations, and introduced evidence tending to show a condemnation of said land by it, and also to show
(662) that there was room at Tyson's Creek for both roads to cross without danger or inconvenience.

His Honor found that there was room at Tyson's Creek for both roads to cross without going outside of the disputed land, and dissolved the order in part, from which the plaintiff appealed.

T. B. Womack and John Devereux for plaintiff.
W. A. Guthrie for defendant.

AVERY, J. It is not alleged in the affidavits nor was it contended upon the argument that the defendant company is insolvent; on the contrary, it seems to be conceded that it was able to answer in damages

for the alleged trespass on the plaintiff's right of way. Though the fact of such insolvency is not decisive of the right to extraordinary relief, yet in some cases it becomes material. If it shall be found upon an investigation before a jury that the defendant has constructed a roadbed and erected a bridge on land to which the plaintiff has the superior title, and has placed the bridge at the only eligible location on the right of way previously acquired by plaintiff, then, upon his own showing, the latter will suffer no irreparable injury, since it will recover the roadbed in its finished condition and compensation for any damage incident to the wrongful detention of the possession. *R. R. v. R. R.*, 88 N. C., 79.

If, as counsel insist, the case at bar is distinguishable from *R. R. v. R. R., supra,* in that the plaintiff is ready and waiting to prosecute the work of constructing its roadbed at this very point across the river, the answer is that the presiding judge has found as a fact, upon the affidavits and proofs before him, that there is "enough space between defendant's crossing on Tyson's Creek and the bank of Deep River at the mouth of said creek to construct another roadbed below (663) the defendant's railroad, without interfering with the defendant's roadbed and trestle." Meantime his Honor orders that the defendant shall occupy at Tyson's Creek and the approaches thereto only the roadbed constructed and in process of construction, the necessary approaches thereto and so much space south of the center of its roadbed as it may be found actually necessary to occupy in the construction of its road. This order is equivalent to a refusal of the injunction for which plaintiff prayed as to the line actually adopted and for the most part constructed on the land described in the affidavit, but to granting the order as to all disputed territory lying beyond and not necessary to the construction and use of the defendant's located line; and therefore the case of *Durham v. R. R.*, 104 N. C., 261, where the judge below vacated the restraining order as to all that portion of the street lying south of a designated boundary and continued the injunction to the hearing as to the roadbed, must govern our decision in the case before us.

Instead of *ex parte* testimony as to all the questions upon which the rights of the parties depend, we shall have after the trial the findings of a jury, and if it should appear from the verdict that the plaintiff has the better right to the roadbed, the law will allow him ample compensation in damages to cover his losses, including the additional cost of another crossing over the creek if it should construct it.

AFFIRMED.

Cited: Thomason v. R. R., 142 N. C., 331; *Taylor v. Riley*, 153 N. C., 203; *Yount v. Setzer*, 155 N. C., 218; *Rope Co. v. Aluminum Co.*, 165 N. C., 577.

(664)

*JAMES W. CULP AND WIFE V. C. L. STANFORD ET AL.

Guardian—Negligence—Liability.

Where a guardian carelessly and without deliberation, or, at the most, upon the hasty and "horseback" opinion of counsel, until then employed by the debtor and not by himself, and not by way of compromise of a doubtful claim, accepted from a solvent debtor half the sum he should have collected, he is responsible at the suit of his ward for what he failed or neglected to collect.

ACTION tried before *Graves, J.*, and a jury, at Fall Term, 1892, of MECKLENBURG.

The facts in the case are as follows:

One Thomas Russell made a will appointing D. P. Lee executor. He devised certain moneys, about $1,300, to "be equally divided and paid over to Philip J. Russell, Miss Mary Russell and the children of my niece, Martha, wife of Charles Stanford, in equal portion, share and share alike, to them and each and every of them." The Charles Stanford mentioned is the defendant in this case, and the *feme* plaintiff is his child. He became the guardian of his children, and when he came to collect for them what was due by Lee, executor, under the will, there was a question raised as to whether the division should be *per stirpes* or *per capita,* and the advice of Major Dowd, who was a lawyer of undoubted ability and character, but the counsel of the executor, was sought. Dowd decided that the division should be made *per stirpes,* and hence Stanford accepted in settlement one-third for all his children, and brought no suit for any more, because Dowd advised him that was all he was entitled to. Subsequently, in a suit between Culp,
(665) the present plaintiff, and Lee, the executor, the Supreme Court (109 N. C., 675) construed this clause of the will and held that the division should have been *per capita.*

Judgment was rendered for the plaintiffs for only half of amount in hands of executor under the third issue, and judgment for
(668) defendants as to balance. Plaintiffs excepted and appealed.

P. D. Walker for plaintiffs.

E. T. Cansler and Jones & Tillett for defendants.

CLARK, J. The defendant guardian should have collected for his wards two-thirds of the fund. *Culp v. Lee,* 109 N. C., 675. Instead thereof he collected only one-third. In *Harris v. Harrison,* 78 N. C.,

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

202, it is said: "Both by statute and the decisions of the courts (669) . . . the guardian shall endeavor to collect by all lawful means his ward's estate upon pain of being liable if he neglect."

It is doubtful, to say the least, if the advice of counsel could be a defense where the law in favor of the ward's right to the fund had been so clearly settled by the authorities (cited in *Culp v. Lee, ante*) and the amount collected was only one-half of that due the wards, since the construction of the court could have been readily had and would have been full protection. *Freeman v. Cook,* 41 N. C., 373; *Batts v. Winstead,* 77 N. C., 238; *Boulton v. Beard,* 3 DeC. M. & G. R., 608. In the latter case it was held that the defendant, who made an error in the distribution of the funds of the residuary estate, could not defend himself by reason of having acted upon the advice of two eminent counsel of the chancery bar. To similar purport is *Wade v. Dick,* 36 N. C., 313.

Luton v. Wilcox, 83 N. C., 20; *Lawrence v. Morrison,* 68 N. C., 162, and other cases cited by defendant, were instances where the facts were doubtful or the chances of recovery uncertain by reason of the insolvency of the defendant. In those cases where the fiduciary uses his best judgment and acts upon the advice of good counsel he will not be held liable if the event should show he might have recovered more. But in the present case there is simply a proposition of law which he could have submitted to the court.

We would not be understood as holding that a fiduciary should litigate every legal question arising. In the majority of instances the advice of counsel will correctly settle the matter. There are others so doubtful or so contingent upon doubtful and unsettled facts, or the amount is so small, that he should compromise the matter.

But the present was not a compromise. If it be conceded (670) that the guardian would have been relieved if he had acted upon the advice of counsel, still he did not show reasonable care in this case. He did not apply to his own lawyer nor seek out counsel and lay the case before him. When the fund was ready to be paid over he simply, according to his evidence, asked the counsel of the party paying it over what part thereof was coming to his wards, and claims that he paid five dollars for the reply. The counsel himself says he has no recollection of being asked any question by the guardian and was not paid any fee. Though the counsel was a gentleman of recognized eminence in the profession, the opinion (if given) seems to have been a reply made, without deliberation or reference to the authorities, to one who was not his client and for which he says he was not paid. The advice (if given) seems to have been off-hand, and what is known in the profession as a "horseback opinion."

It was negligence in the defendant to surrender one-half of the fund which he should have collected, without more care, deliberation, or thought given to the subject than this evidence disclosed. The party paying over the fund was solvent, and there was no such doubt as to either the law or the facts as called for a compromise. There was, in fact, no compromise. The guardian simply, carelessly and without deliberation and, at the most, upon the hasty opinion of counsel, till then employed by the debtor, not by himself, accepted half the sum he should have collected. He is responsible for his want of due care.

REVERSED.

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(671)

D. B. BRISCO & CO. v. J. F. NORRIS ET AL.

Deed from Husband to Wife—Action to Set Aside—Fraudulent Intent—Evidence.

1. Where a husband purchased land with his wife's separate estate, taking deed to himself with her consent and agreeing to convey to her at her request, and did so convey to her just before making a general assignment for benefit of creditors: *Held*, that in an action by creditors to set aside the deed, it was immaterial to inquire as to whether the intent of the husband in making the deed to his wife was to hinder and delay his creditors.

2. Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed.

3. Counsel fees, although provided for in a note, cannot be recovered in an action on the note.

ACTION tried at Spring Term, 1892, of MCDOWELL, before *Graves, J.*

(676) *Gudger & Pritchard and P. J. Sinclair for plaintiffs.*
W. H. Malone for defendants.

BURWELL, J. The jury have found that the land conveyed to his wife by Benjamin Aldridge by his deed of 10 July, 1889, was purchased with her separate estate and moneys, and the title was put in him by consent of his wife upon an agreement then made that he would convey said land to her when requested. Upon this state of facts the husband held the land as trustee for the wife (*Lyon v. Aiken,* 78 N. C., 258; *Kirkpatrick v. Holmes,* 108 N. C., 206), and her rights in it were in effect the same before the execution of the deed, which is alleged to

have been made with fraudulent intent, as they were after its execution and delivery. Its effect was merely to vest in her the legal title to the land of which she was before the equitable owner, her title being such as to enable her, upon the strength of it, to recover the land from her husband or from any one purchasing of him with notice of her rights (*Lyon v. Akin, supra*), or from any one who had bought the land at a sale under execution against her husband, for such purchaser would acquire only such title as the husband had.

Hence, these facts being established, it became immaterial to inquire with what intent the deed was made and accepted, for the substantial rights of none of the parties have been changed thereby.

We agree with his Honor that there was no evidence that Millie Aldridge consented that the title to this land might remain in her husband in order that he might thus acquire a fictitious credit and be enabled to defraud the plaintiffs. There was no attempt to prove any act or word of hers that in any way could affect her title or estop her from asserting it against the plaintiffs or any other of her husband's creditors. (677)

The first and second assignments of error cannot, therefore, be sustained.

There was no error in adjudging costs in favor of the *feme* defendant. The Code, sec. 527.

The plaintiffs had judgment for the amount of the debt claimed by them, with interest. Hence it is not necessary to consider the fourth assignment of error. They were not entitled to recover the ten per cent for counsel fees provided for in the note, even if it had been adjudged to be the note of the defendant Aldridge. *Tinsley v. Hoskins,* 111 N. C., 340.

NO ERROR.

Cited: Turner v. Boger, 126 N. C., 302; *Ray v. Long,* 128 N. C., 91; *Bank v. Land Co., ib.,* 195; *S. c.,* 132 N. C., 892.

A. L. MAXWELL v. JOHN H. TODD ET AL.

Mining Leases—Forfeiture by Nonuser—Estoppel.

1. Where a mining lease provides for the payment to lessors of a part of the net proceeds of minerals taken from the lands, but contains no stipulation for a forfeiture through failure to open and work the mines, the law will

construe the contract as if such a stipulation had been expressly written therein, and will adjudge such lease to be forfeited if, within a reasonable time, the lessee fails to carry out the purpose of the lease.

2. Where lessors of mining privileges were in possession of the land covered by the lease at the date thereof, and continued in possession, and the lease became forfeited by the nonuser and abandonment, according to the terms of the contract as construed by the law, no reëntry by lessors was practicable or necessary, and they or their grantees had a right, without demand or notice to the lessees, after such forfeiture, to resist the entry of the lessees for mining purposes.

3. Where an employee or servant of lessees of mining rights works for them in exploring the minerals on the land, and afterwards acquires from the lessors the mineral rights on the land, he is not estopped from denying the title of his former employers to such mineral rights, the lease thereof having been forfeited by nonuser.

(678) ACTION tried at Spring Term, 1892, of CALDWELL, before *Graves, J.*

(685) *Wakefield & Newland and R. Z. Linney for plaintiffs.*
G. N. Folk and W. B. Councill for defendants.

BURWELL, J. The plaintiffs claim the exclusive right to all mines and minerals in the land described in the complaint, under and by virtue of a mining lease made to them by Elizabeth Gragg and others on 19 December, 1879, for the term of ninety-nine years, and also under and by virtue of a mining lease made by said Elizabeth Gragg and another to one Haigler, dated 24 March, 1866, for the period of twenty-five years, the latter lease having been, as they claim, assigned to them, in effect, with the assent and concurrence of the lessors.

The defendants claim all the mines and minerals and all mining rights in said land under and by virtue of a deed made to them on 27 May, 1890, by the plaintiffs' lessors, for the consideration of
(686) $2,000.

Since both plaintiffs and defendants claim under the same parties (the Graggs), the plaintiffs, their titles being anterior, are entitled to recover, unless the leases mentioned above have expired or have been forfeited or surrendered and should have thus become void.

The consideration for the lease to plaintiffs was one dollar and their agreement to pay to the lessors, their administrators, executors, heirs, or assigns, one-tenth part of all the net proceeds of any minerals taken from said land, but there is in it no stipulation that a failure to open and work the mines shall cause a forfeiture. But the construction put upon their contract by the law is the same as if such a stipulation had been expressly written therein, for, as was said in *Conrad v. Morehead,*

89 N. C., 31, of a similar lease: "It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice."

His Honor construed the contract under consideration according to the principle announced in the case cited above, and told the jury that a failure on the part of the lessees to work the mines for five years would cause a forfeiture, of which the lessors might take advantage if they saw fit so to do. Certainly the plaintiffs have no right to complain that the period fixed by his Honor (five years) was too short. No reëntry by lessors was practicable or necessary. They were in possession of the land at the date of the lease, and thereafter continued in possession, that possession being subject to the mining rights of the (687) plaintiffs until those rights were lost to them by nonuser and abandonment, according to the terms of the contract as construed by the law. They were presumed to know what meaning the law put upon the expressed terms of that contract, and that, without any claim or demand or notice, the lessors, after such nonuser for an unreasonable time, could resist their entry for mining purposes, their rights having been forfeited. And if the lessors could resist an entry by plaintiffs, certainly the defendants, the grantees of those lessors, may avail themselves of the forfeiture and resist any interference by plaintiffs with the rights they have purchased, unless their relation to the plaintiffs was such as estops them from asserting an adverse title; and his Honor's instructions to the jury in regard to such estoppel were correct.

The jury having found the fourth and fifth issues in defendants' favor—that is, that the leases under which plaintiffs claim are void—and this, as we have seen, under proper instructions, the plaintiffs cannot recover, and the judgment must be affirmed.

We deem it unnecessary to consider separately each exception to the charge made by plaintiffs as to what has been said above, which is, indeed, but a reiteration of the principle announced in *Conrad v. Morehead, supra,* and seems to meet all their objections. We note that some of the exceptions seem not applicable to the charge of his Honor as set out in the case.

NO ERROR.

Cited: Hawkins v. Pepper, 117 N. C., 414.

(688)

JOSIAH RABY v. R. K. REEVES.

Easement—Covenant Running with Land.

1. Where, in the grant of an easement, a reservation is made by the grantor of a yearly sum to be paid him, it is a covenant, and the grantor may bring an action of debt for the nonpayment of the sum so reserved. Such covenant runs with land to which it is appurtenant, and a subsequent purchaser of the land takes it subject to the burden of the easement, and is entitled to collect the compensation.

2. The grantee who accepts and acts under a deed granting an easement and reserving rental is bound by its covenants.

ACTION to recover for use of right of way over plaintiff's land, tried at Spring Term, 1892, of MACON, before *Hoke, J.*, on defendant's appeal from a justice of the peace.

Plaintiff offered in evidence a deed from Elijah Raby and wife to the defendant, dated 25 April, 1885, granting the right of way over lands to be utilized in the construction of a ditch for the transportation of water, and reserving a yearly rental of $20. He also offered in evidence a deed from Elijah Raby and wife to himself, dated 11 June, 1887, conveying the land, over which the right of way had been granted, to the defendant. Witnesses testified that the water was conveyed over the land to a mine owned by defendant, who was in the habit of coming to the mine; knew the water was being brought over the land for the operation of the mine; had paid off employees hired by the operator; had witnessed the digging of the ditch, and sent for tools, and otherwise concerned himself about the construction of the ditch, and had
(689) paid rent for the years 1886 and 1889.

The court charged the jury that the contract created a right appurtenant to the land, and the right to recover the rent passed to plaintiff on the execution of the deed conveying the land; and that if the defendant entered into the contract as set up in the instrument from Elijah Raby and wife to R. K. Reeves, then he (Reeves) would be responsible to the plaintiff for the rent accrued to time this action brought, and unpaid for time mine was operated after plaintiff purchased and paid last payment, to wit, 1890 and 1891, and at rate of $20 per annum, the contract rate; that if defendant Reeves accepted, used and took advantage of the right of way, knowing that such a contract had been made in his name, this would be a ratification
(690) of the contract, and he would be responsible for rents at the contract rate.

There was a verdict for the plaintiff for $20 for amount of 1890 and 1891, with interest on each amount from maturity.

There was judgment on verdict for plaintiff. Appeal by defendant.

J. F. Ray for plaintiff.
Jones & Daniel for defendant.

SHEPHERD, C. J. It is laid down in 8 Bacon's Abridgment, Letter 8, Title Rent, that, "as a general rule, no rent can issue out of an incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress." It is also stated by the same author that "if a lease by deed for years of an incorporeal inheritance be made—reserving rent—such reservation is good by way of contract to bind lessee, and for nonperformance lessor may bring debt."

So, it seems, that in the present case, when the easement was granted, reserving $20 per year, it was not rent, but a covenant, for the nonpayment of which the grantor might have brought an action of debt.

Is this covenant a mere personal one, or does it run with the land? We think that the plaintiff grantee took the land subject to the easement, and if he interfered with its use the grantee of the easement would have an action against him. Being thus subject to the burden, he should, under the circumstances of this case, share the benefit and be entitled to collect the compensation.

As to the other point, his Honor very properly held that if the (691) defendant accepted and acted under the deed, he was bound by its covenants. *Fort v. Allen,* 110 N. C., 183.

We also concur in the ruling that there was evidence tending to show such acceptance, etc.

NO ERROR.

Cited: Lumber Co. v. Hudson, 153 N. C., 100.

W. H. WOLF & CO. v. J. W. L. ARTHUR.

Fraudulent Intent—Evidence.

1. No question is competent which puts the witness, in giving an answer to it, in the place of the jury, or offers his opinion for their adoption upon a matter involved in the issues, or upon some question of fact to be passed upon by them preliminary to a finding upon an issue; therefore,

2. Where, in a proceeding to determine the validity of an order of arrest, the issue was as to whether a deed had been executed by the defendant with intent to defraud his creditors, etc., it was error to permit the grantees to answer a question whether the trade between them and defendant was a *bona fide* transaction and without fraud.

MOTION to vacate an order of arrest, heard, upon the submission of an issue of fraud to the jury, at Fall Term, 1892, of SWAIN, before *Bynum, J.*

The following issue was prepared by the court and submitted to the jury, to wit: "Did the defendant, J. W. L. Arthur, dispose of his property to Collins and Allison with an intent to defraud his creditors?"

Counsel for defendant Arthur proposed to ask the witness Collins "whether the trade between witness and Arthur was a *bona fide* transaction," to which question the plaintiffs objected—(1) because it (692) was asking the witness to state a conclusion of law; (2) it was asking the witness to state an opinion, and not facts. Counsel for defendant proposed to ask the same question of the witness Allison, and to this question the plaintiffs interposed the same objections and upon the same grounds; both of which objections were overruled, to which the plaintiffs excepted, and the said witnesses were allowed to testify that said transaction was *bona fide* and without fraud.

The jury responded to the issue in the negative, and from a judgment vacating the order of arrest, the plaintiffs appealed.

Fry & Newby for plaintiffs.
No counsel contra.

AVERY, J., after stating the facts: No question is competent which puts the witness, in giving an answer to it, in the place of the jury and substitutes his opinion for theirs, or offers his opinion for their adoption, upon a matter involved in the issues, or upon some question of fact to be passed upon by them preliminary to a finding upon an issue. Best on Ev., sec. 512. The inquiry to which the attention of the jury was being directed was whether a deed was executed in good faith by Arthur, the defendant, to the witness and one Allison, or with intent to hinder, delay or defraud his creditors. As to a question of fact, the intent of Arthur was actually known only by himself, and the jury could not form an opinion as to his *bona fides,* except upon his direct denial or admission, or upon circumstances related by other witnesses tending to show his intent. The witness Collins was competent to show his own good faith and to negative the expression to himself of a purpose on the part of Arthur to defraud his creditors or to prove any circumstance calculated to throw light upon the intent of Arthur. When,

however, the question was so framed that Collins was left at (693) liberty to declare that Arthur acted in good faith, he stated what he could not know—what must have been his opinion, either as a fact or upon the law arising on the facts. The presiding judge would not have been warranted in stating to the jury what his conclusions of law and fact were, and the witness could not be permitted to give his opinion as to the existence or absence of a fraudulent purpose, which opinion must have been founded upon the testimony of other witnesses, or his own knowledge of circumstances which he was at liberty, in response to proper questions, to impart to the jury. Of course, he could not be allowed, in the face of objection, first to usurp the province of the jury and find the facts, and then the office of the judge, and give an opinion upon the law arising on his own findings.

Since we are of opinion that there was error in admitting the testimony to which objection was made, it is not necessary to pass upon the other assignments of error, and upon the record sent up we might fall into error in doing so. But the attention of the parties may with propriety be called to the probable bearing of the opinions in *Beasley v. Bray,* 98 N. C., 266, and in *Barber v. Buffaloe,* 111 N. C., 206, upon the right of a debtor to assign or sell his goods after execution has been issued on a docketed judgment.

For error in the admission of the testimony mentioned, there must be a NEW TRIAL.

Cited: Tillett v. R. R., 118 N. C., 1042; *Marks v. Cotton Mills,* 135 N. C., 289; *Taylor v. Security Co.,* 145 N. C., 396.

(694)

H. E. SONDLEY v. CITY OF ASHEVILLE.

Appeal—Verbal Agreement of Counsel—Rule of Court.

1. The statutory requisites as to appeals cannot be dispensed with, except with the assent of counsel entered in the record or evidenced by writing. Rule 39 of Supreme Court.

2. An alleged verbal agreement between counsel, if denied, will be deemed as legally nonexistent.

ACTION tried at December Term, 1892, of BUNCOMBE, before *Bynum, J.,* and a jury, the object being to recover damages accruing to plaintiff from the condemnation of her land for a street. The assessors awarded

her $2,000, and on appeal by the defendant to the Superior Court the same damages were allowed by the jury, and from a judgment for the same, defendant appealed.

The transcript of the record was duly docketed here, and when the case was reached in its order at this term, at which the appeal stood regularly for trial, the appellee moved to affirm the judgment below, upon the ground that there was no case on appeal and no errors apparent upon the face of the record proper. The appellant moved for a *certiorari,* filing affidavits of counsel that there was an agreement of counsel to extend the time for serving case on appeal and a waiver of service by an officer, as required by statute. The Code, sec. 597; *S. v. Price,* 110 N. C., 599. These allegations are not only not admitted, but are squarely met by affidavits denying such agreement by counsel of the opposite party.

(695) *W. W. Jones for plaintiff.*
Cobb & Merrimon for defendant.

CLARK, J., after stating the facts: Rule 39 of this Court (104 N. C., 927) provides: "The Court will not recognize any agreement of counsel in any case, unless the same shall appear in the record or in writing, filed in the cause in this Court." This had long before been the established rule, and recognized as binding by many decisions. Under it, *certiorari,* in a case like the present, was again denied as recently as *Graves v. Hines,* 106 N. C., 323. The courts can only admit such verbal agreement, or such part of it, as shall not be denied.

The propriety—indeed, the necessity—of such rule must be recognized by all. Indeed, both the necessity and propriety of it could receive no stronger illustration than the present case, in which allegations of such verbal agreement and waiver are made on oath by several gentlemen of the very highest and most unquestioned personal and professional standing, and denied on oath by a similar number of gentlemen of like character. It is very evident that the recollections of one side are at fault, or that the parties misunderstood each other, in which case there was no perfected agreement. There is no way by which this Court, if disposed (which it is not) to pass upon the conflicting affidavits, could form any definite idea as to which side was more correct in its recollections of what transpired. This difficulty could have been so easily avoided by having the agreement, if made, entered upon the record in open court or reduced to writing and signed. Any misunderstanding as to the terms would be perceived on their being put in writing and the writing corrected, or if of doubtful meaning its purport would simply be a matter of legal construction, as in *Mitchell v. Haggard,* 105 N. C., 173. This

precaution not having been taken, the Court will remit the parties to their legal rights, and the appellant must be denied its motion for a *certiorari.*

In *Walker v. Scott,* 102 N. C., 487, where the question was as (696) to whether there was in fact service within the prescribed time, the case was remanded to the Superior Court, that such question of fact should there be determined. But here it is admitted that service was not made within the time, and the question is, whether there was an oral agreement to extend time and a waiver of legal service by an officer, which, the allegation being denied, the Court will not decide.

The remark in *S. v. Johnson,* 109 N. C., on page 852, that the failure of an appellant "to serve notice in a legal manner and within statutory time" is subject to the "discretion reposed in the appellate court to permit notice to be given after that time," is applicable only to appeals from a justice of the peace to the Superior Court, as may be seen by reference to the cases there cited. This is on account of the small amounts at issue in such cases, and the fact that often parties are not represented by counsel and are ignorant of the time and other requirements as to taking an appeal. Even in such cases the exercise of the discretion should be sparing. *S. v. Johnson, supra,* on page 855. Probably it would not be exercised where, in fact, counsel had appeared before the justice. But in appeals to this Court it has always been held that the statutory requisites cannot be dispensed with by this Court, nor by the court below, except with the assent of counsel. See numerous cases cited in Clark's Code (2 Ed.), p. 574, and *S. v. Price,* 110 N. C., 599. When such agreement of counsel is not in writing it is deemed legally nonexistent if denied.

A very little care in reducing agreements to writing will avoid such controversies as the present, which must be unpleasant to all parties concerned. It is to be hoped that hereafter counsel will, in every instance, put their agreements in writing, or have them entered of record when for any reason they may think best to depart (697) from the plain provisions of the statute. If they do not care to do this the Court will not pass upon controversies as to the terms or existence of such agreement. *Hemphill v. Morrison,* at this term.

The judgment must be

AFFIRMED.

Cited: Hemphill v. Morrison, post, 758; *Davenport v. Grissom,* 113 N. C., 41; *LeDuc v. Moore, ib.,* 276; *Atkinson v. R. R., ib.,* 587; *Graham v. Edwards,* 114 N. C., 230; *Herbin v. Wagoner,* 118 N. C., 660; *Smith v. Smith,* 119 N. C., 313; *Willis v. R. R., ib.,* 718; *Pipkin v. McArtan,* 122 N. C., 194; *Hahn v. Brinson,* 133 N. C., 8; *Mirror Co. v. Casualty*

Co., 157 N. C., 32; *Board of Education v. Orr*, 161 N. C., 218; *Lindsey v. Knights of Honor*, 172 N. C., 820; *Brown v. Taylor*, 173 N. C., 700; *McNeil v. R. R., ib.*, 731; *Justice v. Lumber Co.*, 181 N. C., 391.

G. MARSHALL ET AL. V. LEE STINE AND WIFE.

Verbal Request for Instruction to Jury—Exception—Waiver.

1. Failure to grant an instruction not asked for in writing is not ground for exception.
2. Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by this Court.
3. Where no exception of any kind appears in case on appeal, and no error appears on the record proper, the judgment below will be affirmed.

ACTION for the recovery of land, tried before *Armfield, J.*, and a jury, at Spring Term, 1893, of CATAWBA.

On the trial the issue submitted by consent of the parties related to the location of a boundary line upon which the case turned. There was no exception to the Judge's charge to the jury and no instruction was asked for in writing, but during the argument the plaintiff's counsel made a verbal request for an instruction, which was not given. The case on appeal does not set out any exception. There was verdict for defendants, and from the refusal of a motion for a new trial (698) the plaintiffs appealed.

M. E. Thornton for plaintiffs.
E. B. Cline for defendants.

CLARK, J. The appellants asked the court verbally for an instruction to the jury. The failure to grant a prayer for instruction not asked in writing is not ground for exception. The Code, sec. 415. Besides, if the prayer had been asked in writing, though the failure to give it is deemed excepted to, the exception would have been waived, as it is not set out in the case on appeal, and we could not pass upon it. *Taylor v. Plumber*, 105 N. C., 56.

No exception of any kind appears in the case on appeal, and no error appears upon an inspection of the record proper.

NO ERROR.

Cited: S. v. Blankenship, 117 N. C., 809; *Craddock v. Barnes*, 142 N. C., 99.

S. V. PICKENS v. COMMISSIONERS OF HENDERSON COUNTY.

Taxation—Equalization—Excessive Valuation.

1. The term "excessive valuation," as used in section 78, chapter 326, Acts of 1891, relating to the valuation of real estate for taxation, means a valuation exceeding that which was adjudged to be proper by the boards authorized by the act to finally determine such valuation.

2. The term "excessive" tax, as used in the said section, means a tax exceeding what the tax would be if correctly calculated at the legal rate on the adjudged valuation as determined or approved by the board of county commissioners.

3. In an action by a taxpayer against the county commissioners to recover the amount of an alleged excessive tax paid by him he is not entitled to recover unless he can show that the valuation of his property upon the tax-books is greater than that fixed by the proper authorities, or that the tax which he has been forced to pay was greater than it would have been if correctly computed, at the legal rate on the adjudged valuation.

APPEAL from a justice of the peace, tried before *Armfield, J.,* (699) and a jury, at Fall Term, 1892, of HENDERSON.

T. J. Rickman for plaintiff.
W. A. Smith and Busbee & Busbee for defendants. (701)

BURWELL, J. The contention of the plaintiff is that, though his land was appraised for taxation according to the provisions of Laws 1891, ch. 326, entitled "An Act to Provide for the Assessment of Property and Collection of Taxes," he is entitled to have that property reappraised by a jury, and to recover back the difference between the tax he has paid on that property and what the tax would have been had it been valued at the sum fixed by the jury as its "true value in money."

The act referred to provides for the valuation of real estate for taxation by sworn assessors appointed for that purpose, who are required to return their lists of assessments to the county commissioners, and this latter body, in conjunction with the chairmen of the boards of list takers and assessors of the several townships and wards of cities and towns, is constituted by section 7 of the act a board of equalization, *to equalize the valuation* so that each tract or lot shall be *entered on the tax list at its true value in money.*

This is to be done on the first Monday of July of each year. Section 25 provides that the board of commissioners shall, by advertisement, notify the public that they will meet on the second Monday in July to

hear the complaints of all persons who object to the valuation put upon their property, and to revise the valuation, having power to summon witnesses before them.

The appraisement of real estate thus fixed by the board of county commissioners are those which must be used for all State, county, township, and city or town taxation for the year, because of the requirement of the Constitution *that all taxes* shall be laid by a
(702) uniform rule. *Kyle v. Commissioners,* 75 N. C., 445.

It seems, therefore, most important that the valuation of real estate for taxation, for the making of which the revenue law of the State has so carefully provided, shall be final and stable. And a consideration of sections 7, 24, and 25, of the act shows very plainly that intent on the part of the Legislature. Three times, according to the act, these appraisements are considered by sworn officers: (1) By the township or ward assessors; (2) by the board of equalization; and (3) by the board of county commissioners alone. And to the meeting of this body, whose session for that purpose must be held on the day fixed by the statute (second Monday in July), all property owners are duly notified to appear and complain of the valuation of their real estate, if they have any complaint to make.

These portions of the act appear to clearly indicate a purpose to make the conclusion of this last tribunal a final determination of these matters, so that upon the valuation so fixed the officers of the county and of the cities and towns therein may calculate, with some degree of certainty, what to expect from that source of revenue.

Now it is said to be an elementary rule of construction "that all the parts of the act relating to the same subject should be considered together, and not each by itself. By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part. Flexible language, which may be used in a restricted or extensive sense, will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison."

Southerland on Statutory Construction, sec. 215.

(703) Applying this rule of construction to the terms of section 78 of the act, upon which the plaintiff relies, we must interpret "excessive valuation," as there used, to mean a valuation exceeding that which was adjudged to be proper by the boards authorized by the act to finally determine such valuation, and "excessive" tax to mean a tax exceeding what the tax would be if correctly calculated at the legal rate on the adjudged valuation, as determined or approved by the board of commissioners.

Hence the plaintiff is not entitled to recover anything by his action unless he can show that the valuation of his property upon the tax books in the hands of the sheriff is greater than that fixed upon it by the proper authorities under sections 7, 24, and 25 of the act under consideration, or that the tax which he has been forced to pay on this property was greater than it would have been if correctly computed at the legal rate on the adjudged valuation.

NEW TRIAL.

Cited: Guano Co. v. New Bern, 172 N. C., 260.

(704)

*J. K. SIMPSON AND FRANK K. DAVIS v. CAROLINA CENTRAL RAILROAD COMPANY.

Contract—Quantum Meruit.

1. Where, on issues raised by the allegations in two causes of action—one on a special contract and the other on a *quantum meruit*—with the corresponding denials in the answer, the jury found that plaintiffs had not complied with the terms of the written contract and defendant was not indebted to them thereon, but that defendant was indebted to them for work and labor done for the amount claimed: *Held*, that the findings were not inconsistent or contradictory.

2. In such case, although plaintiffs had not complied with the contract in all respects, if defendant took advantage of the work done and accepted and used the same without giving plaintiff's notice of objection and an opportunity to correct defects and complete the job, but completed it with its own force, plaintiffs are entitled to recover the reasonable value of the work done, not exceeding the amount demanded in the complaint.

ACTION tried on appeal from a justice of the peace at Special Term, 1892, of RUTHERFORD, before *Hoke, J.*

The plaintiff Simpson filed a formal complaint, afterwards adopted by plaintiff Davis when made a party, on a special contract to finish a well at Rutherfordton depot for the defendant company. The second cause of action was a declaration on a *quantum meruit.*

The action was commenced in the name of the plaintiff J. K. Simpson, who claimed to be assignee of contract, and owned same. It was proved that said J. K. Simpson had paid the hands employed in work and advanced supplies to further same for Frank Davis, (705)

*BURWELL, J., having been of counsel, did not sit.

with whom defendant company had contracted, and under an arrangement and agreement with Davis to own contract to amount advanced and until he was repaid. On motion in the Superior Court, Frank Davis, with whom the contract was made and who did the work sued for, was made party plaintiff, to which there was no exception, said Davis adopting pleadings already filed.

(707) *M. H. Justice for plaintiff.*
W. H. Neal, Jones & Tillett, and P. D. Walker for defendant.

AVERY, J. The issues having been raised by the allegations set forth in the two causes of action (the one on the special contract and the other on the *quantum meruit*), with the corresponding denials
(708) in the answer, the findings upon them were not inconsistent or contradictory, as counsel for the defendant contended. Though the plaintiff Davis could not recover on the special contract on account of the failure to show compliance with its terms on his own part, yet if he satisfied the jury that the defendant received and used the well without notifying him of any defect in the work until payment was demanded, or that the work previously done proved beneficial to the defendant after the well was taken charge of by its agents without objection, the plaintiff was entitled to recover, as on the common counts, for work and labor done. *Byerly v. Kepley,* 46 N. C., 35; *Dover v. Plemmons,* 32 N. C., 23.

Had the defendant notified the plaintiff that the work was not done as the company "deemed necessary to furnish an ample supply of water for their purposes," and given him an opportunity to remedy defects and complete the job with his own force instead of enlarging the well, sinking it deeper without notice to him, he could not have recovered unless he had shown that he complied with its reasonable demands. *Winstead v. Reid,* 44 N. C., 76. The instruction given by the judge was in accord with the principle we have announced, and embodied a clear and succinct statement of the law applicable to the second cause of action.

As all of the assignments were founded either upon the contentions that the plaintiff was not in any aspect of the evidence entitled to recover, as upon a *quantum meruit,* or that the court could not proceed to judgment on the verdict, we do not deem it necessary to discuss them in detail.

NO ERROR.

Cited: Dixon v. Gravely, 117 N. C., 86; *Coal Co. v. Ice Co.,* 134 N. C., 580; *Raby v. Cozad,* 164 N. C., 289; *McCurry v. Purgason,* 170 N. C., 470.

(709)

*R. M. ROSEMAN v. CAROLINA CENTRAL RAILROAD COMPANY.

Action for Damages—Negligence—Intoxication of Passenger—Nonpayment of Fare—Conductor of Train.

1. The conductor of a railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, at any point where he may safely get off, provided it be (as required by the statute, section 1962 of The Code) "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train"; and provided further that the ejected person is not willfully and wantonly exposed to danger to life or limb.

2. A conductor requiring an intoxicated man to leave the train for nonpayment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away.

3. A somewhat intoxicated passenger who gets off safely without assistance, when told that he must pay his fare or leave the train, and whom the conductor has seen a few minutes before in an eating house demanding food and acting somewhat boisterously, may be reasonably supposed to be capable of reaching a place of safety where he is left in the evening, when it is neither raining nor freezing, within two hundred yards from a dwelling house, and not far from the railroad station.

4. A conductor is not bound to act upon the volunteered opinion of a passenger as to the physical or mental state of a drunken man who has been expelled from the train where he has no reasonable ground to believe that the man is unable to find a place where he will be safe.

ACTION tried before *Bynum, J.*, and a jury, at Special Term, 1892, of LINCOLN, wherein plaintiff, as administrator of Robert Murdock, sought to recover of the defendant damages for the negligent expulsion of his intestate from defendant's train on an inclement (710) night while he was intoxicated, thereby exposing him to the injuries resulting in his death.

Jones & Tillett and D. W. Robinson for plaintiff.
P. D. Walker for defendant. (715)

AVERY, J. The plaintiff's intestate got upon the defendant's passenger train at Iron Station and, failing or refusing to produce a ticket or pay fare on demand of the conductor, was ejected a little more than a half-mile from that place and within two hundred yards of a dwelling

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

house. There was testimony tending to show that the intestate appeared to be drunk at the station while the passengers were taking supper there, and had come as a passenger from Stanley to Iron Station (about twenty-one miles) on the same train, having purchased a ticket from one station to the other. The conductor testified that he
(716) considered him neither sober nor drunk; and a witness for the plaintiff corroborated his statement that the intestate when ordered to get off the train followed him to the platform and then stepped off without assistance from the brakeman, who held his lamp for him to see in alighting. The only direct evidence as to the nature of the ground where he was ejected was that of the conductor, who said that he went down an embankment about three feet high. He was found next morning frozen and in the water that had collected near the center of an embankment eight feet high, three fourths of a mile from the station.

Where there is no statute prescribing where or when recusant or disorderly passengers must be ejected, the officer in charge of trains, as a rule, is authorized to expel, without using unnecessary force, one who refuses to pay regular fare, at any point where he may safely get off. *Pickens v. R. R.*, 104 N. C., 312; *Clark v. R. R.*, 91 N. C., 506. The statute (The Code, sec. 1962) affirms this right, subject to the limitation that the expulsion must be either "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train." It is admitted that the plaintiff's intestate was put off without using force, near a dwelling house, and not remote from a station. But, where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood R. R. Law, sec. 362; 2 Shearman & Red. Neg., sec. 493; *R. R. v. Right*, 34 Am. Rep., 277.

(717) The question, therefore, which first confronts us is whether in any view of the testimony the conductor had reasonable ground to believe that the plaintiff's intestate was so greatly under the influence of liquor as to be unable to find his way or walk to the nearest house or to the station. He was put off the train on the night of 16 November, 1889. According to the testimony of Miller for plaintiff and that of the conductor it was not raining nor was it freezing at that early hour of the evening, though later in the night there was sleet, and the ground was frozen next morning. The conductor had heard intestate's demand

for food at the supper house and had seen him supplied. He next saw that he had got on the train and found him awake and declaring that he had neither money nor ticket. When told that he must get off, the intestate arose, walked to the platform and got off without assistance. Under such circumstances was it the duty of the conductor to take him free of charge to the next station, lest he should drink more, or the intoxicants that he had already drunk should take effect and subsequently render him unable to travel? We think not.

It was but natural to infer that one who could find his way to the eating house and demand food and thence into the train again could follow a road hard-by when he was put off, and which it seems the conductor knew led to his father's house, only a short distance off. His boisterous behavior at the station, so far as it seems to have come under the observation of the conductor, clearly indicated that it might become necessary to expel him for disorderly conduct, but was not calculated to excite apprehension that he might prove physically unable to return to the station or reach a house in the immediate vicinity of the point where he got off. The statement of the conductor that he saw him land without assistance "safe upon the ground" being undisputed by any direct evidence, the conductor was warranted (718) in acting upon the supposition that he would seek and reach a place of safety. Had he shown symptoms of infirmity or of stupor in presence of the conductor, or had there been any dispute as to what the demeanor of the intestate had been in his presence, it might have been for the jury to determine whether the conductor had reason to believe he was physically or mentally incapacitated for traveling by reason of intoxication. Waiving the objection to the competency of the question propounded to Alderman by the witness Miller, just after the deceased was expelled, we think that the answer of the former, "Oh, no; he lives near here, and it is only a few hundred yards to the station," sufficiently shows the reasonableness of his course from his own standpoint. It would place a premium upon drunkenness and subject companies and passengers to needless delay and danger if officers in charge of trains were bound, in order to save the companies harmless, to act upon an off-hand opinion ventured by a passenger instead of their own well-founded view of the situation, and stop the train to hunt for or pick up an ejected trespasser. This is one of the thousands of terrible casualties due to the immoderate use of spirituous liquors. If there is a moral accountability at the door of any person other than the victim, or should be a legal liability elsewhere, we see no ground for saddling the responsibility upon a common carrier whose conveyances are so frequently resorted to by such boisterous and violent men to the annoyance of sober and orderly passengers. We are unwilling to lay down the

principle that a conductor subjects his company to liability for refusing to act upon the volunteer opinion of any passenger as to the physical or mental state of a drunken man who has been expelled.

(719) We think that there was no evidence, competent or incompetent, that fairly raised the question whether the conductor had reasonable ground to believe that the intestate was too infirm by reason of intoxication to reach a place where he would be safe, and upon the answer to that inquiry the liability of the company depended. In the absence of any sufficient testimony to make the company liable for willful disregard of the intestate's danger on the part of Alderman, we think that the court below erred in submitting the case to the jury at all. In this view of the evidence it is unnecessary to mention particular prayers for instructions or exceptions arising from the refusal to give them.

In the most favorable aspect of the testimony for the plaintiff the conductor had notice that the deceased was drinking and disposed to be quarrelsome at the station, and saw that he was under the influence of liquor when he was expelled from the train; but there was no evidence of physical infirmity or mental incapacity such as to excite a reasonable apprehension that he would be unable to walk to a house or to his home. Alderman was not bound, because of what he did see and hear, to institute inquiry among the other passengers before ejecting the intestate, or to act upon their opinions given afterwards, when he had no reason to believe that the intoxication had deprived the intestate of the mental capacity to find his way or the physical power to follow it to a neighboring house or to the station. However much such accidents are to be deplored, justice and public policy alike forbid that the failure of the conductor in charge of a train to consult the fellow-passengers of a man who refuses to pay fare and appears to be somewhat intoxicated as to his ability to provide for his own safety, shall be declared negligence, such that a jury are at liberty to find it the proximate cause of injury or death befalling him after expulsion.

(720) For the reasons given we think there was error in submitting the question of defendant's negligence to the jury at all upon the evidence, and the defendant is therefore entitled to a

NEW TRIAL.

Cited: Hansley v. R. R., 115 N. C., 612; *Tankard v. R. R.,* 117 N. C., 562; *Lee v. R. R.,* 176 N. C., 97.

(721)

ANNIE L. ALEXANDER v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Action for Damages—Injury at Railroad Crossing—Negligence of Railroad—Instructions to Jury.

1. Where, in an action against a railroad for injuries received by plaintiff at railroad crossing, an instruction asked for by defendant was, "That if plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it was negligence on her part, and the answer to the issue (as to contributory negligence) should be 'Yes' ": *Held*, that while it would have been proper to give the conclusion, "the answer should be 'Yes,' " yet the refusal to give it was not error, since the failure to do so could not mislead the jury or prejudice the defendant.

2. In an action against a railroad for injuries received by plaintiff at a railroad crossing, it appeared that there were in the neighborhood of the crossing a factory and a foundry, both making a noise like a running train. Defendant asked the court to instruct the jury, on an issue as to contributory negligence, "that if the cars on the track cut off plaintiff's vision, and the noise of the factory and machine shop drowned other noises, it was the duty of plaintiff to use her sense of hearing all the more cautiously, and if she failed to use greater than ordinary caution, the answer should be 'Yes.' " It was not error to substitute for the words, "the answer to the second issue should be 'Yes,' " the words, "it would be negligence."

3. Where a railroad company kept cars standing on side tracks near a street crossing where plaintiff was injured, an instruction to the jury, in an action for damages, that "defendant had the right to leave its cars standing on the track, provided it kept open a sufficient passway," was as favorable to defendant as it was entitled to.

4. Where, in an action for damages for an injury received at a railroad crossing, plaintiff testified that she "held up very slow" as she was driving across, and, hearing no bell, which she had heard the day before while at the crossing, notwithstanding the noise of the factories on each side of the street, concluded that no engine was approaching, and drove on: *Held*, that it was not necessary for her to get out of the buggy and go beyond the cars to look up and down the track, or to stop and listen for an approaching engine when no signal was given of its approach.

5. Where the substance of an instruction prayed for has already been given in response to another request, it is unnecessary to repeat it.

6. A prayer for instruction embracing a general proposition fully covered in instructions already given was properly refused.

7. Requests for instructions that "the evidence shows that plaintiff's injury was caused by her own negligence," and that if the jury believe the evidence, plaintiff "did not use reasonable care in crossing the railroad, and thereby contributed by her own negligence to her injury," were properly refused.

8. Where the jury had been instructed as to the duty of a plaintiff, in a suit for damages for an injury, to use reasonable and proper care for her recovery, in such manner as to indicate that otherwise she could not recover damages at all, the defendant cannot complain of a refusal of an instruction that, if she did not use such care, she could only recover for such loss of time and medical bills as would reasonably result under proper treatment.

9. Where, in an action for injuries caused by negligence of defendant, it appeared that plaintiff was herself a practicing physician, and immediately after the accident went to see a patient; that she had not been kept at home nor carried her arm in a sling, but continued to practice her profession as a physician, and to drive with her injured hand, it was not error to refuse a special instruction "that plaintiff did not use the proper means for restoring herself to health," and could not recover for the injury caused by her own neglect, when the question of such neglect had already been left to the jury, under a proper charge.

ACTION tried at Fall Term, 1892, of MECKLENBURG, before *Graves, J.*, and a jury.

The plaintiff alleged that in attempting to cross defendant's railroad at the crossing at Fifth Street, in Charlotte, with her horse and
(722) buggy, she was carelessly and negligently run into by defendant's shifting engine, and that she was injured in her person and property—her buggy broken, her horse frightened and thereby rendered less easily manageable, and her shoulder bruised, causing a permanent injury to her right arm, and claimed $1,900 damages.

Defendant denied that plaintiff's injuries were caused by its engine, and charged plaintiff with a failure to exercise ordinary care in attempting to make the crossing.

The following issues were submitted:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. Did the plaintiff contribute to her injury by her own negligence?

3. What damage did plaintiff sustain?

Plaintiff's counsel agreed, after the pleadings were read, that she was entitled to compensatory damages only.

Plaintiff in her own behalf testified that she was a regularly licensed physician, engaged in the practice of her profession. "On 17 April, 1891, on my way to visit a patient, I attempted to cross defendant's railroad at the Fifth Street crossing; it was about 5 p. m. I was driving my horse and buggy, and had in the buggy with me a colored boy, 8 or 10 years old. Before crossing track, I pulled up my horse to hear if there was any approaching train. There were box cars on one of the tracks on both sides of the street—this was on the first track—and an engine standing to the left; these were all stationary. I heard no bell

ring. I did not see the engine that struck me until it was within a few feet of me. The engine was running backward towards Trade Street, which was the next street to my left as I crossed; it was pushing the tender, and it was the tender which struck my buggy. I was sitting on the right side of the buggy. The buggy was struck; (723) one wheel was broken and the other wheel ruined. The horse fell, but soon got up and ran. I was thrown first up against the side of the buggy, striking my shoulder against one of the upright pieces, or bows, which hold up the top of the buggy; I then fell down into the foot of the buggy. I held on to the lines and stopped the horse in some 50 or 75 feet. The fall against the top bruised my right arm, near the shoulder, and the fall into the front bruised my left side slightly. My arm was hurt. I did not feel the pain for half an hour; then I felt pain in my shoulder. I went on from the place where the buggy was stricken, to visit my patient, a sick child. When I got home I had a nervous shock. There was a dull, aching pain in my shoulder, which has continued ever since. The railroad is accustomed to ring the bell at the crossings."

On cross-examination she testified: "I do not say I came to a full stop; I held up very slow. I had crossed there the evening before and that morning. Fifth Street is open beyond this crossing. This was the railroad yard. There were several tracks there. I was familiar with the Trade Street crossing. There are gates there, which are lowered when there is danger and raised when there is none. Oates' factory is on one side and Wilkes' foundry and machine shop on the other side of Fifth Street at this crossing. Both the factory and foundry were running and making a noise. I heard the bell at the same place the evening before, when the factory and foundry were both running. Dr. Meisenheimer and my father, who is also a physician, were called in that same evening and examined me. I have been examined, since I brought suit, by Drs. Meisenheimer, Graham, and Brevard—once last February and once a week or so ago, by Drs. Meisenheimer and Brevard. Dr. Graham was out of the city the last time. They examined me for the purpose of ascertaining the extent of my present condition, so as to (724) be able to testify. I went to see my patient immediately. I have not been kept in the house and never carried my arm in a sling. I did not stop from my profession; used my arm as little as possible. I drive the same horse yet—drive with my right hand, the one that was hurt."

One Bostwick, witness for the plaintiff, testified: "I was sitting in my door; could see the crossing from it; saw Dr. Alexander rein up as if to look and listen; then she drove across. I did not hear any bell or warning given by the engine. There is a slight up-grade from a point

above, 100 yards up the track to Fifth Street. The engine was rolling slowly, without steam up, to within a few yards of the crossing, and then steam was put on and the speed increased to 6 or 8 miles an hour. I examined the place a short time afterwards. She could not have seen the approaching engine."

Dr. J. B. Alexander, for plaintiff: "I am a physician; am in the drug business. The plaintiff is my daughter. I did not see my daughter, the plaintiff, until I got home. Her arm was bruised and discolored. I sent for Dr. Meisenheimer. We could not tell much about the injury. It has gradually grown worse. The action of the arm is greatly impaired; the shoulder is lower than the other; the shoulder-blade is dislocated, and there is a slight curvature of the spine. All of it is the result of the blow—at least, I know of no other cause."

Dr. Meisenheimer, for plaintiff, testified: "I examined the arm that day, or the next, and found it blue from the blow—discolored on outside. I found no crepitation. She complained of pain. I saw the arm again last February, with Drs. Graham and Brevard. I found crepitation then—a creaking sound. I examined it again a short time ago, and found the crepitation increased—the shoulder-blade drawn around
(725) one inch further than the other. I think the injury was caused by the blow. In my opinion, it will be a permanent injury."

On cross-examination witness stated: "The scapula, or shoulder-blade, is drawn around by contracting muscles. I do not think driving could pull the shoulder-blade around. I think probably it will be permanent. I do not think there was a rupture of the ligament. It is possible it might have been overlooked. Rest is good for all joint troubles; it is the proper treatment."

Dr. Brevard, for plaintiff, testified: "I examined plaintiff's arm last spring, with Drs. Meisenheimer and Graham; found crepitation in shoulder joint; some depression of the shoulder. I am inclined to think the injury is permanent. The bone has been jammed into the socket and injured. On second examination, a short time ago, with same doctors, I found the scapula moved forward about one inch. The injury was from the blow on the shoulder. It would lessen the strength of the arm and render it less able to bear continued exertion, and is a great injury to a physician. Rest is the proper treatment for injury to joints. It would have been better to have kept it in a sling. Any exertion of that arm and the muscles would tire and irritate the injured part. Driving would be bad for it. Rest is the proper treatment of injured joints, so far as I know. I should prescribe rest for it now."

Plaintiff then introduced the town ordinance limiting the speed of engines running through the city to 4 miles and requiring them to ring bell at crossings, and prohibiting the blowing of the whistle.

Plaintiff rested.

Defendant offered J. W. Keeter, who swore that he was running the engine; that he was what is known as a "hostler" in the yard of defendant; that he was running 5 or 6 miles an hour and not ringing the bell because the bell rope was on the fireman's side and he (726) could not reach it; that his helper, or fireman, was riding in front, on the tender; was there for the purpose of changing the switch just below Fifth Street, so as to let the engine go over without injury, and to look out for people on the track or attempting to cross it; that he had been letting his engine roll, so as to stop at Fifth Street and allow the helper to get down and change the switch, but just before reaching Fifth Street he discovered that the switch had been changed by some one and was in proper condition to let him through; that the engine did not have way enough on it—was not running fast enough to carry him over the street, and he had just reached up to put on steam when he saw the buggy; could not say whether he put on any steam or not; did everything he could to stop when he saw the buggy, only a few feet from the tender, but could not, and rolled on some 20 or 30 feet across the street. The helper, Nelson, got off immediately and went to plaintiff, but witness could not go at once, until he could secure his engine, which was on the main line. As soon as he could do this, he saw from the fireman's window that plaintiff was leaving. There are four tracks across the street there. In going in the direction the plaintiff was traveling, the first track you crossed was the Oates spur track—no cars on it; the next was a side track, called the factory track; on this track there were box cars, standing on the right side of the street, and an engine standing, headed toward the street on the left side. I was running on the next track, which is the main line, and beyond me was the fourth track—a side track, known as the cemetery track."

In proper time, and in writing, the defendant asked special instructions, some of which were refused and some were given in the very words of the prayer. Some were refused and not given in the very words asked for, but were given as the opinion of the court (727) in the general instructions given in the written charge.

The first prayer was given, and no exception is made to that.

The second prayer was: "If the plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it was negligence on her part, and the answer to the second prayer should be 'Yes.'" The court, being of opinion that defendant had no right to have the legal proposition embraced in the prayer, gave the instruction asked for, down to and including the words, "negligence on her part," and refused to add the remaining words, "and your answer to the second issue should be 'Yes.'"

Defendant excepted, because the whole prayer was not given, because the words were omitted, "and your answer to the second issue should be 'Yes.'"

The third prayer was: "The defendant had a right to leave its cars on its side track, and if this was the cause of the injury, the answer to the first issue should be 'No.'"

The court refused to give the instruction thus asked for, and said defendant had the right to use its track across the public highway and to leave its cars standing on the track, provided it kept open a sufficient passway.

To this the defendant excepted.

The court, in answer to the prayer of defendant for instruction No. 1, had given, in the words of the request, this instruction: "The burden is on the plaintiff to show that the negligence of the defendant was the proximate cause of her injury, and unless she shows this by a preponderance of the evidence, the answer to the first issue should be 'No.'"

The fourth prayer for instruction is as follows: "The fast
(728) running of the defendant's engine, and its failure to ring the bell, and any other negligence it may have been guilty of, did not relieve the plaintiff from taking the ordinary precaution for her own safety, and if her negligence was the proximate cause of her injury, the answer to the second prayer should be 'Yes.'"

This instruction was not given entirely as asked for, but it was given down to and including "the proximate cause of her injury," and the court added, "she can recover," and omitted the words, "the answer to the second prayer should be 'Yes.'"

To this defendant excepted.

The fifth instruction asked for was: "If plaintiff heard, or could by reasonable diligence have heard, the approaching train, and attempted to cross before it reached the crossing, and her injury was the result of her miscalculation, the answer to the second prayer should be 'Yes.'"

This prayer was given, as prayed for, down to and including the word "miscalculation," and the court added, "she could not recover," and declined to give "the answer to the second issue should be 'Yes.'"

To this the defendant excepted.

The sixth instruction asked for was: "If the cars on the track cut off the plaintiff's vision, and the noise of the factory and machine shop drowned other noises, it was the duty of the plaintiff to use her sense of hearing all the more cautiously, and if she failed to use greater than ordinary caution, the answer to the second issue should be 'Yes.'"

The court gave the instruction asked for, in the very words, down to and including the word "caution," and added, "it would be negligence," and refused to give the words, "the answer to the second issue should be 'Yes.'"

And to this the defendant excepted. (729)

The seventh instruction asked for was as follows: "Under the circumstances of this case, as shown by the evidence, it was the duty of the plaintiff to get out of her buggy and go to a point past the cars on the side track, where she could see up and down the tracks, and if she failed to do this, and such failure was the cause of her injury, the answer to the second issue should be 'Yes.' "

This was refused, and defendant excepted.

The defendant asked for instruction numbered 7a, as follows: "Under the circumstances of this case, as shown by the evidence, it was the duty of the plaintiff to stop, to look and listen, and if she failed to do so, and her injury was caused thereby, this was contributory negligence, and the answer to the second issue should be 'Yes.' "

The court, being of opinion that this had been in substance already given, refused it.

And to this the defendant excepted.

The defendant asked for instruction numbered 8, as follows: "The fact that the plaintiff is a woman makes no difference. The degree of care she was required to use was that which a man should have used, and if a man in the possession of his senses could, in her situation, have avoided the accident by the use of reasonable care, the answer to the second issue should be 'Yes.' "

The court had instructed the jury: "It makes no difference, in applying the law, that the plaintiff is a woman. She is under, in respect to this case, the same rules as a man."

The court refused the instruction in the words of the prayer, and defendant excepted.

The ninth instruction asked for was in these words: "If a man in possession of his senses could, by reasonable care, have heard or seen the approaching engine, the plaintiff is presumed to have (730) seen or heard it."

The tenth prayer was as follows: "The evidence shows that plaintiff's injury was caused by her own negligence, and the answer to the second issue should be 'Yes.' "

Both the foregoing prayers were refused, and the defendant excepted.

The defendant asked for instruction 10a, as follows: "It was the duty of the plaintiff to use the proper means for her recovery from any injury she sustained by the accident, and if she failed to do so she can only recover for such injury, loss of time and medical bills as would reasonably flow from the injury with proper treatment."

This prayer was refused in the words asked, and the court in response gave the instructions set out in the charge, and to this defendant excepted.

The defendant further asked instruction No. 11, as follows: "Plaintiff cannot recover anything on account of any increased damages or injury to herself caused by her own neglect and failure not to adopt a reasonably proper treatment of herself." (His Honor states: "My recollection is that the charge was given. I find on examining the prayers presented by the defendant that I marked on the margin opposite each prayer 'Given' if I intended to give, and 'Refused' if not to be given. I did not make any mark on the margin opposite this prayer.")

No. 12 prayer for instruction was: "If the jury believe the evidence of the plaintiff herself, she did not use reasonable care in crossing the railroad, and thereby contributed by her own negligence to her injury, and the answer to the second issue should be 'Yes.'"

No. 13 prayer was as follows: "If the jury believe the evidence, plaintiff did not use the proper means for restoring herself to health, and she can therefore recover nothing for any injury caused by her own neglect."

(731) Both the foregoing prayers were refused, and the defendant excepted.

The jury found all the issues in favor of the plaintiff, and assessed damages $1,500, and, after refusing motions to set aside the verdict as being against the weight of the evidence and as awarding excessive damages, and for a new trial, the court gave judgment for the plaintiff, and defendant appealed.

Jones & Tillett for plaintiff.
G. F. Bason and D. Schenck for defendant.

MACRAE, J. It was admitted on the trial that the defendant had been negligent. The contention was principally upon the second issue, which involved the question of contributory negligence. As stated in defendant's brief, "The only question, then, is, Were the instructions warranted by the evidence, and, if so, were they substantially given in the charge?" There seems to be no error in the charge, unless there was a failure on the part of his Honor to give some instruction which defendant requested and to which it was entitled. We will, therefore, examine the prayers for instruction, with the responses and exceptions thereto, in connection with the general charge.

The second prayer was given, with the exception of the last clause thereof, which was, "and the answer to the second prayer (evidently meaning *issue*) should be 'Yes.'" We do not appreciate the reasons of his Honor for refusing to give this portion of the instruction, as it was the corollary of the proposition laid down, and was entirely proper to have been given. But we must presume that the jury were intelligent

enough to understand plain language. The question was, (732) the plaintiff contributed to the injury by her own negligence. The instruction was, "If the plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it *was* negligence on her part." While it was proper to add the conclusion asked for, it was not necessary, as to the mind of any man of ordinary comprehension it followed as of course. We cannot see that the failure to give it was calculated to mislead the jury or in any manner prejudice the defendant.

The sixth prayer for instruction was responded to in the same manner, the concluding portion being omitted and the words "it would be negligence" substituted. And what we have said with regard to the response to the second prayer will apply with equal force to the sixth. In the same connection we will consider the fourth and fifth prayers, with the responses thereto of his Honor. The instructions were given in the words of the prayers, except as to the conclusions, "that the answer to the second issue should be 'Yes,' " for which his Honor substituted the words "she cannot recover." It is true that this Court has repeatedly held that it is not error in the trial judge to refuse an instruction upon an issue directed to the ascertainment of a fact, that in a certain event the plaintiff is not entitled to recover. *McDonald v. Carson,* 94 N. C., 497; *Farrell v. R. R.,* 102 N. C., 390; *Baker v. Brem,* 103 N. C., 72. We reiterate the expressions heretofore used upon this subject, but it by no means follows, when the instruction has been given in the words of the prayer upon the facts involved, that because the conclusion is in this objectionable form, there is such error as will entitle the defendant to a new trial. There is no complication in this case which would make it likely that the jury could be confused by this instruction. It could bear no other construction than that if they found the facts as stated, there was contributory negligence on the part of the plaintiff. The instruction as requested is in the approved formula, but (733) unless the jury have been misled, or it was calculated to mislead them, no harm could have come to defendant. We cannot see how any intelligent mind could hesitate in reaching a right understanding of the charge in this respect.

We consider the instruction given in answer to the third prayer as fully as strong as the defendant was entitled to. It was in evidence that the accident occurred at the crossing of a public highway. It may be questionable whether the defendant had the right to leave its cars, except for necessary delays in crossing, upon it at all. Certainly it was its duty to have left open a sufficient passway for the public. *Harrell v. R. R.,* 110 N. C., 215.

It is contended, under prayers No. 7 and No. 7a, that the duty of the plaintiff, under the circumstances of this case, was to have got out of the buggy and gone to a point beyond the cars on the side track, where she could have seen up and down the track, or at least to have stopped to look and listen for an approaching engine or train.

His Honor announced the general principle in that part of his charge which immediately precedes the first exception, and in that part which is covered by the first and second exceptions applied it to this case. The general principle was that she had the right to use the public street across the railroad track of defendant, but she did not have the right to carelessly undertake to pass immediately before a moving engine, if she could, by taking reasonable precaution, have known of its approach. The application seems to have been fairly made. Although no testimony is reported to us that would warrant the inquiry whether she was motioned to by the helper on the engine and told to hold up, yet the whole of that part of the charge just referred to was full and presented the questions of negligence or care, and we see nothing in it of (734) which the defendant can justly complain. We cannot hold with the defendant that it was necessary for the plaintiff to do more than to check up slowly and look and listen, and endeavor to ascertain whether there was an approaching engine. The public knew—the ordinance required—that the approach of an engine should be heralded by the signal of the bell. According to the testimony of defendant's witness, this necessary precaution was omitted. And if the plaintiff's testimony was believed, she did "hold up slow," and, hearing no bell, which she had heard on the evening previous, notwithstanding the noise of the machinery on each side of her, concluded there was no engine approaching, and drove on. *Hinkle v. R. R.*, 109 N. C., 472.

The eighth prayer was not given in full, but that portion which was not given had already in substance been given in the instructions in response to the second prayer. Where the instruction has once been given it is not ordinarily incumbent upon the judge to repeat it; and there is scarcely a volume of our Reports in the past ten years which has not declared that the instruction need not be in the words of the prayer if there is a substantial compliance therewith.

The ninth prayer was a general proposition which was fully covered in the instructions given. The tenth and twelfth were properly refused, and the issue as to contributory negligence left to the jury.

If we take it that the eleventh prayer was not given, his Honor not being able to say distinctly from his notes or recollection that it was given, we do not think the defendant had cause of complaint, for his Honor had already instructed the jury as to the duty of the plaintiff to use reasonable and proper care for her recovery in such manner as to

indicate that unless such care was taken, the plaintiff could (735) not recover at all, thus going further than the defendant asked. And this applies to the prayer marked "10a."

Upon the thirteenth and last prayer the testimony was that the plaintiff was herself a practicing physician; that she did not feel the pain until about half an hour after the accident; that she went on to see her patient, and when she got home she had a nervous shock, and her father, who was also a physician, and Dr. Meisenheimer were called in the same evening; that she had not been kept in the house nor had she carried her arm in a sling; that she continued to practice her profession and to drive with her right hand, the one that was hurt. It was also in evidence that it would have been proper treatment for her to have carried her arm in a sling and to have rested. There was also evidence as to the character of the injury.

We think his Honor properly left the question to the jury under appropriate instructions, and when we advert to that part of the charge which bore upon this point, and which we think was warranted by the testimony we think it was not error to refuse the thirteenth prayer. Patterson's Ry. Accident Law, sec. 397.

Upon the whole, we conclude that the case has been fairly and intelligently tried; that the failure to give the conclusions asked in several prayers and the phrases substituted therefor, while in those in which his Honor used the words "she cannot recover" it is objectionable, were not calculated to and did not prejudice defendant's case.

We do not deem it necessary to cite the very numerous authorities on the subject of contributory negligence, ever increasing in volume. The general doctrine is so well established that the only labor is in the application thereof to the case presented.

NO ERROR.

Cited: Tankard v. R. R., 117 N. C., 562; *Russell v. R. R.,* 118 N. C., 1109; *Mesic v. R. R.,* 120 N. C., 491; *Norton v. R. R.,* 122 N. C., 934, 936; *Cooper v. R. R.,* 140 N. C., 219, 227; *Inman v. R. R.,* 149 N. C., 127; *Osborn v. R. R.,* 160 N. C., 312; *Johnson v. R. R.,* 163 N. C., 447; *Shepard v. R. R.,* 166 N. C., 545; *Brown v. R. R.,* 171 N. C., 270; *Dunn v. R. R.,* 174 N. C., 260; *Perry v. R. R.,* 180 N. C., 296.

(736)

J. C. COWEN v. T. J. WITHROW.

Unregistered Deed—Constructive Notice—Purchaser at Execution Sale.

The proviso to section 1, chapter 147, Laws 1885, that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice, as to a purchaser from the "bargainor or lessor."

CLARK, J., dissents *arguendo*, in which MACRAE, J., concurs.

PETITION of plaintiff to rehear the cause decided at September Term, 1891, and reported in 109 N. C., 636.

Justice & Justice for petitioner.
J. A. Forney contra.

SHEPHERD, C. J. It is provided by section 1, chapter 147, Laws 1885, that "No conveyance of land . . . shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof." This language is very plain as to purchasers, and their rights attach as against an unregistered deed from the time of their purchase and the execution of a deed to them. As to creditors the intention is not so clear, and whether their rights attach from the contracting of the indebtedness, the docketing of a judgment, or sale under execution, is left an open question. Assuming, however, that the creditor's rights as against an unregistered deed attached from the docketing of a judgment, we are at a loss to discover any reason for exempting him from the proviso of the act and placing him upon a higher ground as to
(737) constructive or actual notice than that occupied by a purchaser for value. A judgment creditor has never in this State been regarded in the light of a purchaser for value, and it is well settled that even a purchaser without notice at an execution sale takes the land subject to any rights or equities that might have been asserted against the judgment debtor. *Rollins v. Henry,* 78 N. C., 342. Like a mortgagee, where the mortgage is made to secure a preëxisting debt, he is "not out of pocket one cent, and stands in the shoes of the debtor." *Southerland v. Fremont,* 107 N. C., 565.

The incongruity of the supposed distinction is well illustrated by the contention in this case that the purchaser at the execution sale is unaffected by *actual notice* of Mrs. Withrow's claim under her unregistered

deed, while a purchaser who pays out his money and takes a deed from her grantor would, under similar circumstances, take subject to her equitable estate. The reasons assigned for the distinction when the case was formerly before us (109 N. C.) are not, upon a consideration, deemed satisfactory to us; and indeed it is clearly intimated that they have no application whatever when actual notice is given.

Thus much have we said for the purpose of showing that the words of the proviso should receive a liberal construction so as to give full force and effect to the spirit and intention of the act. We should be slow to adopt such a strict and narrow construction of a statute as reverses the respective standing of creditors and purchasers as fixed by the entire course of judicial decision in this State. The language should be very clear before we can attribute such an intention to the Legislature. We think that the proviso was intended to save the rights of the holder of an unregistered deed against these undefined creditors, as well as against purchasers who actually paid out their money upon the faith of their purchase. The act was not to apply to deeds, etc., (738) already executed, until 1 January, 1886, nor does it apply to deeds executed prior to 1 December, 1885, where a purchaser from the grantor of an unregistered deed had actual or constructive notice of the same. It was intended, as we have said, to save the rights of the equitable owner against creditors as well as purchasers having such notice, and, as we have remarked, we can see no reason why there should be any discrimination between them, and certainly none in favor of creditors.

It is insisted, however, that this intention was clearly indicated by the language of the proviso, which is as follows: "Provided, further, that no purchase from any such donor, bargainor, or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885," where there is constructive or actual notice. It is urged that, notwithstanding the superior rights of the equitable owner as against judgment creditors, which have ever been recognized and enforced by our courts, the words "donor, bargainor and lessor" should, in order to defeat them, be construed so strictly as to exclude from their meaning one who purchases land at an execution sale. In other words, because the purchaser acquires his title through the instrumentality of the sheriff's deed, he is not to be deemed a purchaser from the "donor bargainor or lessor," and like them affected with notice. This is too great a refinement—*nam qui hœret in litera, hœret in cortice*—and should not be permitted to defeat a clear, equitable right of which the purchaser *has actual notice.*

That the late *Chief Justice* did not intend that such an inequitable result should follow is entirely clear from his reasoning, as well as his plain and unmistakable intimation. Whatever he may have said in the

(739) discussion of the case it is perfectly manifest that he never contemplated that Mrs. Withrow should be deprived of her land if the purchaser had actual notice of her claim.

It will be observed that most of the opinion is directed against the impolicy of applying the doctrine of constructive notice by possession to execution sales, but as to actual notice it is *assumed* that it was sufficient. If this is not so, it is difficult to account for the following language: "Moreover persons so claiming under an unregistered deed are charged with notice of docketed judgments against the donor, etc., under whom they claim; they have constructive notice of the sheriff's sale of land, and it is their own laches if they fail to give notice at the sale of their claim and unregistered deed." Such is the just and equitable view as to the effect of actual notice in this case which the lamented *Chief Justice* entertained, and this was so evidently his meaning that his Honor below seems to have had but little hesitation in acting upon it. We did the same upon the appeal and are unable to see any reason why the judgment should be disturbed.

No objection was made to the introduction of the deed to Mrs. Withrow because it was not registered within five years.

PETITION DISMISSED.

CLARK, J., dissenting: One of the most beneficial laws enacted of late years is chapter 147, Laws 1885, commonly known as "Connor's Act," from having been drawn and introduced in the General Assembly by *Connor, J.*, now of the Superior Court bench, but at that time a member of the State Senate. One of the settled rules of construction is to consider the mischief to be remedied. The object of the act is thus referred to by *Avery, J.*, in *Hughes v. Hodges,* 102 N. C. (on p. 240): "It has been repeatedly declared to be sound public policy to remove every obstacle to the ready sale of real estate upon the market in (740) order to benefit commerce and thereby promote general prosperity. It was in furtherance of this object that our General Assembly but a few years since so altered our registration laws that persons proposing to purchase could be well advised as to the title by a careful inspection of the public records." This was not the case till the adoption of this act. Till then, while counsel investigating the title to land for an intending purchaser, could assure him the conveyance would be valid against any unregistered mortgages, it might be wholly invalidated by the unexpected production of an unregistered deed. To remedy this the Legislature proceeded to place unregistered deeds upon exactly the same basis as unregistered mortgages. How does this appear? In the most unmistakable manner. The act of 1885, as to unregistered deeds, is copied *verbatim* from the act in force as to un-

registered mortgages. The Code, sec. 1254. It is difficult to understand how the same words in the two acts can be construed to mean differently. There is one exception only in the act of 1885. There is no exception of any kind whatever as to unregistered deeds executed after 1 December, 1885. As to deeds executed before that date there is no exception except as to "purchasers from a donor, bargainor or lessor" when the person holding or claiming under the unregistered deed is in actual possession of such land at the time of the purchase, or such purchaser from donor or bargainor has notice of the prior unregistered deed. As already pointed out by the opinion of *Merrimon, C. J.,* when this case was here first (109 N. C., 636), the plaintiff did not come within the exception, for he was not a "purchaser from a donor, bargainor or lessor." The plaintiff not being within the *proviso,* the statute places him absolutely on the footing of one who purchases at an execution sale against a mortgagor whose mortgage is unregistered at the date of such sale and whose title as such purchaser is good against the mortgage executed before, but registered after, the sale.

When the judgment was docketed it became a lien in favor of (741) the creditor on the debtor's realty (The Code, sec. 435), which could not be divested by the subsequent registration of either deed or mortgage from the debtor. By such docketing, the rights of the creditor to have the land applied to his debt becomes vested. The purchaser at the execution sale buys the land to the full extent of the creditor's lien on it. He is not limited to the interest which the debtor would have as between himself and his grantee or mortgagee under an unregistered deed or mortgage, for as between the parties the deed or mortgage would be good without registration. The statute, as we have seen, makes no exception which divests the lien of a docketed judgment in favor of an unregistered deed. The exception is only (and only, too, as to deeds executed prior to 1 December, 1885) that the unregistered deed is good as to purchaser from the donor, bargainor, or lessor when such purchaser has notice by possession or otherwise of the rights of the holder of the unregistered deed.

It is not required to find a good reason for an act of the Legislature in order to support the validity of the distinction made by the act, but in fact a very good reason is pointed out by *Merrimon, C. J.,* in this case, 109 N. C., 636, in that a purchaser, up to 1 December, 1885 though not since, if careful, would inquire of his bargainor as to unregistered deeds, and secure himself from them by a proper warranty, while a purchaser at an execution sale would not have that advantage, and, therefore, by the terms of the act is protected against unregistered deeds or anything not appearing on the record, exactly as against un-

(742) registered mortgages. Indeed, as this Court has held, a docketed judgment is in the nature of a statutory mortgage, and the purchaser under it should have the same protection.

The *feme* defendant has no cause to complain. The act was ratified 27 February, 1885, and she, as well as the rest of the world, was notified that the extension of the time within which her unregistered deed would be good against the rights of creditors was limited to 1 January following. It is singular that though she claims that her husband made her the deed in 1882 yet, notwithstanding the publicity of advertisement and the subsequent sale under the creditor's judgment lien on 11 December, 1888, her deed was not recorded till near a year thereafter, 27 November, 1889, when the purchaser was endeavoring to obtain possession. Laws 1885, ch. 147, provides: "No conveyance of land shall be valid to pass any property as against creditors but from registration thereof in the county where the land lieth." There is no exception as to the rights of married women or any other exception of any kind whatever affecting this case, and the Court has power to interpolate none.

When this case was here again (111 N. C., 306) the Court correctly held that notice to the agent, acting in the scope of his employment, was notice to the principal. But it was an inadvertence to hold that the proviso in the act applied to purchasers at an execution sale who buy the creditor's rights. What is the intent and effect of docketing the judgment but that the interest acquired by such docketing shall be sold and pass to the purchaser at the execution sale? The proviso, by its plain, unmistakable terms, as well as by the former decision of this Court (109 N. C., 636), contains, as already stated, no exception as to creditors, but is restricted to purchasers from the donor, bargainor or lessor.

(743) Even independent altogether of the act of 1885 the defendant has no valid defense to the plaintiff's demand for possession. By section 1245 of The Code, in force in 1882, her deed was not "good and available" unless registered in two years and no subsequent act was passed which extended the time beyond 1 January, 1886. Her deed is therefore valueless under the former statute. Whence, then, comes her right under the circumstances to resist the purchaser at a sale under a docketed judgment? The petition to rehear should be allowed.

MACRAE, J., also dissents.

Cited: S. c., 116 N. C., 772; *Bank v. Adrian, ib.,* 547; *Patterson v. Mills,* 121 N. C., 267.

M. A. JORDAN v. CITY OF ASHEVILLE.

Contributory Negligence—Burden of Proof—Judge's Charge.

1. Under the statute (chapter 33, Laws 1887) which requires that, in actions for the recovery of damages resulting from the negligence of the defendant, contributory negligence, if relied upon as a defense, shall be set up in the answer and proved on the trial, there can be no presumption of contributory negligence; therefore it was error in the judge to charge that the burden of proof was upon the plaintiff, in such an action, to show that she was not herself guilty of negligence, though the defendant offered no testimony.

2. Where, upon an issue as to whether an injury complained of was caused by the negligence of the defendant, the plaintiff made a *prima facie* case, the judge ought to have instructed the jury to find the issue in her favor if they believed her testimony, and it was error to blend his instructions on that issue with those on an issue relating to contributory negligence.

APPEAL at August Term, 1892, of BUNCOMBE, from *Bynum, J.* (744)

The plaintiff seeks to recover damages on account of injuries sustained by her in stepping into a hole in a sidewalk of defendant city, alleged to have resulted from the negligence of defendant city in its failure to keep the sidewalk in repair. The defendant denied that the sidewalk was in an unsafe condition and that the plaintiff was injured through its negligence, and alleged that the plaintiff by her own negligence contributed to her injury. The plaintiff also alleged that it was the duty of the city to keep the sidewalks in repair.

The issues were:

1. Was the plaintiff injured by the negligence of the defendant?
2. Did the plaintiff contribute to her injury by her own negligence?
3. What damage has plaintiff sustained?

Among other things the judge charged the jury as follows:

"The plaintiff claims that she has been injured by the negligence of the defendant, and the burden is on her to show, by a preponderance of the evidence, that fact and the following fact, that she herself was not guilty of negligence."

The issues were found in favor of the defendant, and there was judgment accordingly, from which the plaintiff appealed.

W. W. Jones and F. A. Sondley for plaintiff.
Cobb & Merrimon for defendant.

MACRAE, J. Without considering the exceptions of the plaintiff, *seriatim,* upon a careful consideration of the charge of his Honor and

the exceptions specially directed to some portions thereof, and not the first exception, which is too general, we are forced to the conclusion that the plaintiff has just cause of exception that the jury was in-
(745) structed that the burden was upon the plaintiff to show that she herself was not guilty of negligence. It is true that the defendant offered no testimony, and that notwithstanding by Laws 1887, ch. 33, it is provided "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial," yet if the plaintiff's own testimony, offered for the purpose of showing negligence on the part of the defendant, proved also contributory negligence on her part as the proximate cause of the injury the defendant might have relied upon the plaintiff's evidence and introduced none by way of defense. 4 Wait Ac. and Def., 720, and cases cited.

But the plaintiff was entitled to have the instructions separately given upon the two issues. His Honor states the proposition at the outset: "The plaintiff claims that she has been injured by the negligence of the defendant, and the burden is on her to show by a preponderance of the evidence that fact and the following fact, that she herself was not guilty of negligence." And while the law of negligence bearing upon this case is well stated, yet from time to time in his instructions upon the first issue he repeats the proposition that it was incumbent upon her to show that she was injured not by her own negligence. We think that he ought to have instructed the jury that upon the testimony, if believed by them, they should respond to the first issue in the affirmative, for the testimony shows that the sidewalk upon a public street in Asheville was not in the condition in which it should have been kept by defendant with due regard to the safety of the public, and that the plaintiff was injured by stepping upon a rotten plank or into a hole caused by the decay of a plank. Several witnesses testified to its
(746) unsafe condition and to the continuance thereof for a long time. His Honor properly charged the jury as to notice to defendant of the defect in the sidewalk.

Upon the first issue a *prima facie* case was made of negligence of defendant and consequent injury to plaintiff, for it is plain that but for the defect the accident would not have occurred. But the instructions upon the first and second issues were so blended that it could not have been expected of the jury, however intelligent, to have drawn the distinction which they were required to do in passing upon the distinct issues.

Under our statute there is no presumption that the plaintiff contributed to the injury by her own negligence. By placing the burden upon her the conditions were changed, and it was necessary that she should offer evidence that she was not negligent in the face of the statute. If

upon her own testimony and that of her witnesses the jury were left in doubt whether she were negligent or not, they must have found against her, whereas, the rule is to the contrary. The defendant offered no testimony. Unless the jury were satisfied by the evidence offered by the plaintiff that she had contributed to her own injury and that this negligence of hers was the proximate cause, they should have responded to the second issue in her favor.

It will not be necessary for us to examine further into the exception.

NEW TRIAL.

Cited: Haltom v. R. R., 127 N. C., 258.

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(747)

*W. W. McDOWELL AND WIFE v. CITY OF ASHEVILLE.

Eminent Domain—Opening Streets—Mandamus to Compel Assessment of Damages.

1. Where a corporation, having the right of eminent domain, and whose charter imposes the duty of ascertaining, by a prescribed method, the damages or benefits resulting to the owner in case of disagreement, takes and occupies land without having taken any valid legal proceedings to have the damages, etc., assessed, and refuses on the demand of the owner to proceed to have such assessment made, such owner is entitled to a writ of *mandamus* compelling the performance of the duty imposed by the charter.

2. Where the owner of land appealed from a report of a jury appointed by a corporation to assess damages or benefits resulting to his land by opening a street thereon on the ground that no damages were given, and in the appellate court a judgment was entered with the consent of the appellant therein, declaring that the proceedings subsequent to the condemnation of the land, and in reference to the assessment of damages and benefits, were irregular and void, and dismissing the appeal at cost of appellant: *Held*, that the effect of such judgment was to leave the parties in exactly the same position they occupied before the proceedings were instituted, and the owner is not estopped thereby from insisting, in another suit, that the corporation shall be compelled to have damages, etc., assessed.

3. Where a corporation having alone the power to institute proceedings for the assessment of damages and benefits resulting from its exercise of eminent domain, fails and refuses, on demand of the owner, to do so, the owner may treat the corporation as a trespasser and sue in ejectment, if he elect to do so; otherwise the appropriate remedy is by *mandamus* to compel the corporation to assess the damages as provided by its charter.

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

ACTION heard at March Term, 1893, of BUNCOMBE, before *Graves, J.*, who ordered the writ of *mandamus* to issue as prayed for in the complaint, from which judgment the defendant appealed.

(748) The facts necessary to an understanding of the decision of the Court are fully stated in the opinion of *Shepherd, C. J.*

Charles A. Moore and J. H. Merrimon for plaintiffs.
Cobb & Merrimon for defendant.

SHEPHERD, C. J. Under a provision of its amended charter (section 37, chapter 111, Pr. Laws 1883) the defendant, on 20 August, 1887, condemned certain land of the plaintiffs and entered thereon and constructed a street, which it has continuously used ever since. The charter does not give the plaintiffs the right to institute proceedings for the assessment of damages, but, in case of disagreement, it imposes upon the defendant the duty of causing its marshal to summon six freeholders who shall ascertain such damages as well as any special advantage which may result to the owners by reason of the contemplated improvements. The report of these freeholders, when confirmed by the aldermen, may be appealed from by the owners, and the appellate court shall have power to increase or diminish the amount of damages, etc., but shall "in no wise adjudicate the necessity of the improvement." It is further provided that no appeal shall hinder or delay the aldermen in making the proposed improvements, provided the amount of damages assessed by the freeholders be paid into the office of the clerk of the court. The freeholders in this case reported that no damage had been sustained by the plaintiffs, and an appeal was taken to the Superior Court. Upon the hearing of the appeal at December Term, 1889, the defendant insisted that all of the proceedings which it had instituted subsequent to the condemnation and taking of the land were void, assigning as one of its reasons that the said freeholders were not summoned for

(749) the purpose of assessing damages and benefits, but simply to "view and lay off a street." The plaintiffs assented to the proposition that the proceedings were void and a judgment was entered declaring the same. The appeal was dismissed at the cost of the plaintiffs, and from this part only of the judgment they appealed to this Court. That appeal was abandoned.

Thus it appears by the defendant's own admission that it has entered upon and is in the use and occupation of the plaintiffs' property without having taken any valid legal proceedings to have the damages, etc., assessed, and, although the plaintiffs have demanded that the defendant proceed to have such assessment made, it has refused and still refuses to do so. The plaintiffs pray that a *mandamus* issue compelling the

defendant to perform the duty so plainly imposed upon it by its charter, but this is resisted upon several grounds, which we will now proceed to examine.

It is urged that the plaintiffs are estopped upon the principle of *res judicata*. We do not think that the principle applies to the peculiar circumstances attending this case. It was the duty of the defendant to have instituted proper proceedings. This it failed to do, and at its own instance a judgment was entered with the consent of the plaintiffs, declaring that the proceedings appealed from were void. The substance of the judgment was that the defendant had made no legal attempt to perform its statutory duty, and its effect was to leave the parties exactly in the same position they occupied before the proceedings were instituted.

It is, therefore, the plain duty of the defendant to proceed according to the provisions of the charter to have the damages assessed. It is insisted, however, that *mandamus* is not the proper remedy, inasmuch as the plaintiffs may have adequate relief at common law. The principle asserted is well established, but it must be borne in mind that in its application "the existing legal remedy relied upon as a bar to interference by *mandamus* must not only be an adequate remedy (750) in the general sense of the term, but it must be specific and appropriate to the particular circumstances of the case; that is, it must be such a remedy as affords relief upon the very subject-matter of the controversy." High Extraordinary Remedies, 19.

Now it may be true as contended by counsel that the defendant alone having the power to initiate statutory proceedings, and having failed to do so, may be treated as a trespasser and sued in ejectment (Mills Eminent Domain, 89), but it is clear that such a remedy would not be appropriate to the peculiar circumstances of this case. The defendant is still occupying the land as a street, claiming it under the right of eminent domain conferred by its charter, and the plaintiffs evidently prefer that the street should remain, and therefore do not elect to treat the defendant as a trespasser. Such being the case, the appropriate remedy is to compel the defendant to assess the damages as provided by its charter. In accordance with this view it has often been held that *mandamus* is a proper remedy in cases of this character. High (*supra,* 318) says: "The writ has frequently been granted to protect the rights of landowners to compensation for their lands taken in the construction of works of public improvement. And where a railway or other corporation is vested with the right of eminent domain, it may be compelled by *mandamus* to take the necessary steps for summoning a jury to assess damages for the property taken or damaged." To the same effect are Lewis on Eminent Domain, 614; Heard's Short Ex. Rem.,

333, and 14 A. & E., 162, and the numerous cases cited in the notes. These authorities abundantly sustain the position that where the statute does not provide that the owner may institute proceedings, the
(751) party condemning, on whom is imposed the duty, may be compelled to do so by *mandamus*.

Being clearly of this opinion, we have deemed it unnecessary to enter into an elaborate discussion of all the authorities presented by the intelligent counsel.

AFFIRMED.

H. T. RUMBOUGH v. SOUTHERN IMPROVEMENT COMPANY.

Corporations—Power of Officer to Bind—Declaration of One Officer as to Authority of Another—Evidence.

1. Officers of a corporation, from the highest to the lowest, are only the agents thereof, and their acts and contracts are binding on their principal only when within the scope of their authority, express or implied.

2. The scope of the authority of one officer of a corporation, as to a past transaction at least, cannot be proved by the unsworn declarations of another officer or agent; therefore,

3. In an action on a draft drawn by an agent of a corporation and accepted by him in the name of the corporation, the declarations of the president, made after the alleged acceptance, were inadmissible to show the agent's authority to bind the company.

4. Evidence of the contents of a letter to prove a contract is inadmissible when the letter itself is not produced nor its loss satisfactorily accounted for.

ACTION heard before *Hoke, J.*, and a jury at Spring Term, 1892, of MADISON.

The same case upon a former appeal is reported in 109 N. C., 703, and the facts pertinent to this appeal sufficiently appear in the opinion of *Associate Justice Burwell*.

One of the issues submitted to the jury by the court was as follows: "Was W. E. Watkins authorized to draw and accept said bill of exchange for the defendant company?" There was verdict for the plaintiff,
(752) and from the judgment thereon defendant appealed.

W. W. Jones and H. T. Rumbough for plaintiff.

J. M. Gudger, T. F. Davidson, C. M. Busbee and F. A. Sondley for defendant.

BURWELL, J. The plaintiff's action is founded upon a draft drawn in his favor by W. E. Watkins for the sum of $950 and accepted by said Watkins in the name of the defendant corporation. It was necessary to the establishment of his claim that plaintiff should prove that Watkins had authority to bind the defendant in this manner. In his effort to do this he was allowed on the trial, notwithstanding the objection of defendant, to introduce the declarations of the president and general manager of defendant company, made after the alleged acceptance, to the effect that Watkins had authority so to contract for the defendant. This was not proper. *Smith v. R. R.*, 68 N. C., 107. It is there said that "the power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. No such power is expressly given by the by-laws of defendant company, and a general power so unusual and so unnecessary in the ordinary business of a company must require a clear and distinct grant." In that case the declaration offered was that of the superintendent, who "had authority from the president and directors of the road to arrange and alter the tariff of freights, and generally to make all other contracts with shippers over the road," and the controversy was in relation to a contract for the shipment of freight. Here, it is true, the declarations intro- (753) duced were those of the president. But the name of the officer cannot change the rule. It is a question not of name but of authority. Officers of corporations, from the highest to the lowest, are only the agents of such corporations. What acts they perform and what contracts they make for their principals are binding if within the scope of their particular authority, express or implied. But the scope of the authority of one officer or agent, as to a past transaction at least, cannot be proved by the unsworn declaration of another officer or agent. The objection to the admissibility of such testimony is obvious.

It appears from the statement of the case on appeal that some of the declarations of the president of defendant company, as to the authority of Watkins to accept this draft, as we understand the record, were contained in a letter written by him, and the objection was made that the contents of the letter should not be spoken of, because it was not produced, nor was its nonproduction properly accounted for.

If the contents of this letter were relied on by plaintiff merely as a declaration by the president that Watkins had authority to accept the draft, they were incompetent whether the letter was produced or not, for the reasons above stated.

If its contents were to be used as proof of a contract on the part of the company that it would acknowledge and pay the draft, then it was

very clearly improper to allow the witness to speak of the contents, the letter not being produced, unless its loss was accounted for according to the rules of law, for, in that view of the matter, this was to allow parol testimony to establish what was contained in a written agreement without first proving that the writing was lost or destroyed.

(754) Inasmuch as the defendant is entitled to a new trial for the error above pointed out, we do not deem it necessary to consider any other of the numerous exceptions taken by its counsel.

NEW TRIAL.

Cited: Egerton v. R. R., 115 N. C., 648; *Williams v. Tel. Co.,* 116 N. C., 561; *Summerrow v. Baruch,* 128 N. C., 205; *McEntyre v. Cotton Mills,* 132 N. C., 600; *Younce v. Lumber Co.,* 155 N. C., 241; *Gazzam v. Ins. Co., ib.,* 341; *Lytton v. Mfg. Co.,* 157 N. C., 332; *Barnes v. R. R.,* 161 N. C., 582; *Styles v. Mfg. Co.,* 164 N. C., 377; *Robertson v. Lumber Co.,* 165 N. C., 5; *Morgan v. Benefit Society,* 167 N. C., 265, 266; *Fleming v. R. R.,* 168 N. C., 250; *Johnson v. Ins. Co.,* 172 N. C., 148; *Sternberg v. Crohon, ib.,* 736; *R. R. v. Smitherman,* 178 N. C., 599.

J. H. BARNARD v. J. G. MARTIN.

Action on Note—Liability of Surety—Judgment.

1. Where the maker of a note, in an action thereon, claims that it was given as security for a loan made by plaintiff to a corporation, his liability is fixed by a showing that the corporation was insolvent at the commencement of the action, and it would be a vain thing to require plaintiff to seek to recover from an insolvent corporation before demanding of defendant the fulfillment of his contract of suretyship.

2. Where, in an action on a note for which collateral had been deposited, it appeared that plaintiff had rehypothecated the collateral, the rights of the defendant were properly guarded by the judgment which set out that the collateral had been deposited with the clerk to be delivered to defendant on the payment of the judgment.

ACTION heard before *Bynum, J.,* and a jury, at August Term, 1892, of BUNCOMBE.

The facts are sufficiently stated in the opinion of *Associate Justice Burwell.*

From a judgment for the plaintiff the defendant appealed.

W. W. Jones for plaintiff.
Charles A. Moore for defendant.

BURWELL, J. The plaintiff alleges in his complaint that he (755) is the owner and holder of a promissory note for the sum of $3,000 signed by the defendant, by his duly authorized agent, and made payable to him and due 30 January, 1891; that no part of said note has been paid, except the interest thereon to 24 August, 1891; that at the time of the execution of said note the defendant deposited with him a certificate for nine hundred and fifty shares of stock in the Asheville Street Railway Company, which he avers he is ready and willing to return to the defendant upon the payment of said note.

The defendant admits the truth of all the above stated facts, and says that the certificate of stock spoken of was put in the hands of the plaintiff to secure the payment of the note, but he insists that it was delivered, with the stock collateral, to secure the plaintiff in the event that the Asheville Light and Power Company could not be compelled to pay to him the sum of $3,000 and interest which plaintiff had agreed to loan that company, if protected by defendant in that way from loss.

The plaintiff contended that such was not the agreement under which he acquired possession of the note and collateral, but, on the contrary, that he loaned defendant $3,000, taking the note therefor, and defendant in turn loaned the money he had thus borrowed from plaintiff to the Light and Power Company.

The jury, upon issues submitted to them, have found that that company was insolvent when this suit was brought, and is insolvent now, and there is no pretense that the money spoken of, which it received, has been paid to either of the parties. There was no exception to any of the evidence relating to these issues, nor to the charge so far as it referred to them.

The insolvency of the Light and Power Company being thus established, the liability of defendant to plaintiff for the amount of the note was fixed according to his own version of the matter, and it becomes of no consequence to decide whether the money was loaned (756) to the company by defendant or by plaintiff. He cannot require the plaintiff to do so vain a thing as to seek to recover from an insolvent corporation before demanding that he shall fulfill his contract of suretyship.

We do not deem it necessary to consider the exceptions taken on the trial, all of which relate to other issues, since in the view we take of the case, expressed above, those issues become immaterial, further than to say that we find no error in his Honor's ruling.

It was admitted on the trial that plaintiff had used the certificate of stock which defendant had deposited with him as above stated to secure a loan of $3,000 which he had obtained from the National Bank at Asheville. In the judgment rendered against the defendant it is stated that the plaintiff has deposited that certificate in the hands of the clerk to be delivered to defendant when he pays the amount of that judgment. We think that his Honor has properly guarded the rights of the defendant by the terms of the judgment.

NO ERROR.

Cited: Sykes v. Everett, 167 N. C., 609.

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(757)

J. H. HEMPHILL v. T. J. MORRISON.

Practice—Appeal—Exceptions to Charge—Agreement of Counsel.

1. Where no exception is set out in the case on appeal other than "To the whole of this charge the plaintiff excepted," and it does not affirmatively appear that there was not more than one proposition of law laid down in the charge, and no error appears on the face of the record proper, the judgment of the court below will be affirmed.

2. Exceptions to the judge's charge, filed in the clerk's office after the settlement of the case on appeal, are not properly a part of the transcript on appeal and should not be sent up.

3. The purpose of requiring exceptions to be made specifically in appellant's statement of case is that the judge, in settling the case, may send up such parts of the testimony as are pertinent to the parts of the charge excepted to, and that the appellee may be apprised at the "settlement" of the case and before argument here, of the true grounds upon which the appeal is based.

4. The judge below has no authority without the consent of the appellee to extend the time fixed by the statute for filing exceptions, and no agreement of counsel when denied and not entered upon the record or in writing will be considered by this Court.

ACTION tried before *Bynum, J.,* and a jury, at December Term, 1892, of BUNCOMBE.

There was verdict and judgment for defendant, and plaintiff appealed. The essential facts are stated in the opinion of *Associate Justice Clark.*

Charles A. Moore for plaintiff.
Cobb & Merrimon and Gudger & Martin for defendant.

CLARK, J. There is no exception set out in the case on appeal other than "To the whole of this charge the plaintiff excepted." It does not affirmatively appear that there was not more than one proposition of law laid down in the charge, and this exception by the repeatedly repeated rulings of this Court, cannot be considered (*Hopkins v. Bowers,* 111 N. C., 175; *S. v. Frizell, ib.,* 722), and there being no error apparent on the face of the record proper, the judgment is affirmed.

It is true that, as to the charge, the appellant can file exceptions within ten days, and when he has placed them in his statement of case on appeal he can have a *certiorari* for them when omitted by the judge. *Lowe v. Elliott,* 107 N. C., 718. But the appellant did (758) not take this course. After the case on appeal was settled he filed in the clerk's office sundry exceptions to the charge. This does not serve the purpose of requiring the exceptions to be made specifically in appellant's statement of the case, which is that the judge, in settling the case, may send up as much of the evidence as is necessary to us in passing upon the correctness of the parts of the charge excepted to, and that the appellee may be prepared at the "settlement" of the case and in argument here to meet the appellant upon the grounds he has selected. These exceptions were, therefore, improperly sent up. They are not properly a part of the transcript on appeal. For his delay in this regard the appellant's excuse in this case is that the judge extended the time to file exceptions. But the time being fixed by statute, the court was without authority to extend it without consent of the appellee. *S. v. Price,* 110 N. C., 599 (on p. 602).

The consent is denied, and, not being in writing, the Court cannot consider affidavits to decide the question. Rule 39 of the Supreme Court; Clark's Code, p. 704, and numerous cases there cited. The Court is here to decide litigated questions between the parties presented by the appeal, but not disputed questions as to the recollection of counsel in regard to agreements or waivers which could so easily be avoided by proper entries on the record, or by being reduced to writing. *Sondley v. Asheville, ante,* 694.

NO ERROR.

Cited: Sondley v. Asheville, ante, 697; *Graham v. Edwards,* 114 N. C., 229; *Pipkin v. McArtan,* 122 N. C., 194; *Hahn v. Brinson,* 133 N. C., 8; *Mirror Co. v. Casualty Co.,* 157 N. C., 31.

(759)

C. H. MILLER ET AL. v. THE CITY OF ASHEVILLE.

DEFENDANT'S APPEAL.

Municipal Corporations—Condemnation of Land for Streets—Diverse Owners—Life Estate—Remainder—Reference to Determine Value and Respective Interest of Owners.

1. Where, in the trial of an appeal from an assessment of damages in condemnation proceedings instituted by a city for widening a street, a map of the plan of the city had been introduced at the beginning of the trial without objection and used by other witnesses in explaining their testimony, it was not error to permit a subsequent witness to testify in regard to such map.

2. In a trial of an action wherein plaintiff sought damages for land condemned by a defendant city, the defendant having admitted that plaintiffs' ancestor died seized in fee simple of the land condemned; that his will, which was in evidence without objection, had been construed by the Supreme Court as devising the land in question for life to one of the plaintiffs, and that the other plaintiffs were her children, and having itself instituted the proceedings against the plaintiffs for condemnation of the land, was estopped to deny that the title to the land was in the plaintiffs or some of them.

3. Although parties who are entitled to land by way of contingent remainder may not sell the same for partition because their respective shares therein cannot be ascertained until the happening of the contingency, yet such property may be taken in the exercise of eminent domain by the sovereign or the one to whom it delegates that right, and the fund awarded as damages will be substituted for the realty, and upon the happening of the contingency will be divided among the parties entitled in the same manner as the realty would have been if left intact; therefore,

4. Where, in the trial of a suit relating to damages for land condemned by defendant city and belonging to one of the plaintiffs for life and to the others by way of contingent remainder, the jury assessed the totality of damages due by the defendant to the plaintiffs, the defendant has no concern as to the division of the fund and cannot object to an order of reference to ascertain how, and in what proportions, the plaintiffs are entitled thereto.

5. Where land had been condemned in 1887 for widening a street, and the house thereon was torn down in 1890, and in the meantime rented by the owners, it was proper, on the trial of a suit relating to the damages for such condemnation, to instruct the jury that they should allow interest on such sum as they might assess as damages from the time of the condemnation, but should take into consideration the use made of and benefit received by the plaintiffs from the land after such date, against the damages.

6. After proceedings for the condemnation of land by the city of Asheville were begun, but before the trial and verdict assessing damages therefor, chapter 135, Private Laws 1891, was passed, section 16 of which provided that in condemnation proceedings all benefits to the owner shall be considered: *Held*, that such act was merely a change of remedy and is valid, and it was error in the court below to instruct the jury that the benefits assessed must be only "those which are special to the owner and not such as he shares in common with other persons."

ACTION tried before *Merrimon, J.*, and a jury, at August Term, (760) 1891, of BUNCOMBE.

The city of Asheville instituted two proceedings, each against the plaintiffs, under the provisions of the charter of the defendant, the city of Asheville, being chapter 3, Laws 1883, and acts amendatory thereof, for the purpose of condemning certain lands for the purpose of widening North Main Street and Pulliam Street in said city, and the reports of the juries summoned for such purposes were duly confirmed and approved by the mayor and board of aldermen of the defendant, the said city of Asheville.

Each of said proceedings was thereafter brought upon appeal by the plaintiffs, under the provisions of the said charter of the defendant, to the Superior Court and at the March Term, 1891, the said two proceedings were consolidated by consent.

Upon the trial the following issues were submitted:

1. What damages, if any, have been done to the property by the proposed improvements of Main and Pulliam streets?

2. What special benefit, advantage and enhanced value have been caused to the property by the proposed improvement? (761)

Charles A. Moore for plaintiffs. (766)
Cobb & Merrimon for defendant.

CLARK, J. The first exception of the defendant, which is to the testimony of C. H. Miller in regard to the plan of the city, already in evidence, without exception, is without merit.

The defendant having admitted that James M. Smith died seized in fee simple of the land; that his will, which was in evidence, without objection, had been construed in *Miller ex parte*, 90 N. C., 625, and that the plaintiffs were the testator's daughter and grandchildren, and having itself instituted this proceeding to condemn the land, was estopped to deny that the title to the land was in the plaintiffs or some of them. In what proportion the damages for the land should be divided among the plaintiffs did not concern the defendant. It had no right, therefore, to except to the order of reference made to that end by

(767) the court after verdict. The verdict established the title in plaintiffs, and the amount of damages the defendant should pay.

It is true that it was held in the case cited that the real estate devised by James M. Smith could not be sold for partition. But that was between the parties themselves, and on the ground that, the remainders being contingent, the parties entitled to share therein could not be ascertained. But that rule does not apply as between the sovereign, or the party to whom it delegates the right of eminent domain, and those having an interest in the land—vested or contingent. When (as here) the property is taken under the right of eminent domain, the fund realized is substituted for the realty and is held subject to like charges and trusts, and when limited over on a contingent remainder it will be divided among the parties entitled, upon the happening of the contingency, in the same manner as the realty itself would have been if it had remained intact. If this were not so, it would be easy as to the construction of railroads, the opening or widening of streets, and in the numerous other instances which, in a progressive community, call for the exercise of the powers of ultimate sovereignty, to defeat the right of eminent domain, by simply limiting or settling property upon a contingent remainder. It would hamper the exercise of the right if the remainderman could wait till some remote day when the damages would be enhanced by the rise in values. The jury having assessed the totality of the damages due by the defendant, and that it was due to the plaintiffs, the defendant, as above said, need not concern itself as to the division of the fund or the directions of the court how the fund or any part thereof shall be held or divided; hence the requests from the defendant to charge, numbered 3, 4, 5, 6, 7, were properly refused. The charge substituted for the eighth prayer of defendant was proper.

We are of opinion, however, that there was error in instructing the jury, as requested by the plaintiffs, that the benefits assessed must be only those "which are special to the owner, and not such as he (768) shares in common with other persons." To this the defendant excepted. The rule laid down by his Honor has been the settled ruling of this Court, but it was expressly altered as to all condemnation proceedings instituted in behalf of the defendant by section 16, chapter 135, Private Laws 1891. It is true, this was enacted 28 February, 1891, after these proceedings were begun. But the verdict assessing the damages was rendered thereafter, at August Term, 1891. This is merely a change of remedy. Whether the defendant can reduce the damages by all the benefits accruing to the plaintiffs, or only by those benefits special to the plaintiffs, rests with the sovereign when it confers the exercise of the right of eminent domain. When, after proceedings begun, but before the trial, the Legislature struck out all right to any benefits

as an offset, it was held valid. *R. R. v. Hall,* 67 Ill., 99. For the same reason, the present act, which extends the assessment of benefits to all received by the landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right. The Legislature, in conferring upon the corporation the exercise of the right of eminent domain, can in its discretion require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled and vested by a verdict and judgment.

This error in no way enters into or affects the verdict upon the (769) first issue. Therefore, a partial new trial will be awarded as to the verdict upon the second issue only.

PARTIAL NEW TRIAL.

Cited: *R. R. v. Platt Land,* 133 N. C., 273; *Bost v. Cabarrus,* 152 N. C., 536; *Phifer v. Comrs.,* 157 N. C., 152; *Campbell v. Comrs.,* 173 N. C., 501; *Lanier v. Greenville,* 174 N. C., 317; *Elks v. Comrs.,* 179 N. C., 243, 245, 246, 247.

C. H. MILLER ET AL. v. THE CITY OF ASHEVILLE.

PLAINTIFFS' APPEAL.

Municipal Corporations—Condemnation Proceedings—Damages—Benefits—Diverse Owners—Life Estate—Contingent Remainder—Issues.

1. Where it appeared from a will in evidence, without objection, that one of the claimants of land condemned by a city was entitled to a life estate only therein, a judgment in favor of such claimant for the value of the life estate only was properly rendered in a suit relating to damages for such condemnation.

2. Where, in apportioning an award of damages and ascertaining the value of a life estate in a fund of $1,500, it appeared that the life tenant was sixty-two years of age and in good health, the finding of a referee that the expectancy of such life tenant was twelve years and nine months, and the value of her life estate in such fund was $787.63, was proper under section 1352 of The Code.

3. Where land, limited by a will to one for life and by contingent remainder to others, was condemned by a city for widening streets, the damages awarded stand in the same plight and condition as the realty, and it was proper to adjudge that the balance of the recovery, after deducting the present value of the life estate of the life tenant, should be invested by the clerk until the termination of the life estate so as then to be divided among the parties then entitled in the manner provided by the will as to the realty for which it had been substituted.

4. In ascertaining damages for the condemnation of land, where the amount of damages and benefits have both been found by the jury, it is immaterial whether the mathematical operation of deducting one from the other is made by the court or the jury.

(770) ACTION for the recovery of damages for land condemned by the city of Asheville belonging to plaintiffs, tried at August Term, 1891, of BUNCOMBE, before *Merrimon, J.*, and a jury.

The nature of the proceedings and the facts in relation thereto, including the issues submitted to the jury and the report of R. McBrayer, referee, are fully set out in the report of the defendant's appeal in the case between the same parties, *ante,* page 759.

The plaintiffs filed the following exceptions to the report of the referee: "The plaintiffs except to the report of the referee for that (1) he finds that Mrs. Elizabeth A. Smith is the owner of a life estate in said land; (2) said referee had no right to take testimony or consider the same; (3) said referee found that Lula R. Miller, C. H. Miller and J. H. Miller are not entitled to any part of the damages assigned against the city; (4) said referee finds that the remainder, after deducting the value of Elizabeth A. Smith's alleged life estate, should not be paid to any one, whereas he should have found that the entire amount of damages should be paid equally to the plaintiffs."

The exceptions were overruled, and from the judgment entered on the report of the referee (see report of defendant's appeal, page 759) in favor of Elizabeth Smith for a part of the money recovered as damages for taking the land and ordering an investment of the balance until the termination of her life estate, the other plaintiffs appealed.

Charles A. Moore for plaintiffs.
Cobb & Merrimon for defendant.

CLARK, J. The proceedings were begun by the defendant as plaintiff, and against one of the plaintiffs as defendant, the other plaintiffs having since come in and been made parties by consent. By some means (771) the relative position of the plaintiffs and defendant was changed

when the case got into the Superior Court, but this is immaterial as also are some other technical irregularities which were waived, no exception having been taken at the time.

As to the first and second exceptions by the plaintiffs to the referee's report, the will of James M. Smith was in evidence without exception, and it appears therefrom (the same having already been construed by this Court in *Miller ex parte,* 90 N. C., 625) that the plaintiff Elizabeth A. Smith possessed only a life estate.

As to the remaining exceptions, the defendant was estopped to deny that the title of the land was in the plaintiffs, but in which of them, or in what proportion the damages assessed should be divided between them, was a matter arising after verdict. This in no wise concerned the defendant. The report of the referee and the judgment of the court thereon were in accordance with the construction placed on the will. *Miller ex parte, supra.* The value of the life estate was assessed as provided by The Code, sec. 1352. The balance of the recovery is the present value of the interests of the remaindermen. It stands in the same plight and condition as the realty itself stood, and upon the expiration of the life estate it will be divided among the parties then entitled in the manner provided by the will as to the realty for which it has been substituted.

The usual manner of ascertaining the damages is by estimating the damages and benefits and deducting one from the other. Dillon Mun. Corp., secs. 624, 625. And this is contemplated by the defendant's charter. Private Laws 1883, ch. 111, sec. 37. Whether this shall be done by the jury, deducting one from the other and finding the difference as their response to a single issue submitted as to the damages, or whether the court shall submit, as in the present case, (772) two separate issues, one as to the damages and the other as to the benefits, is a matter of discretion. *Humphrey v. Trustees,* 109 N. C., 132. It cannot affect the result, when the amount of damages and benefits have been both found by the jury, whether the mathematical operation of deducting one from the other is made by the court or the jury. By the terms of the plaintiff's notices of appeal the question of benefits as well as damages was expressly brought to the Superior Court for trial.

AFFIRMED.

J. C. BROWN v. RHINEHART BROS. AND W. L. WALKER.

Practice—Judgment by Default—Setting Aside—Irregular Judgment—Excusable Neglect.

1. A material amendment, unverified, to a verified complaint renders it necessary to treat the complaint as unverified.

2. The term of court at which a complaint is filed before the third day thereof is practically the return term, and if defendant does not answer, judgment by default final may be taken at such term in cases falling within the provisions of section 385 of The Code, and by default and inquiry in other cases.

3. An inquiry as to damages cannot be executed at the same term as that at which judgment by default is rendered, unless it is expressly allowed by statute.

4. Where an action, not within the provisions of section 385 of The Code, was brought to August Term, 1891, of a Superior Court, but complaint was not filed until December Term following, and at March Term, 1892, the case was put on the trial docket, and when called, an amended complaint, unverified, was filed, and, the defendant, not having appeared, certain issues were submitted to the jury, and, upon the findings, a judgment final was rendered, no judgment by default and inquiry having been obtained: *Held*, (1) that the case was properly placed on the trial docket, since not only issues of fact joined on the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put thereon: (2) that it was irregular and not according to the course of practice to submit the case to a jury at March Term, 1892, without judgment by default and inquiry, and to enter a judgment on the verdict.

5. Where a judgment has been rendered on a verdict the judgment and verdict may not be set aside for excusable neglect, etc., under section 274 of The Code.

(773) MOTION to vacate and set aside a judgment and verdict, heard at August Term, 1892, of BUNCOMBE, before *Bynum, J.*

The plaintiff seeks, in this action, to enforce a lien against the real property of the defendant, W. L. Walker, and also to recover a personal judgment against him and his codefendants.

Summons in the action was issued 21 July, 1891, returnable to the August Term, 1891, of Buncombe, and was served on all the defendants on 3 August—more than ten days prior to said August Term. The summons was duly returned and the case stood upon the summons docket of said term, but no complaint was filed during said term.

At the next (December) term of the court the plaintiff filed his complaint, but took no further action. At March Term, 1892, plaintiff caused the case to be put upon the regular calendar of civil issues for

trial, and when it was reached, and before the jury were impaneled, the plaintiff obtained leave to amend his complaint in a material part. Certain issues were submitted to a jury, which they answered.

The plaintiff complains as a subcontractor for the reasonable worth of certain labor done for and materials furnished to the defendants Rhinehart Bros., who were the defendant Walker's contractors, to build him a house.

The amended complaint, which was never verified, alleges that defendant Walker agreed to pay the plaintiff whatever sum (774) might be found to be due him from Rhinehart Bros.

There was never a judgment by default and inquiry entered in the case, but the final judgment was entered, upon the findings of the jury, at March Term, 1892.

The defendant Walker moved the court, at August Term, 1892, to set aside the judgment and verdict or findings of the jury on the ground that the same were irregular, against the course and practice of the court, and contrary to positive provisions of law.

His Honor ruled that the trial, judgment and verdict were regular, and refused to vacate and set them aside for irregularities, holding that there were no irregularities and that section 386 of The Code did not apply to judgments by default rendered at a term subsequent to the return term of the action. The defendant Walker excepted to these rulings and appealed from the judgment rendered.

The defendant also moved to set aside the verdict and judgment for excusable neglect, which was done, and plaintiff appealed.

H. B. Carter for plaintiff.

J. H. Merrimon and W. W. Jones for defendants.

MACRAE, J. We cannot agree in the conclusion reached by his Honor. It does not seem to have been contended by the plaintiff that he was entitled to judgment final by default under section 385 of The Code, as the action was not brought upon a "breach of an express or implied contract to pay absolutely or upon a contingency a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." Therefore it is not a matter of moment whether the complaint was verified or not. It is well established, however, that a material amendment, unverified, to a verified (775) complaint renders it necessary to treat the complaint as unverified. And as this amendment was material, at least as far as defendant Walker was concerned, the complaint was filed as to him just before the issues were submitted to the jury. *Rankin v. Allison,* 64 N. C., 673; *Bank v. Frankford,* 61 N. C., 199.

Section 386 of The Code provides: "In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term." The return term was that held in August, 1891. If the complaint had been filed according to the provisions of section 206 of The Code, on or before the third day of the term, and the defendant had failed to appear and demur or answer at the same term, the plaintiff might have had judgment by default (section 207). But where the complaint is filed after the return term, it stands on the file during the first three days of the next succeeding term, and judgment by default for want of an answer at that term may be rendered, and if judgment is not rendered at the term last named, and there is no answer filed at the next term thereafter, judgment may then be taken by default. *Roberts v. Allman,* 106 N. C., 391. The plaintiff, therefore, was entitled to judgment by default at March Term, 1892, upon the complaint filed at the previous term. But the complaint was amended at March Term, 1892, when the case was reached upon the calendar; it does not appear whether this was within the first three days of the term or not; if it were, the defendants were entitled to the balance of the term to file their answer, and if no demurrer or answer was filed, the plaintiff would have been entitled to judgment by default. It is evident that this
(776) judgment could not have been rendered until just before the adjournment for the term.

We think the case was properly placed upon the civil issue docket, although no issues had been joined, for not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court, are to be put upon this docket. The Code, sec. 83, paragraph 3; *Walton v. McKesson,* 101 N. C., 428. The complaint having been amended at March Term, 1892, the defendant was entitled to answer. For all practical purposes the term at which the complaint is filed, before the third day thereof, is the return term. *Roberts v. Allman, supra.* And while it is true that the refusal of the judge to allow an answer to be filed at the trial term is a matter of discretion and not reviewable (*Reese v. Jones,* 84 N. C., 597), this was not the trial term, because the amended complaint had just been filed. We, of course, are referring to such amendments as that which was made in this case, and not of amendments where the opposing party has not been misled by a defect in the pleadings, in which case an amendment can be allowed during the trial or even after verdict. *Garrett v. Trotter,* 65 N. C., 430; The Code, sec. 273.

Defendant Walker, then, ought to have been permitted to answer at March Term, 1892, and if answer was not filed before the adjournment,

in case the amended complaint was filed before the close of the third day of the term, the plaintiff would have been entitled to a judgment by default and inquiry under section 386. We nowhere find that the inquiry may be executed at the same term as that at which the judgment by default was rendered, unless it is expressly allowed to be done by statute.

An irregular judgment is one rendered contrary to the course (777) and practice of the Court, and may be set aside at any reasonable time.

The submission of the case to the jury without judgment by default, and at the same term at which such judgment might have been rendered if the defendant had not been entitled to answer, was not according to the course and practice of the court and was irregular, and it was error to have held that the trial, verdict and judgment were regular. They ought to have been set aside as to the defendant Walker, and the said defendant allowed to answer. (Defendant Rhinehart did not appeal.) Error in defendant Walker's appeal.

PLAINTIFF'S APPEAL IN SAME CASE

MACRAE, J. Whatever may have been the former rulings upon the power of the judge to set aside judgments under section 274 of The Code, we must consider it settled by the decisions in *Beck v. Bellamy,* 93 N. C., 129, and *Clemmons v. Field,* 99 N. C., 400, followed in *Flowers v. Alford,* 111 N. C., 248, that where the judgment was rendered upon a verdict the motion will be denied, and that therefore it was error in his Honor to have set aside the verdict and judgment for excusable neglect. But as the same result will be reached, and the verdict and judgment be set aside as irregular, the appellant will not recover his costs upon the appeal. It is so ordered.

ERROR.

Cited: Morrison v. McDonald, 113 N. C., 331; *Junge v. MacKnight,* 135 N. C., 109; *Mann v. Hall,* 163 N. C., 53, 60; *Forbis v. Lumber Co.,* 165 N. C., 409; *Hyder v. R. R.,* 167 N. C., 586.

(778)

PENNIMAN & CO. v. B. J. ALEXANDER.

Contract—Maturity—Interest—Instruction to Jury.

1. A writing containing a statement of sums to become due, at different dates, followed by an authorization to a third person to pay the amounts, as specified, to another, becomes, when accepted, a contract by the acceptor to pay such sums, and in the absence of any collateral or contemporaneous agreement, the legal effect of such writing is a matter for construction by the court.

2. Where, in an action on a promise to pay a sum of money, the jury found the same to be due the plaintiff "with interest from maturity," which was fixed by the judgment at the date thereof, the defendant cannot complain that the court did not instruct the jury when, upon the face of the writing, the sum became due.

3. Where defendant resisted recovery on his acceptance of an order given to plaintiffs by a builder, on the ground that the builder had quit work before the date fixed for the payment, and the judge instructed the jury that, if there was fraud or collusion between the builder and the defendant to defraud the plaintiff, the defendant could not avoid his liability and the burden of proof of proving such fraud and collusion was on the plaintiff: *Held*, that such instruction was not erroneous, and could not have the effect of prejudicing the defendant's cause.

ACTION for the recovery of money, heard before *Graves, J.*, and a jury, at Spring Term, 1893, of BUNCOMBE.

This action was originally begun, in the court of a justice of the peace, by Penniman & Co., plaintiffs, against the defendant, and W. R. Penniman was subsequently admitted as plaintiff by amendment.

The action was based upon a written instrument, which is in (779) the words and figures following, to wit (this instrument was put in evidence by plaintiffs and admitted to be genuine):

13 OCTOBER, 1890.

First payment on second house	$ 132.25
Payment next week.	
Second payment on first house	66.13
Payment in about twenty days.	
Second payment on second house	66.12
Payment in about thirty days.	
	$ 264.50

I authorize B. J. Alexander to pay the above amount to Penniman & Co., as specified above.

Asheville, N. C., 13 October, 1890.

Tickets to be presented. JONATHAN MOONEY.

Accepted. B. J. ALEXANDER.

It was proved on the trial that the item "First payment on second house, $132.25," was paid in November, 1890, by defendant to plaintiff.

There was testimony tending to show that after the alleged acceptance of the order, the defendant "had taken the job away from Mooney," the contractor; that Mooney gave up the contract; that he quit work within twenty days after the date of the writing; that while he was building the house a report had gone out that he would not be able to finish his contract, and that when he quit he had on hand some material not paid for, which defendant used in completing the house.

His Honor charged the jury as follows:

The paper offered in evidence by the plaintiff is neither a check, nor draft, nor bill of exchange, in the usual form of such instruments. It is evidence of a contract in writing which the court will construe and instruct you how this writing is to be construed. Taking what appears on the face of the paper, it means a promise on the part of the defendant Alexander to pay to the plaintiff the two sums of (780) $62.13 and $62.12, and if nothing more is shown, the plaintiff has the right to recover the sums, with interest at six per cent from the time it fell due.

The defendant substantially admits this and undertakes to show you that the promise was not absolute and unconditional, but that at the time the writing was made it was agreed that payment was not to be made unless Mooney did so much work on the house as should entitle him to have the second payment on his contract with Alexander for the building of the house.

Now the defendant assumes the burden of the proof, and he must satisfy you, by a preponderance of the evidence, that there was such an agreement, and must further satisfy you that the work was not done by Mooney, which would entitle him to the second payment.

It is not required that the defendant satisfy you beyond a reasonable doubt, but it must appear by a preponderance of evidence.

If the jury find that there was at the time of the writing an agreement, outside of the writing, and that Mooney quit the building before he did the work which was to have been done before the second payment was to be paid, then the plaintiff cannot recover of the defendant in this action.

Of course, if there was any fraud or collusion between Mooney and Alexander to defraud the plaintiff, Alexander could not by fraud avoid his liability. Or if Alexander prevented Mooney from going on to complete the work he could not be allowed by his own wrong-doing, by his unlawful interference, to prevent Mooney from doing the work, to relieve himself from liability to pay.

(781) But the plaintiff must show you that there was such fraud and collusion, or that Alexander did prevent Mooney from going on with the work on his contract with Alexander.

The jury returned verdict for the plaintiff, and defendant moved that the same be set aside and for a new trial, upon the following grounds:

1. The defendant requested the court to charge the jury that the contract sued on showed upon its face that the two sums of money claimed by plaintiff would not become due, as to the first, until the second payment on first house became due, and as to the second, until the second payment on the second house became due, and that the burden was upon the plaintiff to show that the said payments on said house had become due, or that one of said payments had become due when this action was begun. His Honor declined to give this instruction, and defendant excepted, and now assigns his Honor's refusal as error.

2. The defendant excepts to, and assigns as error, his Honor's construction of the contract sued on. The defendant insists that there was error in the instruction itself, and that it was also error that his Honor did not tell the jury when, upon the face of the contract, the two sums became due.

3. That the defendant excepts and assigns error in his Honor's instruction to the jury in reference to "fraud or collusion between Mooney and Alexander to defraud the plaintiff."

Defendant insists that there was no evidence in the case to which these instructions could apply; that there was no evidence of fraud or collusion of any kind between Mooney and Alexander to defraud plaintiff or any one; there was no evidence that Alexander was guilty of fraud; there was no evidence that Alexander prevented Mooney from going on to complete the work, or of any unlawful interference by Alexander with the work.

The motion for new trial was refused, and from the judgment (782) on the verdict defendant appealed.

Charles A. Moore for plaintiff.
J. H. Merrimon and W. W. Jones for defendant.

BURWELL, J. We find no error in the instruction given to the jury. The writing, which was admitted to be genuine, was in effect a contract on the part of defendant to pay to the plaintiff one hundred and thirty-two dollars within the week following the date thereof, and sixty-six dollars within twenty days after that date, and sixty-six dollars within thirty days thereafter, and the defendant has failed to show to the

satisfaction of the jury that at the time he assumed the alleged liability by writing the word "accepted" on the account and order, there was between the parties a collateral agreement, not made a part of the writing, explaining and modifying his apparent liability. If there was no contract or agreement between the parties except the writing itself, it was to be construed by his Honor, and the right of the plaintiff to recover followed from that construction.

The jury found that the defendant was indebted to plaintiff in the sum of one hundred and thirty-two dollars and twenty-five cents, "with interest at six per cent from date of maturity," which date seems to have been fixed by the judgment on 17 December, 1890. Of this, defendant has no cause to complain.

Nor can the third exception of defendant be sustained. His Honor distinctly told the jury that if the plaintiff had insisted before them that Mooney's quitting the contract might have been the result of the unlawful act of defendant or collusion between him and Mooney, the burden of proving that fact was upon him. The proposition of law was correctly stated. We cannot see that the statement to (783) the jury, under the circumstances, prejudiced the defendant's cause.

NO ERROR.

Cited: S. c., 115 N. C., 555.

S. M. CARR ET AL. V. J. E. ALEXANDER ET AL.

Action to Recover Land—Parties—Nonsuit of Unnecessary Party—Rents and Profits—Damages.

1. During the pendency of an action relating to land between P. and C., in which there was subsequently a decree directing P. to convey the land to C. upon the payment by the latter of the balance of the purchase-money, P. conveyed to other parties; thereafter C. brought suit for the land against P. and his grantees, who were in possession. *Held*, that P. was not a necessary party, and it was not error to allow plaintiff to enter a nonsuit as to P., the grantor of the other defendants.

2. Where exceptions are not taken to a refusal to submit issues tendered or to those submitted, until after verdict on a motion for new trial, such exceptions are too late to be considered on appeal.

3. Where, in an action to recover land, the defendants sought to introduce in evidence a record of a suit then pending between the plaintiff and an-

other for the purpose of showing that that case was between the same parties and for the same cause of action, and it appeared that none of the present defendants was a party to such suit: *Held*, that the record was properly excluded.

4. Where P., as executor holding a debt against C., and also holding the legal title to land in trust to convey it to C., upon the payment of the debt, conveyed the land to others, P. and his grantees having been in possession and receiving the rents and profits of the land, it was proper, in a suit by C. to recover the land and rents, profits and damages, to adjudge, upon proper findings by the jury, that such rents, profits and damages were chargeable against P. to the extent of extinguishing the debt held by him as executor against C.

(784) ACTION tried before *Hoke, J.*, and a jury, at March Term, 1892, of BUNCOMBE.

(788) *Charles A. Moore and Cobb & Merrimon for plaintiff.*
F. A. Sondley for defendants.

BURWELL, J. The plaintiff, when the case was called for trial, could enter a nonsuit as to the defendant executor, and no one had a right to object to this except that particular defendant, and he only in the
(789) event that in his answer he had demanded affirmative relief against the plaintiffs or some of them, which he had not done. If, when the executor had been thus discharged by the plaintiff, the other defendants had so demanded, the court might have adjudged him to be a necessary party, and might have directed him to be made a party again at their instance. No such motion was made, nor did his Honor, of his own motion, cause him to be brought in (The Code, sec. 189), concluding correctly, as we think, that his presence was not necessary to a complete determination of the controversy.

It appears that the defendants tendered certain issues, but they made no exception to the refusal to submit those they tendered nor any exception to those submitted by his Honor till they asked for a new trial. These exceptions came too late to be considered. However, we do not think they would have availed the defendant if they had been taken in apt time, because the issues settled by his Honor, and submitted to the jury, were sufficient and proper. *Emery v. R. R.*, 102 N. C., 209; *Leach v. Linde*, 108 N. C., 547.

The record of the suit of S. M. Carr against Richmond Pearson, executor, was properly excluded. It did not show the pendency in the Superior Court of Buncombe of another action between the same parties and for the same cause of action. Not one of the defendants here was a party to that suit.

When, in 1879, Richmond Pearson, executor, under power given him in the will of his testator, contracted to sell the land in controversy to J. E. Alexander, W. M. Smith and James M. Wright, the legal title thereto was in the heirs of R. M. Pearson in trust to convey it to S. M. Carr in fee whenever the balance of the purchase-money due from him to the estate of R. M. Pearson was paid. In 1884 it was judicially determined that the balance of the said purchase-money was (790) three hundred and forty dollars, which was adjudged to bear interest from 25 July of that year. It is admitted that all the other heirs of R. M. Pearson conveyed their estate in said land to Richmond Pearson, and the latter has conveyed the same to Alexander, Smith and Wright, who, having gone into possession under the executor, to whom the balance of the purchase-money was due, and also holding under a deed from him who was invested with the legal title as trustee for Carr, the vendee, stand in the place of both the executor and heir of R. M. Pearson so far as Carr and his assignee are concerned, and whatever rents and profits would have been credited on the purchase-money, if the land had remained in the hands of the executor, are properly to be credited on that debt, though the land has been held and used, not by the executor, but by his vendees and tenants. *White v. Jones,* 88 N. C., 166. It so happened that the trustee held the legal title and the possession, and was himself, as executor the *cestui que trust.* It was his duty to apply the rents and profits of the land to the extinguishment of the debt, until said debt was thereby fully paid, if he chose, as it seems he did, not to have the commissioner to sell the land. And, since he saw fit to hold possession by his assignees, who had notice of Carr's equities, he and they are liable to the plaintiff for such waste and damage to the land as has been committed or done while it was so held. The plaintiffs, the debt due for the purchase of the land being extinguished, are entitled to the possession of it, and to such balance of rents and damages as remain after appropriating as much thereof as may be necessary to the satisfying of that claim.

And the executor's presence in court as a party to this action was not at all necessary in order that there might be made a settlement that will effectually bar, as it seems, any lien he may assert on the land for the balance found due him by the decree of 1884. By force (791) of the judgment in this cause the legal title to the land is vested in the plaintiffs, and they hold that title free from any trust in favor of the executor, if in fact he sold the land to the defendants, for the sale of the land by him was a transfer of his debt or claim thereon, and that has been adjudged to have been satisfied by a judgment binding on his assignee.

As the executor was not a party when the decree was rendered, it was not strictly proper that it should declare that a judgment standing in his favor should be canceled. If, in truth, he sold the land to the defendants, that legal effect will follow. If he had not done so, the decree will be harmless as to him, as it has no binding force on the executor except through his assignee. So in neither case can it work harm to him.

NO ERROR. AFFIRMED.

B. F. SMATHERS, ADMR., ETC., OF JOHN LEATHERWOOD,
v. W. L. MOODY ET AL.

Construction of Will—Devise—Life Estate—Right of Executor to Possession of Land.

1. Where a testator devised lands and other property to his wife, and in the devising clause provided as follows: "All the above named articles she is to have the undisturbed possession of during her natural life. At her death they shall descend to and become the property of my three blind sons, to wit, Edward, Elias and Jason, to be equally divided between them for their support; to be managed for them by my executor. In case one of them should die then said property, with its increase, shall descend to and become the property of the other two. In case two of them die, then the aforesaid property shall inure to and become the property of the remaining one; at his death all the property that remains I will to be sold by my executor to the best advantage, and the moneys arising from said sale shall be equally divided among all my grandchildren of whatever name": *Held*, that the plain intention of the testator was that upon the death of the last survivor of the three blind sons all the property committed by him to the management of his executor for their support—the land and so much of the personal property as remained—should be sold for division as stated in his will.

2. An administrator *cum testamento annexo* has all the rights and powers and is subject to the same duties as if he had been named as executor; therefore,

3. Where an executor was charged with the management of land, which implied the right of possession until the trust should be fully carried out, upon his death and the appointment of an administrator *de bonis non, cum testamento annexo*, the latter became entitled to the possession of the land, and can recover the same from those withholding it.

(792) ACTION for the recovery of land, brought by B. F. Smathers, administrator *de bonis non, cum testamento annexo,* of John Leatherwood, against W. L. Moody and W. P. Moody, and heard before *Bynum, J.,* at Fall Term, 1892, of HAYWOOD, on complaint and demurrer.

The plaintiff alleged that he was the owner of and entitled to the possession of the land by virtue of the will of John Leatherwood, deceased, and his office as administrator, having been appointed administrator *de bonis non, cum testamento annexo,* upon the death of the executor named in the will and who had qualified. The pertinent clause of the will was as follows:

"2. I give and bequeath to my beloved wife, Sarah Leatherwood, four tracts of land (describing them). Also four negroes, to wit, Fillia, Raleigh, Fannie and Robert. Also four head of horses, equal to any of my stock I may have on hand. Also ten head of cattle, equal to the medium of my stock that may be on hand at my death. Also twenty head of hogs, equal in value to my stock, and also twelve head, equal in value to my stock. Also all my household and kitchen (793) furniture, together with all the poultry on the farm of whatever nature or kind. All the above-named articles she is to have the undisturbed possession of during her natural life. At her death they shall descend to and become the property of my three blind sons, to wit, Edward, Elias and Jason, to be equally divided between them for their support; to be managed for them by my executor; in case one of them should die, then said property, with its increase, shall descend to and become the property of the other two; in case two of them die then the aforesaid property shall inure and become the property of the remaining one; at his death all the property that remains I will to be sold by my executor to the best advantage, and the moneys arising from said sale shall be equally divided among all my grandchildren of whatever name."

The defendants demurred to the complaint and insisted that by the terms of the will the land descended to the survivor of the three blind sons, with the right of disposal in fee, "and that it does not appear from the complaint that there was no disposition made of said property or that any of said property remained at the death of the survivor; and that it does not appear from the complaint that the plaintiff has or claims any other right or interest in said land outside of his appointment as administrator, etc.; and that it appears from the face of the complaint that the plaintiff is nothing more than a naked trustee, and it does not appear therefrom that the said trust has not been executed."

His Honor overruled the demurrer, holding that by the will the three sons had only a life estate in the land, and defendants appealed.

G. H. Smathers, J. C. L. Gudger and T. F. Davidson for (794) *plaintiff.*

G. S. Ferguson, J. M. Moody and T. R. Purnell for defendants.

BURWELL, J. The testator, whose intention is the great object of inquiry in our effort to correctly construe his will, seems most naturally to have considered four persons—his wife and his three unfortunate sons—the special objects of his provident care. To his "beloved wife," as he calls her, he gives the home where he and she, with the blind boys, lived, and other lands, and all the furniture, and certain slaves and stock, indicating most unmistakably his wish and purpose that the home, as he left it, should be the home of his widow. His intentions as to her are plain.

It will be noted that he makes no provision for his three blind children during the life of his wife, in whose "undisturbed possession" he directed "all the above-named articles" should remain "during her natural lifetime," thus indicating his entire confidence that so long as the mother lived they would be cared for by her out of the property thus given to her. But he is careful to provide for these unfortunates after the death of the mother; and as he showed, by giving them nothing during their mother's life, his belief that they were helpless and in need of constant care, so he further exhibited that belief by his provision for them after her demise. The property, including the land described in the complaint, was then to come under the *management* of the executor of his will for the support of his three blind sons equally. His language shows an evident intent that they should neither be burdened by, nor entrusted with, the management of the estate from which he wished them to be supported; and while he says that these lands and the other property named shall "descend" to them, and "become their property"
(795) "inure" to them, and upon the death of one of these should inure and become the "property of the surviving ones," all these expressions are controlled and explained by the provision that at the death of that surviving one "all the property that remains" shall be sold by the executor and the money divided among his grandchildren of whatever name. We think it very plain that the testator's intention was that upon the happening of this event—the death of the last survivor of the three blind sons—all the property committed by him to the management of his executor for their support, the land and as much of the personal property as had not been consumed or lost, should then be sold for division as above stated.

Since, under this construction of the will, it is the duty of the plaintiff administrator to sell the land described in the complaint, it is his right and his duty, standing as he does in the place of the executor, to take possession of that land that he may in a proper manner discharge the trust imposed upon him. He has all the rights and powers and is subject to the same duties as if he had been named as executor. The Code, sec. 2168. The executor of this will was expressly charged with the manage-

ment of this land, which implied the possession thereof, during the life of the three blind children, and it is clearly implied that his possession was to continue till he had made sale thereof for the purpose mentioned in the will. As the executor could recover the possession of this land if he were living (The Code, sec. 1501) so can the plaintiff do, being clothed with all his rights and powers. *McAlpine v. Daniel,* 101 N. C., 550; The Code, secs. 2166, 2168.

Such being the right of the plaintiff under the will which he has been appointed to execute, it follows that the demurrer was properly overruled. The effect of it was to admit the truth of all the allegations of the complaint, among which was one that defendants unlawfully and wrongfully withheld the possession from the plaintiff. He (796) avers a right to the possession, which we adjudge to be valid if the facts upon which he says it rests are true, and a wrongful withholding of that possession by defendant. He is entitled to judgment unless an answer is filed.

AFFIRMED.

Cited: Taylor v. Brown, 165 N. C., 162.

J. H. TUCKER v. THE INTERSTATE LIFE ASSOCIATION.

Petition for Removal to Federal Court—Practice—Judgment for Want of Answer—Appeal.

1. Where it appears upon the face of a petition to remove a cause pending in a State court to the Federal court that the former had exclusive original jurisdiction, it is the right and the duty of the State court to insist upon its exclusive authority and to retain jurisdiction.

2. Failure to enter exception to a judgment within ten days from the expiration of the term of the court forfeits the right of appeal.

3. A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal.

ACTION brought to recover the sum of $1,000, due by virtue of the contract contained in a policy of insurance, and heard at December Term, 1892, of BUNCOMBE, before *Bynum, J.*

The reference in the opinion of *Associate Justice Avery* to the facts is sufficient for an understanding of the decision of the Court.

(797) *Cobb & Merrimon and R. O. Burton for plaintiff.*
No counsel contra.

AVERY, J. If it were conceded that the petition for removal to the Circuit Court of the United States on the ground of local influence and prejudice was duly verified, or if the plaintiff had admitted that such a petition had been filed in the Federal court and an order of removal had been made there (though, in fact, it was not pretended that such action had been taken), it would still have been the right and the duty of the State court to insist upon its exclusive authority and to retain jurisdiction, because the sum demanded, under the policy, is the matter in dispute, and is less than two thousand dollars. *In re Pennsylvania Co.*, 137 U. S., 451; *Lawson v. R. R., ante,* 390.

If the *nisi prius* courts of the States were bound to desist from further proceedings upon the filing of a petition in such courts for removal, or of the record of a petition previously filed and the order made by a Federal court, when, upon the face of the petition, in either case, it appeared that the State court had exclusive original jurisdiction, then the right of litigants in the State tribunals to speedy trial (Const., Art. I, sec. 18) must be enjoyed subject to voluntary forbearance of the Federal courts to overstep the limits of their rightful jurisdiction.

The just and well-settled rule is that where a valid order of removal is made, the jurisdiction of the State court ceases *ipso facto,* and any subsequent orders or proceedings therein are void; but where the Federal tribunal orders the record to be sent up in a case of which it is manifest the State courts have exclusive jurisdiction, though the record may be transmitted in obedience to the order, the subsequent proceedings of the Federal court in assertion of its authority to determine the con-
(798) troversy are equally null and void. *Lawson v. R. R., supra.*

After entering an appearance and filing an answer at the end of sixty days, allowed on his own motion, counsel was not present when the case was called for trial, nor was any exception entered to the judgment of the court within ten days after the end of the term. The right of appeal, therefore, has been lost by laches; but if that were not so, there was no error in granting the motion for judgment for want of an answer when the complaint was duly verified, while what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." beside the signature, but without an official seal.

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

Cited: Howard v. R. R., 122 N. C., 954; *Beach v. R. R.,* 131 N. C., 401.

CHARLES MOODY ET AL. v. A. S. JOHNSON.

Foreign Will—Probate—Witnesses—Authentication of Records—Comity Between States.

1. Where a will relating to land was admitted to probate in another State before the enactment of Revised Code, ch. 119, sec. 17, requiring two of the subscribing witnesses to be actually examined, and the order of the court admitting the same to probate recited that there were two attesting witnesses and that the will was duly proved by them, the presumption arises that each of them was examined and testified to everything essential to show that the will was executed in accordance with the requirements of sections 1 and 6 of chapter 122, Revised Statutes.

2. When duly certified, full faith and credit will be given to the records of a sister State by the courts of this State, reserving, however, the right to determine what forms and ceremonies shall be essential to the valid transfer of title to land lying in the borders of this State.

3. Neither comity nor principle precludes the Legislature of this State from prescribing regulations as to passing upon authenticated records from another State preliminary to recording them.

ACTION to recover land, tried before *Hoke, J.,* at Spring Term, (799) 1892, of MADISON.

The plaintiff Reeves claimed title to an undivided one-half of the land under the will of Alexander Williams, and upon offering a certified copy thereof from the County Court of Greene of the State of Tennessee, his Honor intimated that he would hold it inadmissible in evidence, and the plaintiff Reeves thereupon suffered a nonsuit and appealed. The order of probate, claimed to be defective, is set out in the opinion of *Associate Justice Avery.*

T. R. Purnell for plaintiff.
Gudger & Martin for defendant.

AVERY, J. The plaintiff M. P. Reeves, who claimed one undivided half of the land in controversy, through the will of Alexander Williams, of Tennessee, has joined the heirs at law of Moody, as alleged cotenants, holding the other undivided half, in bringing this action against the defendant, who offered a tax deed as color of title, and also testimony tending to show continuous adverse possession for twenty years before the action was brought. In deference to an intimation that the court would hold the certified copy of said will incompetent as evidence to show the transmission of title to the land, the plaintiff Reeves submitted to judgment of nonsuit and appealed.

The will purported to have been executed on 10 April, 1843, and was proved in the county court of Greene County, Tennessee, in 1852, the record of the said probate being as follows: "The last will and testament of Alexander Williams, deceased, was produced in court for probate, with Tipp Henderson and J. J. Mitchell subscribing witnesses thereto, by whom the same was duly proved, and the court thereupon ordered that the said will be recorded. Whereupon Catherine D. Wil-
(800) liams, the executrix named therein, appeared in court, and she being exonerated by the will from giving security, took the oath of an executor, and the court ordered that letters issue to her accordingly."

The act of 1784 (Revised Statutes, ch. 122, secs. 1 and 6) was construed at an early day as requiring the attestation of two witnesses in order to render a devise therein contained effective to pass land to the devisee, and in this respect the law has remained unaltered up to the present time. *In re Thomas,* 111 N. C., 409. But in the manner of proving wills, a material change was made when, as a part of the Revised Code, the enactment that at least two of the subscribing witnesses should be actually examined took effect on 1 January, 1856. *Jenkins v. Jenkins,* 96 N. C., 254, and *In re Thomas, supra.* Prior to that time it had been repeatedly held that when the instrument upon its face appeared to have been attested by two witnesses, and the entry in the records of the proper tribunal showed that it was "proved in open court" by one of them "and recorded," the presumption would be that all things were done in accordance with law, and therefore the courts would infer, if there was nothing upon the face of the order to the contrary, that the witness examined testified that the other witness, as well as himself, signed in the presence of the testator. *Marshall v. Fisher,* 46 N. C., 111; *Harven v. Springs,* 32 N. C., 181; *Morgan v. Bass,* 25 N. C., 243; *Blount v. Patton,* 9 N. C., 245; *University v. Blount,* 4 N. C., 455; *Jenkins v. Jenkins* and *In re Thomas, supra.*

Commenting upon the act of 1784, *Taylor, C. J.* (in *Blount v. Patton, supra*), said: "The circumstances there enumerated are essential to the legal validity of the will, and their existence must be proved to the county court to authorize them to record the will. But it is not necessary to set them forth in the certificate of the clerk, because when
(801) it appears, as in this case, that the will was attested by two witnesses, and the clerk certifies that it was proved by one, the *proof must prima facie be intended to have been such as the law requires.*" The later case of *Blount v. Patton, supra,* involved the validity of a previous probate before a county court in Tennessee, just as in the case now under consideration. The probate in that case was held by a majority of the Court to be insufficient, because the substance of the

testimony of the single witness examined purported to be set out in full, and failed to show that the other witness, as well as himself, subscribed to the will in the presence of the testator. Opinions were delivered in that case by three judges, *Seawell, Hall* and *Taylor.*

The Court concurred in holding that while adhering to the rule that the title to land lying in North Carolina would not pass by a will unless it was attested by at least two witnesses, as prescribed by our statute, each expressed clearly the opinion that if the record in that case had simply shown that the instrument was proved by one of the witnesses, the law would have presumed that it was rightly done in the court of a sister State, just as the same presumption would have arisen in favor of the proceedings of our own courts. In the absence of any judicial knowledge of the statutory law of another State, the courts of this State must act upon the presumption that the common law of England, as modified by statutes passed previous to our separation, and so far as they are consistent with the genius of our republican institutions, prevails in the original Colonial States and all other States formed primarily by emigration from them. *Brown v. Pratt,* 56 N. C., 202; *Crump v. Morgan,* 38 N. C., 91; 3 A. & E., 348, and notes. *Taylor, C. J.,* acting upon this idea, quoted the rule applicable to proof in a court of common law as laid down by *Lord Camden,* that "One witness is sufficient to prove what three have attested, and though (802) that witness must be a subscriber, yet that is owing to the general common-law rule that where a witness has subscribed an instrument he must always be produced, because he is the best evidence."

Before any statutes were passed marking out the manner of proceeding by an executor, appointed in a will that had been proved and recorded in another State, at the domicile of the testator, who wished to administer in some county in North Carolina in which his decedent had left personal property, *Henderson, J.,* for the Court, declared that it was necessary that the will should be authenticated and letters testamentary issued here. But as to the mode of authentication the Court said: "But when the probate has been made in a sister State we think that the Constitution of the United States and the law of the United States thereupon give to the probate, when authenticated according to the law of the United States, such authentic form as that our courts will recognize the probate without proof, and that such probate may be proffered to the Court to sustain the character of an executor." *Helme v. Sanders,* 10 N. C., 563.

It was thus settled at an early day that when duly certified, full faith and credit was to be given to the records of a sister State, but that without questioning their authenticity this State reserved the right to determine what forms and ceremonies should be essential to the valid transfer

of title to land lying within her borders. Neither comity nor principle, however, precludes the Legislature from prescribing regulations as to passing upon authenticated records from another State preliminary to recording them. *Kelly v. Ross,* 44 N. C., 277; *Ward v. Hearne, ib.,* 184; *Knight v. Wall,* 19 N. C., 125. In *Blount v. Patton, supra,* the
(803) Court, following the English authorities referred to, thought it would have been sufficient to have examined one witness if the record had shown either that both he and the other witness signed in the presence of the testator or that it was duly proved by one witness, thereby giving rise to the presumption that he testified all that was essential. The will in that case was declared inadmissible for no other reason than that the probate negatived the presumption that would have arisen from such a probate as that under consideration, and for that reason has been repeatedly cited to show the validity of the proof by one witness where, by its terms, it raises instead of rebutting the presumption of full and perfect proof. *Morgan v. Bass* and *Harven v. Springs, supra,* and *Jenkins v. Jenkins,* 96 N. C., 254.

But the order of the county court of Greene County recites the fact that there were two witnesses in our case and that the will was duly proved by both of them. The presumption, therefore, arose that each of them was examined and testified to all that was necessary to show that the will was executed in accordance with the requirements of the statute so as to make it effectual to pass real as well as personal estate. This order was made in the year 1852, before the latter statute, embodied in the Revised Code, was passed.

Counsel for defendant insisted so earnestly upon the argument of the appeal that the probate of the will of C. D. Williams was in precisely the same form, and, as it was not proved until 1870, was insufficient to pass land, that this Court was led to a consideration of several questions suggested before adverting to the fact that no exception seems to have been taken by the plaintiff to the probate of that will, as appears from an examination of the statements of case in both appeals. (See defendant's appeal, *infra.*) So the questions, whether it would be necessary now to cause that will to be proved again in conformity to the requirements of the later act, or whether the defects in the probate
(804) entered, if any, have been remedied by any of the successive curative acts passed since 1870, do not arise. In excluding the will of Alexander Williams there was error, and judgment of nonsuit must be REVERSED.

Cited: R. R. v. Mining Co., 113 N. C., 244; *Davis v. Blevins,* 123 N. C., 383; *Bank v. Carr,* 130 N. C., 480; *Roberts v. Pratt,* 152 N. C., 734.

CHARLES MOODY ET AL. V. A. S. JOHNSON.

Ejectment—Tenants in Common—Recovery by One, as Against Trespasser, Inuring to Benefit of Another.

1. Where, in an action to recover the possession of land, the plaintiff's testimony demonstrates incidentally the fact that a person, other than the defendant, holds as tenant in common with plaintiff all of the undivided interest not held by the latter, the action inures to the benefit of such cotenant as against a trespasser claiming sole seizin in himself and relying on an invalid tax deed with possession to show title under adverse right, and entitles the nominal plaintiff to recover possession of the whole for himself and his cotenant.

2. In an action for the recovery of land, plaintiffs claimed title as the heirs and devisees of two tenants in common who originally owned the land; the claimant of the interest of one of the original tenants submitted to nonsuit upon the improper exclusion of a will, under which he claimed, as evidence; of the remaining plaintiffs, heirs of the other original tenant in common, one was a minor, the other two adults; defendant claimed by adverse possession and color of title as against all the heirs and representatives of both the original tenants in common, except the infant plaintiff; in deraigning their title to one-half, plaintiff's testimony showed title to the other half in the nonsuited plaintiff; on the trial the court required the jury to find whether the defendant had acquired title against either the adult or minor plaintiffs, and instructed them if they should find that defendant had acquired title against neither then they should find that his possession of the whole was wrongful: *Held*, (1) that such instruction was proper, for a finding that the defendant had not acquired title by his alleged color, as against any of the heirs of one of the original tenants in common, necessarily established that his possession had not been such as to mature his title against the heirs or devisees of the other original tenant in common; and (2) that judgment in such case was properly given for plaintiffs for title to one-half and for recovery of possession of the whole to inure to benefit of the owner of the other half.

ACTION to recover land, tried before *Hoke, J.*, and a jury, at (805) Spring Term, 1892, of MADISON.

T. R. Purnell for plaintiffs.
Gudger & Martin for defendant. (810)

AVERY, J. Where the testimony relied on in an action for the possession of land to establish the plaintiff's title demonstrates incidentally the fact that a person or persons, other than the defendant, hold as tenants in common with plaintiff all of the undivided interest not (811) held by the latter, the action inures to the benefit of such cotenants as against a trespasser claiming sole seizin in himself, entitling the nominal plaintiff to recover, for himself and them, the whole. *Allen v.*

Sallinger, 103 N. C., 14; *Gilchrist v. Middleton,* 107 N. C., 663; *Foster v. Hackett, ante,* 546. When, in deference to the ruling of the court, whether erroneous or not, the coplaintiff Reeves submitted to judgment of nonsuit and appealed, the subsequent proceedings must be considered just as though Reeves had not joined the heirs of H. M. Moody, but the action had been originally brought and subsequently prosecuted by them only. The whole of the land in controversy was covered by the grant to John Gray Blount, and was transmitted by successive conveyances to M. S. Temple, Thomas Johnson and Alexander Williams, whereupon said Temple conveyed his undivided third to said Johnson and Williams. A paper-writing had been offered purporting to be a copy of the will of Alexander Williams, in which he devised his undivided half-interest to his wife, C. D. Williams. If this instrument had been admitted, the will of C. D. Williams, the evidence that she did not marry again, and the deed of her executor, acting under a power contained in her will, to Link, with Link's deed to Reeves, would have shown *prima facie* title in Reeves as tenant in common with the plaintiffs and transmitted from the same source. After eliminating the evidence offered to trace title to one undivided half from Alexander Williams to Reeves, the testimony, if sufficient—as the jury determined it was—to show that the title to the other undivided half passed by successive conveyances from John Gray Blount to the plaintiffs, necessarily demonstrated the fact that the heirs or assigns of Alexander Williams, though there was no evi-
(812) dence tending to designate or identify them, succeeded to his rights and held through the same line of mesne conveyances a half-interest in common with the three children and heirs-at-law of H. M. Moody. If the heirs of H. M. Moody had not been able to ascertain whether any or, if so, what disposition had been made by Alexander Williams of his interest, they could sue for the whole in their own names without explanation or with a specific averment that they were bringing the action in behalf of the heirs at law of Alexander Williams, who were not known by name or too numerous to mention, and in either way, upon showing, incidentally to the deraignment of their own title, that Alexander Williams was the owner of the other undivided half, and that he was dead, might recover the whole as against a trespasser denying the plaintiff's title in his answer and relying on a deed with possession to show title under an adverse right. *Foster v. Hackett, supra.* The recovery would ultimately inure to the benefit of those who might show title through him whether by descent or purchase.

The defendant claimed under a sheriff's deed for taxes, adverse in its very incipiency to the claim of the heirs of Moody and the representatives of Alexander Williams. He was, therefore, at the beginning of his occupancy a trespasser, setting up an invalid tax deed under which he

might acquire title by the laches of the true owners. If his possession did not ripen his title to the whole or any part, then he continued to be a trespasser up to the moment when the action was brought. The instructions of the court upon the three issues were well calculated to enable the jury to apply the law to the testimony and arrive at and announce their conclusion not only as to what was the actual interest of the plaintiffs, but whether the defendant was a trespasser or cotenant.

There was a conflict in the evidence bearing upon the question whether the defendant entered and put the statute in motion (813) before the death of H. M. Moody, in which event it would have continued to run against his infant child, or whether the occupancy began after his death, which occurred in the year 1870, so as to relieve the youngest child, who had arrived at maturity within three years before the summons issued, from the bar of the statute. It was, therefore, the province of the jury to determine, as they were told to do, whether the plaintiffs were in fact entitled in their own right to one undivided half, or whether the rights of all, except the youngest child, were barred. It was the duty of the court to require such specific findings in order to protect the rights of the parties against the effect of the estoppel of the judgment, and to enable the infant heir, if all others were barred, to recover his interest. *Allen v. Sallinger, supra; Dickens v. Long,* 109 N. C., 165. If, instead of responding to the second issue, "Yes, as to one undivided half," the jury had answered that the youngest of the heirs of H. M. Moody was the owner of one undivided sixth, then, under the instruction of the court, it would have been their duty to find, in passing upon the third issue, that the defendant was not a trespasser, because his title had matured by possession against all of the heirs who were not laboring under disability. If such had been the findings, there would have been error in rendering a judgment for the whole, because it would have been apparent to the court that the defendant had acquired by possession, and one of the plaintiffs by descent, such interest as entitled that particular plaintiff to be let into possession only to the extent of his interest with the defendant.

But when the jury found that the defendant's possession was still wrongful it necessarily meant that he could have acquired no interest whatever by color of title, because if he had acquired seven years continuously, either before or after the death of H. M. Moody, (814) he must have acquired under the instruction given, as against those heirs, all but one undivided sixth held by the youngest. It followed, therefore, that if the jury determined that the two older Moody heirs were not bound by the defendant's possession, it could not have been an occupancy of such nature and duration as to mature title against

the heirs or representatives of Alexander Williams, to whom the plaintiffs, in the deraignment of their own title, had traced the other undivided half.

Lenoir v. Mining Co., 106 N. C., 473, which was cited to sustain the contention of the defendants, is not analogous to this. The plaintiffs there sued for the whole, while the defendants in their answer set up title to one undivided third of the land and admitted that the plaintiffs were cotenants with them. The plaintiffs there offered paper title to one undivided third and testimony tending to show title in themselves to the other interest also, but by possession under color. No evidence was submitted tending to prove that any person other than the plaintiffs could deraign title from the same source to the other two-thirds. The defendant did not offer a regular chain of title, but introduced a paper purporting to convey to it one undivided half interest in order to show color of title and testimony tending to prove possession under it. As between the cotenants it was held that the defendant could establish his title to an undivided one-third by possession under color, and that while a cotenant could not be barred by adverse occupancy for a shorter period than twenty years, still a possession might be adverse to some undivided interests, so as to mature title in seven years as to them, though not adverse as to others.

(815) In our case, though the defendant claimed sole seizin, the judge who presided in the court below, with a very clear perception of the difference between the two, submitted the second issue in two aspects of the testimony, and made the finding on the third conform to the response to the second. If the defendant's title had not matured as to either of the three plaintiffs then, *ex necessitate,* it followed that he had acquired nothing by his occupancy, and was still a trespasser as to the plaintiffs and all who were shown to have derived title from the same source. If the defendant had acquired title as to two-sixths he was not a trespasser, but a cotenant and *non constat,* but that his occupancy had ripened into title as to Williams' half interest also. So, if the answer to the second issue had been "One-sixth" that to the third would have been "No," and the judgment would in that event have ordered that the youngest of the three plaintiffs be let into possession with the defendant.

The practical difference between the present status of the case and that which would have been presented had the will of Alexander Williams been admitted and the finding followed that Reeves and the Moody heirs were the owners, is that, now, the plaintiffs may be concluded by an adjudication from denying that the title to one undivided half interest descended to the heirs and devisees of Alexander Williams, and that the plaintiffs are the owners of the other half.

The judgment of nonsuit being set aside and a new trial granted, the plaintiff Reeves may, on motion, have the decree amended so as to declare that title to one-half descended to the heirs or passed to the devisees, if any, of said Williams, and that plaintiffs hold the other half in fee. If the heirs of Moody do not contest the right of Reeves he can again submit to nonsuit and enter with them. If they resist his claim, or if he prefers to have the matters adjudicated (816) so as to operate by way of estoppel, he can have the cause, as to all of the parties before the court, retained till it shall have been ascertained by a jury whether the interest of Alexander Williams has been transmitted by *mesne* conveyances to him.

For the reasons given we hold on the defendant's appeal there was

NO ERROR.

Cited: Barnhardt v. Brown, 122 N. C., 590; *Taylor v. Meadows,* 169 N. C., 136.

M. R. KIMSEY ET AL. v. A. P. MUNDAY ET AL.

Cherokee Lands—Lapsed Entries—Grant Under Junior Entry.

1. Where enterers of Cherokee lands, as to the acquisition of which a mode of procedure different from that applicable to other public lands was in force prior to 1 November, 1883 (see sections 2465, 2466, and 2477 of The Code), laid their entries in 1855 and 1860, and failed to comply with the requirements of law and to pay the purchase-money and take out grants until February, 1890: *Held,* that their long delay was an abandonment of the equity which their entry gave them to acquire title to the lands so entered, and having obtained grants, they held the legal title to the lands in trust for a grantee of the same land issued in October, 1890, under an entry made in December, 1889, and this would be so even if the later grantee had made his entry with notice of the previous entries of 1855 and 1860.

2. A grant of land made under a lapsed entry is not necessarily void, and where, in an action of ejectment involving conflicting entries, the plaintiff seemed to have the senior entry and a senior grant, but the defendant, junior grantee under a junior entry, in his defense alleged that the plaintiff's senior entry had lapsed, and set up his equity to have the plaintiff declared a trustee for defendant under his later entry: *Held,* that such assertion of counterclaim or equity was not a collateral attack on plaintiff's title.

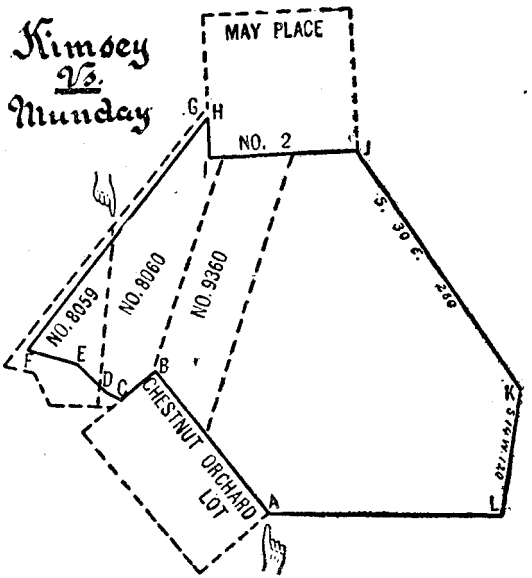
3. It was not error in the trial judge to refuse to submit issues tendered by a party in an action of ejectment when it appeared to such judge that every pertinent inquiry could be presented in the three issues ordinarily submitted in such actions.

4. Where plaintiff claims under grants issued under lapsed entries, he cannot fall back on a subsequent entry made a short time before such grants were issued.

5. Where a junior grant under a junior entry is good against a senior grant under a lapsed senior entry, the question of the priority of survey is of no moment, nor is vagueness in the junior grantee's entry if cured by his survey and grant.

(822) ACTION for the recovery of three tracts of land claimed by the plaintiffs and in possession of the defendants, tried before *Bynum, J.*, and a jury at Fall Term, 1892, of MACON.

The plat of the land was as follows:



NOTE.—The plaintiffs' lands are represented inside the dotted lines and the defendant's by the dark solid lines. The May lot, No. 2, and the Chestnut Orchard lands are not in dispute.

Jones & Daniels for plaintiffs. (825)
Kope Elias and T. F. Davidson for defendants.

MACRAE, J. It will be seen that chapter 17 of The Code in relation to entries and grants, does not apply to those of the plaintiffs, for the reason that the lands therein granted were a part of the land acquired by treaty from the Cherokee Indians and are governed by the provisions of what is known as the "Cherokee Land Law," chapter 11 of the Code, wherein a different mode of procedure is prescribed for the acquisition of land from the State previous to 1 November, 1883, when by section 2478 the Cherokee lands were made subject to entry as other public lands.

The plaintiff claims title to that portion of the lands on the (826) plat which is embraced in the dotted lines by virtue of entries made in 1855 and 1860 and grants issued to him as assignee on 10 February, 1890.

The defendant Heighway claims the land embraced within the solid lines under an entry made by defendant Munday on 21 December, 1889, a grant to said Munday, 20 October, 1890, and a deed from Munday to Heighway, 16 March, 1891.

By the claim of the plaintiff he has the senior entries and the senior grants. But the defendant contends that the entries of 1855 and 1860 had lapsed, and that all rights to grants thereunder had been abandoned and lost by long failure on the part of the enterers to take out grants, as, deducting the time between 20 May, 1861, and 1 January, 1870, when the statute of limitations did not run, there was a period of over twenty-six years between the laying of the entries and the taking out of the grants. Defendants deny that plaintiff is the owner and entitled to the possession of the land described in the complaint, that within the dotted lines, and admit the possession by defendants and deny that it is wrongful. Their further defenses and the plaintiff's reply are set out in the statement of the case.

Defendant tendered eight issues covering the evidential questions rather than the issues proper, which should be submitted to the jury. His Honor declined to submit them, and submitted the usual issues in an action of ejectment. We think his Honor might have presented every pertinent inquiry to the jury under the three issues. It was a matter of discretion with him how they should be presented. The matter has been discussed so often of late that we forbear to quote authorities.

Under the general law regulating entries and grants, the entry creates an equity, which, upon the payment of the purchase-money to the State in due season, entitles the party to a grant, and consequently to a conveyance from another party who obtained a (827)

prior grant under a junior entry with knowledge of the first entry. *Plemmons v. Fore,* 37 N. C., 312, and cases cited; *Gilchrist v. Middleton,* 108 N. C., 705; *Bryan v. Hodges,* 107 N. C., 492.

Section 2766 of The Code prescribes the time within which the enterer shall pay for said land as on or before 31 December which shall happen in the second year thereafter (viz., after the entry), or the entry shall become null and void and the land may be entered by others.

But the law regulating entries and grants of Cherokee lands before 1 November, 1883, provides only such limitations of time within which the purchase-money shall be paid, as will appear in the series of acts collected in chapter 11 of The Code, Vol. II. By section 2465 of The Code, Laws 1852, ch. 119, it was provided at what prices the lands lying in Cherokee County should be sold, and by section 2466 the mode of payment therefor was prescribed as follows:

"It shall be lawful for all persons entering vacant lands in said county of Cherokee to file their bonds, with approved security, with the entry-taker, payable to the State in four equal annual installments, which shall when paid be in full of the purchase-money for the tract or tracts so entered, and upon proof of such payment as herein provided, the Secretary of State shall issue the grant or grants according to the entry and survey thereon, and in case the land shall have been surveyed by authority of the State the grant shall issue according to the survey so made, and not otherwise, and no portion of any tract so surveyed shall be granted without the whole." And this section is made ap-
(828) plicable to lands in Macon and Haywood counties by section 2468.

By section 2477 of The Code, which is section 1, chapter 22, Laws 1854-55, ratified February 15, 1855, shortly after the entries heretofore referred to as made in 1855, it was provided that "All persons who have, previous to 15 February, 1855, entered any of the vacant lands in the counties of Cherokee, Macon, Jackson and Haywood, pursuant to an act of the General Assembly at its session of 1852-53, chapter 119, entitled 'An act to bring into market the lands pledged for the completion of the Western Turnpike Road,' which have not yet been surveyed, and bonds filed for the purchase-money, according to said entry or entries, shall cause the same to be surveyed and file bonds for the same on or before 1 May, 1856; and in case the said entry or entries be not surveyed, nor the entry-takers of said counties notified within the aforesaid time, that it is his intention to become the purchaser accordingly, then it shall be lawful for any other person, who has entered the same lands, to cause the same to be surveyed and to file his bonds for the same on or before 1 July, 1866; and in case the person or persons who have heretofore entered any of the vacant lands afore-

said shall fail or neglect to comply strictly with this section according to its true meaning, then it shall be lawful for any other person or persons to enter said lands, and be allowed three months to survey and file bonds for the same; and the said time of three months shall be allowed in any other instance from and after the date of said entry, unless otherwise provided for: *Provided,* and it is the true meaning of this section that the right to take the said lands in whatsoever manner entered heretofore or hereafter shall be regulated according to priority of entry."

And, so far as we are informed, there was no further legisla- (829) tion on the subject until the adoption of The Code of 1883, when section 2478 was inserted, opening said lands to entry as other public lands.

That the equity in the enterer to secure the title may lapse or be abandoned under the general law is evident; and as to the entries No. 8,059 and No. 8,060 on the plat there can be no question that a neglect for many years to comply with the requirements of the statute (section 2477) bars the right of the enterers to take out a grant under those entries.

As to the entry of tract No. 9,360 on the plat of 16 March, 1860, under the provisions of section 2466, quoted in full above, it was the duty of the enterer to file his bonds, with approved security, with the entry-taker of Macon County, payable to the State in four annual installments.

It could hardly have been intended by the law that as to those entries made after 1856 there should be no limit upon the enterer as to the time in which he was to perfect his right to a grant. Indeed, the requirement that he should give bonds, the last of which was to become due in four years after the entry, would indicate in strong terms the intention of the law that the land should be paid for in that time. If, however, he should be allowed a reasonable time after the maturity of the last bond to pay it and take out his grant, by all analogies twenty years would raise a presumption of abandonment.

In Pennsylvania it was held that "ordinarily abandonment involves a question of intention, and is for the jury on all the circumstances, but where it depends on *lapse of time,* and there are no repelling circumstances in proof, it becomes after seven years a conclusion of law to be declared by the Court." *Emery v. Spencer,* 23 Pa. St., 271.

The entries of 1855 are governed by the act of 1854-55, and (830) had lapsed by failure to comply with that act. The entry of 1860 being governed by no express limitation of statute, it was the duty or privilege of the enterer to have paid his bonds and taken out his grant within a reasonable time. And without announcing any rule as to what

length of time would be reasonable in every case, we have no hesitation in holding that the period between 15th March, 1860, and 10th February, 1890, deducting the period in which the statute of limitations did not run, was unreasonable for delay on the part of the plaintiff and his assignor, and that the defendant Munday might have entered the same land, even with notice of the previous entry, unaffected by any equity of the plaintiff under the old entries.

It is not to be understood, however, that the grants to the plaintiff upon the lapsed entries are void. "Because a grant is taken out upon an entry which has lapsed by the efflux of time it does not follow that it is void." *Wilson v. Land Co.,* 77 N. C., 445. It was held in *Gilchrist v. Middleton, supra,* that where a grant was issued in 1847 under an entry made in 1801 the grant was not void on its face, but the enterer had a right to call for a grant even 46 years afterwards, provided the purchase-money was paid to the State before the 31st of December of the second year after the entry was made.

We do not understand that the defendants undertake in this case to attack the plaintiffs' grants collaterally, for it is well settled that a grant can only be vacated by proceedings under the statute, sections 2786 and 2788 of The Code. *Crow v. Holland,* 15 N. C., 417. But as very fully pointed out in *Gilchrist v. Middleton, supra,* by *Mr. Justice Avery,* where he cites many authorities: "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
(831) 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 a Court of Equity asking that the former be declared a trustee and 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 proceeding. 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; *Monroe v. McCormick,* 41 N. C., 85; *Allen v. Gilreath, ib.,* 252."

Since the distinction between actions at law and suits in equity have been abolished the plaintiff may bring his action or the defendant his counterclaim, seeking this relief, in the one action under the Code of

Civil Procedure. In our case the plaintiff seems to have the senior grant and the senior entry. The defendant, however, in his defense or counterclaim, sets up his equity alleging the lapse and abandonment of the senior entry, and other defenses. But the defendant does not seek to vacate the first grant. His demand is that the plaintiff be declared a trustee for him, and required to make him a deed for all land embraced in plaintiff's grants, which is also covered by defendant's grant. His demand repels the position that plaintiff's grants are void between these parties. It is founded on the very contrary position (832) that they are not void, but that the grantee is a trustee for the claimant under the later entry, because the prior entry had lapsed and been abandoned. *Featherstone v. Mills,* 15 N. C., 596. The plaintiff cannot claim under his entries of 1890, because the grants recite the older entries and are issued in pursuance of them. It has been held that even though the claimant, the subsequent enterer, had notice of the lapsed entries when he made his own, it would not revive the lapsed entries. "The law does not forbid a person from entering land previously entered by another." The second entry is made subject to the engagement of the State to make a grant to the first enterer, provided he pays the price before or at the day limited by law. *Stanly v. Biddle,* 57 N. C., 383.

It being determined that his Honor should have instructed the jury that upon the evidence the plaintiff's entries of 1855 and 1860 had lapsed, and that he could not fall back upon his entry of 27 January, 1890, the question of priority of survey, as to which there was much testimony going to show that plaintiff's survey was made prior to that of defendant, can be of no moment, for as between plaintiff and defendants the prior survey and grant upon lapsed entires cannot give the plaintiff the advantage, neither would the vagueness of defendant's entry if it were not sufficiently definite to give notice of all the land claimed by defendants, for this was cured by defendant's survey and grant, which covered all the land within the solid lines. *Harris v. Ewing,* 21 N. C., 369; *Johnson v. Shelton,* 39 N. C., 85; *Monroe v. McCormick, supra.*

It was error in his Honor to instruct the jury that if A. P. Munday did not give notice to Kimsey and Slagle that his entry was there and covered the land claimed by defendants, that the defendant's line would be established from I to 4. He ought to have instructed (833) them upon the evidence that defendant was entitled to all the land within the solid lines.

But as it was admitted that the lands represented on the plat by the solid lines A, B, C, D, E, F, G, H, I, J, K and L are covered by the defendant's grant, and that the lands represented by the dotted lines are covered by the grants of the plaintiff, and that the May place and Chest-

nut Orchard are not in dispute, and as it appeared that the defendants admitted possession of all the lands claimed by plaintiffs and a portion of said lands was not embraced within the solid lines, the plaintiffs were entitled to recover such part from defendants, and defendants were entitled to a conveyance from plaintiffs of all that part of the land embraced within the solid lines which was covered by plaintiff's grants.

ERROR.

Cited: Ritchie v. Fowler, 132 N. C., 790; *Frasier v. Gibson,* 140 N. C., 278; *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., 408.

D. O. DAVIS v. J. K. DUVAL, ADMINISTRATOR OF ABE BUCKNER.

Petition to Rehear—Exceptions to Charge—Assignment of Error—Compensation for Services to Decedent—Evidence.

1. While the refusal of the trial judge to give instructions prayed for will be deemed to have been excepted to, yet if it is not assigned as error in case on appeal it will be deemed to have been waived.

2. An assignment of error, such as "for error in the charge" or "excepted to," is too general and will not be considered by this Court.

3. Where, in an action by plaintiff to recover from the administrator compensation for services rendered the intestate, the defendant relied as a defense upon the fact that in a suit brought by him and his wife and other heirs at law of the intestate to set aside, for undue influence, a deed made by the intestate to plaintiff for services rendered, the deed was declared void, and it was in evidence that no compensation had been allowed the plaintiff by said settlement, and that there were assets in defendant administrator's hands and no debts against the estate: *Held,* that while there is no privity between the administrator and the heirs, yet as the estate goes to the heirs and next of kin, all of whom (with the defendant) were parties to the compromise decree setting aside the deed, such decree is admissible to show that the plaintiff's claim for services had not been paid or provided for.

(834) PETITION of defendant to rehear. For former decision and the facts involved see case between same parties, 111 N. C., 422.

Jones & Daniels for petitioner.
J. F. Ray contra.

PER CURIAM. We have considered with much care the petition to rehear and the brief of counsel, but we fail to perceive that we have overlooked any of the points presented upon the hearing, although we did not deem it necessary to refer to all of them in declaring the judgment of the Court.

There was no exception to the refusal of the court to give the instructions prayed for, and while such a refusal is deemed excepted to, yet if it is not assigned as error in the case on appeal the exception is deemed to have been waived. *Taylor v. Plummer,* 105 N. C., 56. Neither was there a sufficient assignment of error to the charge. The words "for error in the charge" are too general and will not be considered by this Court. *McKinnon v. Morrison,* 104 N. C., 354. The same is true as to the words "defendant excepts," as it is impossible to tell what part of the charge was objectionable to him. Nothing, therefore, remains but the exception to the testimony as to the amount of the assets and the condition of the estate, and the testimony in reference to the com- (835) promised decree.

The defendant and his wife, an heir at law and next of kin, and the other heirs at law and next of kin brought a suit against the plaintiff, alleging that the deed executed by the intestate to the plaintiff was procured by undue influence, and the same was set aside and a compromise decree rendered. It was in evidence that no compensation was by the said settlement allowed the plaintiff for the services rendered to the intestate, and for which it is insisted the deed was made. This defendant afterwards administered, and there is evidence that there are no debts of any consequence and that the personal assets amount to $500. This money goes to the defendant's wife and the other next of kin, all of whom were, with the defendant, parties to the compromise decree setting aside the deed. Having obtained a decree declaring the deed void, it is now contended that they can insist upon it as a payment, take all of the assets, and leave the plaintiff without any compensation whatever.

Although there is no legal privity between the administrator and the heirs; they should not, upon equitable principles, be allowed to deny the legal effect of a transaction, because they entered into it as heirs, and at the same time profit by it in their character as next of kin. According to these views the testimony was admissible, and this is all that is excepted to. No point was made as to the costs when the case was before us, and this cannot, therefore, be awarded upon a rehearing. We must assume, as is very probable, that his Honor did not consider the defense as made in good faith (The Code, sec. 535), and that he taxed the costs accordingly.

From what we can glean from the record we think that a very equitable result was reached in the court below.

PETITION DISMISSED.

Cited: S. v. Blankenship, 117 N. C., 809.

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(836)

KADER BIGGS & CO. v. JAMES B. WATERS AND WIFE ET AL.

Partnership Accounts—Referee's Findings—Evidence.

Where, in the statement of an account between partners, the only testimony as to an item of charge against one partner was the testimony of witnesses that the said partner sold to them and they paid him the money for certain articles of personal property, such as was dealt in by the firm: *Held,* that such testimony was sufficient to support the finding by the referee charging such item against the partner.

ACTION by Kader Biggs & Co. against J. B. Waters and others on a promissory note and for the foreclosure of a mortgage, heard on exceptions to a referee's report, before *Hoke, J.,* at Fall Term, 1892, of WASHINGTON.

The facts were as follows: L. Jackson, Jr., and the defendant, J. B. Waters, became partners in the livery and sale business at Plymouth, N. C., on 14 April, 1875, on which date Waters executed to Jackson his note for $1,112.50 for his interest in the business, and secured the same by a mortgage on land in which his wife joined. The note was subsequently assigned to the plaintiffs, who brought this action, praying judgment against the defendant Waters and the administrators of L. Jackson, Jr., who had died, and for a foreclosure of the mortgage. The defendant Waters by his answer claimed that during the existence of the copartnership, and before the assignment of the note by Jackson to the plaintiffs, Jackson became indebted to him in a sum much in excess of the amount of the note, and set up the same as a counterclaim and demanded judgment for such excess.

The account was referred to T. S. Armistead, Esq., who reported his findings of fact and conclusions of law to Spring Term, 1892, of

WASHINGTON, and awarded judgment to defendant Waters (837) for $221.15, against the defendants, administrators of L.

Jackson, Jr., who filed exceptions, but at Fall Term, 1892, waived all of the same except one, upon which they rested their case, which was as follows:

"That there was no evidence for the referee to consider in charging the intestate of defendant administrators with the proceeds of sale of certain horses and buggies sold by said intestate during the continuance of the partnership in the livery business."

The counsel further stated that part of the evidence which was claimed to support the charge was in the form of affidavits of certain persons who had witnessed the sales and to whom they had been made.

It was agreed that there was no objection to these affidavits for form, and same were to be considered as depositions duly taken, the position of the appellants being that the statements, embodied in such affidavits, and other evidence in the cause, constituted no evidence to support the findings of the referee and the charge against their intestate's estate.

The appellants waived all other exceptions to the report and the findings of the referee.

Upon examination and consideration of this report and evidence, the court was of opinion that there was evidence to support the finding of the referee in the item of charge pointed out by the exceptions, and gave judgment overruling the exceptions and confirming the report; from which judgment the defendants, Stubbs and Basnight, administrators, excepted and appealed.

The referee found as a fact, from affidavits and depositions of John R. Eborn and W. H. Robertson and others, that L. Jackson, Jr., sold horses, mules and buggies belonging to the firm of L. Jackson & Co., in the years 1875 and 1876, to the amount of $1,305, and, as a con- (838) clusion of law, found "that the facts stated in the affidavits are sufficient in law to charge the estate of L. Jackson, Jr., deceased, represented by W. H. Stubbs and T. J. Basnight, administrators, with the amounts named therein, making $1,305, to one-half of which, to wit, $652.50, the defendant Waters is entitled as a credit on the note," etc.

L. C. Latham and A. O. Gaylord for defendants.

No counsel contra.

PER CURIAM. After a careful inspection of the record we are unable to find any error in the rulings of the court below. The judgment is therefore

AFFIRMED.

W. C. BRADSHER v. JAMES A. CHEEK.

Libel—Qualified Privilege—Second Appeal—Affirmance Without Review.

Where this Court has in a former appeal in the same cause fully discussed the law applicable to the action, and the principles announced in the decision therein seem to have been carefully applied by the judge below in a subsequent trial, and upon an inspection of the whole record no error appears to have been committed on the second trial, this Court will not go over again the legal principles discussed in the former opinion, but, as authorized by chapter 379, Acts of 1893, and section 957 of The Code, will not write out its reasons at length, but simply announce its decision.

(839) ACTION for libel, tried before *Bryan, J.*, and a jury, at January Term, 1893, of DURHAM, in consequence of the grant of a new trial made by this Court on the former appeal (reported in 109 N. C., 278).

On the second trial there were numerous exceptions to the admission and rejection of testimony, to the charge of his Honor, refusal of instructions, etc., covering thirty-eight pages of printed matter. The jury gave verdict for the plaintiff, assessing his damages at $1,000, for which judgment was rendered, and defendant appealed.

Fuller & Fuller for plaintiff.
J. W. Graham and Boone & Parker for defendant.

PER CURIAM. When this cause was here before, 109 N. C., 278, the Court had occasion to discuss in that and its cognate case, *Ramsey v. Cheek, ib.*, 270, the law applicable to this action, which is brought for libel on a state of facts constituting a case of qualified privilege. The principles there laid down seem to have been applied with care by his Honor in the subsequent trial below. The exceptions are numerous and have been argued with much earnestness. On a careful and full examination, however, there appears to have been no material error committed, and we think substantial justice has been done. No good can be served by going over again the legal principles discussed in the former opinion. Probably no better case than this can be found in which to conform to the legislative desire as expressed in the recent act of the General Assembly (chapter 379, Laws 1893), that the Court shall not write out its reasons at length unless necessary, but shall in all such cases simply announce its decision. "Upon an inspection of the whole record" (The Code, sec. 957), we find

NO ERROR.

(840)

LEWIS F. DETRICK & SON v. E. R. McLEAN & CO.

Evidence—Action Against Partnership.

In an action against a partnership for the proceeds of goods sold on consignment, a statement of account rendered by one of the partners long after the dissolution of the copartnership, showing the indebtedness of the firm, not to plaintiff, but to a third party between whom and plaintiff no privity is shown, is not admissible as evidence either to bind the defendants or to contradict a deposition of one of the partners.

ACTION heard on defendants' appeal from a justice of the peace, at Spring Term, 1892, of RANDOLPH, before *McIver, J.*, and a jury.

The plaintiffs complained for goods consigned and delivered to the defendants to the amount of $35.35, and the defendants denied the right of the plaintiffs to recover, on the ground that full settlement had been made for the goods.

On the trial the plaintiffs introduced a statement of account made out by E. R. McLean, one of the partners, in September, 1889, more than two years after the dissolution of the copartnership, showing an indebtedness to the Bradley Fertilizer Company. No evidence was offered to show any connection or privity between plaintiffs and the Bradley Fertilizer Company. The statement was ruled out as irrelevant and immaterial, and plaintiffs excepted. After the close of defendants' testimony tending to show that a settlement had been made by defendants, the statement was again offered to contradict the testimony of one of the defendants, and was again ruled out under plaintiffs' objection.

There was verdict for the defendants, and from the refusal of a motion for a new trial plaintiffs appealed.

A. P. Gilbert for plaintiffs. (841)
L. M. Scott for defendants.

PER CURIAM. We find in the rulings of his Honor on the trial of this case

NO ERROR.

LIZZIE C. NEAL v. OLD NORTH STATE LAND COMPANY.

Dismissal of Appeal—Motion to Reinstate—Neglect of Counsel.

Where an appeal has been dismissed for failure to print the record, a motion to reinstate will not be allowed on the ground that such failure was caused by the neglect of counsel, for the neglect of counsel is the neglect of the party himself and does not excuse.

The appeal in this case having, on motion, been dismissed for failure to print the record, the appellant, after notice given, moved to reinstate the same.

J. F. Morphew for plaintiff.
P. J. Sinclair for defendant.

PER CURIAM. The additional explanatory affidavit of the clerk does not alter the case. The motion to reinstate must be denied. The neglect of counsel to have the record printed is the neglect of the party himself and does not excuse. *Edwards v. Henderson,* 109 N. C., 83, and numerous cases there cited. In that case it is said: "Appellants might as well fail to send up the transcript as not to have it in a condition to be heard by failing to have the 'case and exceptions' printed."

MOTION DENIED.

Cited: Dunn v. Underwood, 116 N. C., 525; *Calvert v. Carstarphen,* 133 N. C., 26; *Holland v. R. R.,* 137 N. C., 371, 380; *Seawell v. Lumber Co.,* 172 N. C., 325.

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(842)

J. S. MERONEY v. ATLANTA NATIONAL BUILDING AND LOAN ASSOCIATION AND J. W. GOLDSMITH, TRUSTEE.

Usury—Conflict of Laws—Mortgage—Injunction.

1. A contract, if made payable in another State to avoid the usury laws in this State, will be adjudged usurious, whatever may be the law of that State.

2. Where, in an action to redeem a mortgage on realty under which the trustee has advertised the land for sale, the complaint alleges that the contract, to secure which the mortgage was given, is usurious and was made payable in another State to avoid the usury laws of this State, there is a "serious issue" between the parties which entitles the plaintiff to an order restraining the sale until the hearing.

HAYS *v.* FORBES

ACTION, returnable to Spring Term, 1892, of CHEROKEE, to redeem a mortgage on realty situated in said county, given by plaintiff to defendant to secure a loan of three hundred dollars. The matter was heard on application by plaintiff for restraining order prohibiting a sale of said realty by defendant under the mortgage. The restraining order was granted, returnable on 23 May, 1892, and on application of both parties for a time to file further affidavits was continued and heard by consent before *Hoke, J.*, at chambers, on 23 June, 1892.

J. W. Cooper for plaintiff. (845)
J. W. Hinsdale and Batchelor & Devereux for defendants.

PER CURIAM. If it is true, as the plaintiff alleges, that the contract set out in the complaint was made payable in the State of Georgia to avoid the usury laws of this State, that contract will be adjudged to be usurious, whatever may be the law of that State. There is, therefore, a "serious issue" between the parties which, under the rule established by *Whitaker v. Hill,* 96 N. C., 2; *Harrison v. Bray,* 92 N. C., 488, and *Davis v. Lassiter, ante,* 128, entitles the plaintiff to have the restraining order continued in force to the hearing.

AFFIRMED.

W. M. HAYS v. H. F. FORBES.

Contract—Arbitration, Noncompliance With—Evidence.

A tenant in common of land conveyed his undivided interest therein to a creditor under an agreement that the value of the interest should be afterwards ascertained by two men, one to be selected by each party, and they to select an umpire in case of disagreement, and the difference between the debt and the value of the land should be then adjusted between the parties; such arbitration was not had, but the land was divided between the grantee and the other tenants in common by arbitrators of their own selection, who placed a valuation on the several shares: *Held,* in an action by the debtor against his creditor for the difference between the debt and the valuation fixed upon the land by the arbitrators, the report of the arbitrators as to the respective shares was improperly admitted, such arbitrators not having been selected according to the agreement.

ACTION tried before *Graves, J.*, and a jury, at Fall Term, 1892, (846) of GASTON.

This action was to recover the difference between a debt which the plaintiff owed the defendant and the value of land conveyed to defendant under an agreement to adjust such difference. Plaintiff testified that, being indebted to defendant, he conveyed by absolute deed his undivided interest in a tract of land to the defendant, with the understanding and agreement that the land was to be divided and assessed by two men to be selected by them, and if the arbitrators could not agree they were to choose another, and they should fix the value; that the land was divided between the defendant and the other tenants in common by arbitrators selected by defendant and his cotenants; that defendant advised him, plaintiff, not to go to the arbitration; that after such division and assessment he went to defendant, who denied the contract, and said he did not owe plaintiff anything.

Plaintiff then offered in evidence the report of the arbitrators, showing a valuation of the land conveyed by plaintiff to defendant at $500, which was admitted against the objection of defendant, who contended that it was incompetent for the reason that, as appeared by the submission to arbitration (which was read), the proceedings were had between the defendant and his cotenants solely for a division of the land among themselves, and not to ascertain the value of the land for the purpose of a settlement between him and the plaintiff.

(847) The material part of the testimony of defendant was the submission to arbitration by defendant and his cotenants, which was put in evidence, showing that they agreed to "abide by the decision of the following arbitrators, etc., in the lands of Lerry Hays, deceased, for partition and division, according to their several interests."

The following issue was submitted to the jury:

"Is the defendant indebted to the plaintiff, and if so, how much?"

Defendant asked the following instruction:

"If the jury should believe that there was an agreement between the parties, that the land should be valued after the partition by two men, one to be selected by each, and such valuation has not been made, and that no demand for such valuation has been made by the plaintiff, the plaintiff cannot recover in this action, and the answer to the issue should be, 'Nothing.'"

The court gave this instruction, but added, "Unless the jury shall find that plaintiff was prevented from making such demand for arbitration by the conduct of the defendant; if plaintiff demanded that defendant pay him what he owed him and defendant denied owing him anything, that would relieve plaintiff from demanding an arbitration." And to the refusal of the court to give the instruction as asked, and to his addition thereto, defendant excepted.

The jury found the issue in favor of the plaintiff, and assessed his damages at $259.16.

There was judgment for the plaintiff, and defendant appealed.

G. F. Bason for plaintiff.
No counsel contra.

PER CURIAM. We see no objection to the charge of his Honor, (848) but in view of the testimony of the plaintiff, we think the report of the arbitrators should not have been submitted to the jury. The plaintiff testified that the value of the land was to be ascertained by two men, one to be chosen by himself and the other by defendant, and if these two could not agree, they were to select a third person to act with them. This was not done, but arbitrators were selected by the defendant and the other tenants in common for the purpose of dividing the land. These arbitrators not having been selected according to the agreement, as stated by the plaintiff, their report as to the value of the respective shares was improperly admitted. The exception to this evidence is sustained, and there must be a

NEW TRIAL.

STATE v. J. B. BRYAN.

False Pretense—Indictment.

Since the passage of chapter 205, Acts of 1891, which defines a felony to be a crime punishable by death or imprisonment in the State prison, an indictment for obtaining goods by false pretense is fatally defective if the word "feloniously" be omitted.

INDICTMENT for false pretense, tried at Fall Term, 1892, of CRAVEN, before *Shuford, J.*

Attorney-General for the State.
S. C. Bragaw and R. B. Nixon for defendant.

PER CURIAM. The omission of the word "feloniously" in (849) indictments for obtaining goods by false pretense is, since the passage of Laws 1891, ch. 205, a fatal defect, as the Attorney-General admits. *S. v. Skidmore,* 109 N. C., 795.

It is not improper to say, however, in view of the contention of counsel, that there is more than a scintilla of evidence to support the charge, if preferred in the required form.

ERROR.

Cited: S. v. Wilson, 116 N. C., 980; *S. v. Bunting,* 118 N. C., 1200.

STATE v. ANDREW JACKSON.

Appeal in Forma Pauperis—Insufficient Affidavit—Dismissal—Correction of Case on Appeal.

1. An appeal *in forma pauperis* is only permissible when the statutory requirements have been complied with.
2. Where the substance only of the affidavit for leave to appeal *in forma pauperis* is set out in the case on appeal and the Court sees that it is sufficient, the appeal will be dismissed on motion of the appellee, not as a matter of discretion, but of right.
3. An amendment or correction to a case or transcript on appeal cannot be made by a party himself without *certiorari* granted.
4. While the Court may, in matters of grave concern, permit *certiorari* to issue on motion of a party without notice to the other side, or *ex mero motu,* this will not be done where the record shows only technical and not substantial grounds of exception to the proceedings below.

INDICTMENT for larceny, tried before *Shuford, J.,* at Fall Term, 1892, of NORTHAMPTON.

The defendant was convicted, and appealed.

Attorney-General for the State.
W. W. Peebles & Son for defendant.

(850) CLARK, J. The case on appeal, which was made up by appellant's counsel, no countercase having been filed by the solicitor, recites that the defendant appealed to this Court "*in forma pauperis* upon filing an affidavit that he is unable to give security for the costs of the appeal." This is almost identical with the language used in *S. v. Jones,* 93 N. C., 617. It is there intimated that possibly if the recital had been simply that the defendant was permitted by the court to appeal

in forma pauperis upon affidavit filed, there would be a presumption that the affidavit was sufficient. But where (as in that case and in this) the substance of the affidavit is set out and the Court sees that it is insufficient, the appeal must be dismissed.

An appeal *in forma pauperis* is only permissible when the statutory requirements have been complied with. *S. v. Wylde,* 110 N. C., 500, and cases there cited. The granting of the motion of the Attorney-General to dismiss is not a matter of discretion, but a right. *S. v. Morgan,* 77 N. C., 510; *S. v. Payne,* 93 N. C., 612.

Since this cause was argued and decided and the opinion written, the defendant sends up a copy of the affidavit on which the leave to appeal was granted. No motion or order for *certiorari* was made, and we cannot recognize this irregular mode of sending up papers after a cause is heard, without notice to the other side and without an order of the court. Such papers become no part of the record. Notice was reiterated at last term, in the case of *S. v. Frizell* (111 N. C., 722), that if there were defects in making up cases or transcripts on appeal, the Court would not grant *certiorari* to appellants to correct the same, unless it was shown that the appellant was without default. *A fortiori* the Court will not permit such correction and amendment to be made by the party himself without a *certiorari* granted.

It is true that, in an exceptional case, the Court might permit (851) the *certiorari* to issue now, or might send it down *ex mero motu.* But an examination of the record shows technical, not substantial, grounds of exception to the proceedings below. The rulings and judgment of that court are presumed to be correct. The case on appeal as made out by the appellant, entitled the Attorney-General to have his motion to dismiss granted. The appellant neither applied for a *certiorari* when the case was reached nor has the Court thought the case one requiring it to issue such writ *ex mero motu.*

APPEAL DISMISSED.

Cited: S. c., post, 852; *S. v. Rhodes, post,* 857; *S. v. Harris,* 114 N. C., 831, 832; *S. v. Bramble,* 121 N. C., 603; *S. v. Smith,* 152 N. C., 842.

STATE v. ANDREW JACKSON.

Larceny—Exceptions to Charge—Expression of Opinion by Trial Judge, What is Not—Unsworn Statement of Bystanders.

1. On the trial of one charged with larceny of pigs there was some evidence that they were not the property of S., as charged in the bill, and the court charged, at the request of defendant, that the jury must be satisfied beyond a reasonable doubt that the pigs belonged to S., and in that connection the court said, among other things, "the solicitor has proved by the testimony of S. and J. that the pigs were the property of S.": *Held*, that the latter part of the charge, if construed in connection with the whole case, meant only that it was "in proof for the State by the testimony" of such witnesses, etc., and was not likely to be misunderstood by the jury as a declaration by the court that the State had proved the ownership to be in S.

2. During the argument of a motion for continuance of a case in the presence, but prior to the impaneling, of the jury, a bystander remarked in open court that the prisoner's wife said she would not come to the trial because she would only help get her husband in jail: *Held*, that this was not ground for exception, as it did not occur on the trial, and if it had, the remark was not admitted as evidence, and being an unsworn statement it could not have been deemed to bias the jury against the sworn testimony placed before them.

3. A mere omission to charge is not error unless a prayer for instruction is made.

(852) MOTION to reinstate appeal. (See *S. v. Jackson, supra,* p. 849.)

Attorney-General for the State.
S. C. Bragaw and R. B. Nixon for petitioner.

CLARK, J. This was a motion to reinstate this appeal, dismissed heretofore at this term. By consent, the case was argued on its merits, as well as on the motion, in order to avoid the possible necessity, if the motion were granted, of counsel returning here for another argument. We do not find it necessary to pass upon the other points, since if the motion were granted, there is no merit in the grounds of the appeal itself. The appellant was defended by two able counsel below, and was convicted by a jury, to which he raised no objection, of the larceny of some pigs. There was some evidence tending to show that the pigs did not belong to Sam Powell, in whom the property was laid, but to his mother. The court gave a prayer for instruction, asked by the defendant, that the jury must be satisfied beyond a reasonable doubt that the

pigs were the property of Sam Powell at the time they were stolen. In this connection the court charged, among other things, that "the solicitor had proved by the testimony of Sam Powell and Junius Vincent that the pigs were the property of Sam Powell." This language was not guarded, but it was used in relation to the prayer, and if construed in connection with the whole case, means really no more than that it was "in proof for the State by the testimony" of those two (853) witnesses, etc. The real gist of the case is not the title to the pigs, but the larceny of them by the defendant, which is not seriously controverted by the appeal nor by the evidence below. We do not see that the remark of his Honor could have been misunderstood by the jury to be other than a mere recital of the fact that two witnesses had testified to the ownership of the pigs by Sam Powell.

The other exception is, that before the jury was impaneled, but in their presence, during the argument on a motion for a continuance, a bystander stated in open court that the defendant's wife said she would not come because she would only help get her husband in jail. This can be no ground for exception. It was nothing that took place on the trial. If it had been, still the remark was not admitted as evidence. The granting or refusal of the continuance thereafter was a matter which rested in the discretion of the judge. *Banks v. Mfg. Co.,* 108 N. C., 282. If such remarks were ground for new trials, all men present who might possibly become jurors would need be sent out of the courthouse on the argument of preliminary motions. Remarks made by the judge on such motions do not come within the prohibition of the statute. *S. v. Jacobs,* 106 N. C., 695, and cases there cited. There is certainly no statute giving such effect to the unsworn remark of a bystander (even had it been made during the trial) that it shall be deemed to bias the jury against the sworn testimony placed before them. There is a presumption of law that jurors are men of sufficient intelligence to understand that their verdicts must be based solely upon the evidence adduced on the trial and the law laid down by the court.

As to appellant's complaint that the court did not instruct the jury as to the positions taken in argument by his counsel, it is settled that a mere omission to charge is not error unless a prayer is asked. *Boon v. Murphy,* 108 N. C., 187, and numerous cases cited in (854) Clark's Code (2 Ed.), p. 382.

MOTION DENIED.

Cited: The Gold Brick Case, 129 N. C., 662, 677; *S. v. Baldwin,* 178 N. C., 692.

STATE v. R. A. CALDWELL.

Indictment for False Pretense—Felony—Omission of Word "Feloniously"—Arrest of Judgment—Motion to Quash.

1. The offense of obtaining goods under false pretense, being punishable by imprisonment in the penitentiary, is a felony, under the classification by chapter 205, Laws 1891, and a bill of indictment charging such offense, and which omits the word "feloniously," is defective, and judgment will be arrested on a verdict of guilty.
2. The motion for arrest of judgment on the ground of the insufficiency of the bill of indictment may be taken in this Court for the first time.
3. A bill of indictment for a felony, though defective, should not be quashed, but the prisoner should be held until the solicitor can send a new bill curing the defect.

THE defendant was tried and convicted at Fall Term, 1892, of NORTHAMPTON, before *Shuford, J.*, and a jury.

(855) *Attorney-General for the State.*
Thomas W. Mason for defendant.

CLARK, J. The offense charged is obtaining goods under false pretense, which may be punished by imprisonment in the penitentiary. The Code, secs. 1025, 1026. Since the enactment of chapter 205, Laws 1891, defining the line between felonies and misdemeanors, all offenses which may be punished by death or imprisonment in the penitentiary are felonies. The bill is defective as a charge for false pretense, as it omits the word "feloniously," and judgment must be arrested. *S. v. Skidmore,* 109 N. C., 795; *S. v. Purdie,* 67 N. C., 25. There is no exception stated for the refusal to grant the motion in arrest of judgment, but that is a motion which may be taken here for the first time. Rule 27 of the Supreme Court. There is an exception to the refusal to quash, but that motion was properly refused. *S. v. Flowers,* 109
(856) N. C., 841. The judge should have held the prisoner and have given the solicitor opportunity to send a new bill curing the defect. This should not have caused a postponement of the trial to the next term. *S. v. Skidmore, supra.*

JUDGMENT ARRESTED.

Cited: S. v. Lee, 114 N. C., 846; *S. v. Wilson,* 116 N. C., 980; *S. v. Bunting,* 118 N. C., 1200; *S. v. Harwell,* 129 N. C., 551, 555; *S. v. Marsh,* 132 N. C., 1001; *S. v. Stephens,* 170 N. C., 747; *S. v. Paris,* 181 N. C., 585.

STATE v. JAMES RHODES.

Practice—Pauper's Appeal—Insufficiency of Affidavit.

An affidavit to obtain an appeal *in forma pauperis*, which lacks the statutory requirement of an averment of good faith, is insufficient and unavailing.

INDICTMENT against the defendant, James Rhodes, for burning certain barns, the property of Mrs. Mary H. King, tried before *Shuford, J.*, and a jury, at January Term, 1893, of FRANKLIN.

There was a verdict of guilty, and from the judgment thereon defendant was allowed to appeal *in forma pauperis*, but in the affidavit omitted to aver that the application was made in good faith.

Attorney-General for the State.
W. M. Person for defendant.

PER CURIAM. The right to appeal *in forma pauperis* requires some restrictions against abuse. What they shall be is for the Legislature to determine. It has set out the requirements in The Code, sec. 1235. The Court has no right to abrogate any of these requisites. This has been often decided. *S. v. Jackson, ante,* 848; *S. v. Wylde,* 110 N. C., 500; *S. v. Tow,* 103 N. C., 350; *S. v. Jones,* 93 N. C., 617; and (857) indeed, in a full score of cases.

The present case presents an affidavit which lacks the statutory requirement of an averment "of good faith." The appellant has not done what was requisite to place his appeal before us. We cannot help him, and the attempted appeal must be dismissed.

APPEAL DISMISSED.

Cited: S. c., infra; S. v. Harris, 114 N. C., 831; *S. v. Bramble,* 121 N. C., 603; *S. v. Smith,* 152 N. C., 842.

STATE v. JAMES RHODES.

Practice—Criminal Law—Certiorari—Former Acquittal.

1. *Certiorari* in lieu of a lost appeal should be moved for before the appeal is regularly reached in its order on the docket for argument.

2. Where, on appeal, a new trial was granted in a criminal case on the ground that the judge below erred in submitting the case to the jury when there

was not sufficient evidence to warrant it, defendant cannot on the new trial plead former acquittal, for he was convicted in the court below, and the granting of a new trial was not an acquittal; nor can he plead former conviction, for it was set aside and a new trial granted.

MOTION to reinstate the appeal dismissed *supra.* (See *S. v. Rhodes, supra.*)

Attorney-General for the State.
W. M. Person for defendant.

CLARK, J. This is a motion to reinstate this appeal, which was dismissed for failure to comply with the requirements for perfecting an appeal *in forma pauperis.* As repeatedly pointed out by the Court, there must be some regulations of some kind for perfecting (858) appeals to this Court. What those regulations shall be, the Legislature has prescribed. When they are not observed by appellants, the opposite party may have the appeal dismissed. Otherwise, the statute would be a vain thing and there would be no orderly method of bringing up appeals. Every case would be the subject of debate.

The appellant now asks to reinstate, and for a *certiorari* in lieu of the appeal, which has been lost, without any negligence or default on his part. It proves unnecessary in this case to consider whether on his own showing he has used such a degree of diligence as entitles him to a *certiorari* in lieu of a lost appeal. Certainly he should have moved for this writ, with proper diligence, before the appeal was regularly reached in its order on the docket for argument. But, without discussing that further, the *certiorari* must be denied, because there is no merit in the appeal.

On examination of the case on appeal, there are two exceptions:

1. On a former appeal (111 N. C., 647) a new trial was granted, because this Court held that the judge below erred in letting the case go to the jury when there was not sufficient evidence to warrant it.

When the case was again called in the lower court, the defendant moved to be dismissed, and excepted to the refusal of the motion. The defendant's motion is anomalous. He could not plead former acquittal, for he was convicted. On appeal, this Court could not acquit him. It merely held that there was error, and directed a new trial. Nor could he plead former conviction, for it was set aside, and the new trial was granted at his instance.

2. The other exception is, that there was no evidence sufficient to go to a jury. Since the case was here on the former appeal, there has been

added to the evidence confessions made by the prisoner that (859) he knew who burnt the barn and all about it. This, taken with the other evidence in the case, makes out a case which it was not error for the judge to submit to the jury.

MOTION DENIED.

Cited: *S. v. Harris,* 114 N. C., 832; *S. v. Adams,* 115 N. C., 784; *Prevatt v. Harrelson,* 132 N. C., 253; *S. v. Marsh,* 134 N. C., 196; *Hollingsworth v. Skelding,* 142 N. C., 255.

STATE v. FURMAN HOWARD.

Murder—Death Caused by Third Person—Evidence.

In a trial of F. for murder, the court gave an instruction as follows: "If you believe, from the evidence, that B. and the prisoner were standing in the store, by the fire, as detailed by the witnesses, and as soon as the difficulty between H. and the deceased commenced, they both rushed upon the deceased, neither of them having a deadly weapon in his hand, . . . and inflicted the wound upon him from which he died, the prisoner is guilty of murder, whether the deadly weapon was in his hands or those of B.: *Held,* that such instruction was erroneous, in that it imputed the felonious act of one participant to the other without an inquiry or finding as to whether B. and the prisoner entered into the fight by preconcert, or whether the prisoner had previous knowledge of the possession and consented to the use of the weapon by the other.

INDICTMENT for murder, tried before *Bryan, J.,* and a jury, at January Term, 1893, of DURHAM.

The defendant, who, with two others, was charged with the murder of Josh Cannaday, obtained a severance, and was tried alone and convicted, and appealed. There were many special instructions asked for by the defendant, and many exceptions to the refusal of some and to the charge of the judge. It was deemed necessary to consider only one exception, made to an instruction to the jury, which, together with the salient points of the testimony upon which it bears, is (860) set out in the opinion of *Shepherd, C. J.*

Attorney-General for the State.
Boone & Parker for defendant.

SHEPHERD, C. J. The prisoner, together with Dock Howard and Henderson Burnett, was indicted for the murder of one Josh Cannaday, but, upon motion, a severance was ordered, and he alone was put upon

trial. Several exceptions were taken to the rulings of his Honor, but only one need be considered by the Court in order to dispose of the appeal.

It appears from the testimony that the deceased and Dock Howard were engaged in a fight, apparently without deadly weapons, and that the prisoner (a brother of Dock Howard) and Henderson Burnett participated in the same for the purpose of assisting the said Howard. His Honor very properly assumed that there was no evidence that these parties acted by preconcert, and it was left in doubt as to which of the defendants used a deadly weapon and struck the fatal blow. While the testimony tended to show that the prisoner, as well as Henderson Burnett, inflicted wounds with a razor or other sharp instrument upon the deceased, it also presented an important phase, insisted upon by the prisoner, that he not only did not enter the fight by preconcert, but that he used no weapons himself and saw none in the hands of Henderson Burnett, or, indeed, of any one else.

This view of the evidence presents the following proposition: Two men are engaged in an affray, without deadly weapons or any other circumstances to indicate that their mutual assaults are of a felonious character. A (a brother of one of the combatants) and B are (861) bystanders, and, without preconcert or any connection with the original quarrel, each acting independently of the other, suddenly take part in the fight against one of the parties. B has a deadly weapon, which is unknown to A, and, without his consent or knowledge, inflicts the fatal wound. Is A guilty of murder?

In *S. v. Simmons,* 51 N. C., 21, it is laid down as a well established principle "that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding or in furtherance of the common purpose." So, in *S. v. Gooch,* 94 N. C., 983, the Court said that if the prisoners "went to the store of Cheatham with the purpose, under the pretense of fighting, to stab Cheatham, and either the one or the other stabbed and killed the deceased, it was murder in the assailants; . . . or if the jury believed that Gooch had prepared himself with a knife, with the intention of using it in case he or Smith got into a fight with the deceased, and went to Cheatham's store with the intention of having a conflict with him, and did kill him with the knife, and Smith, having a knowledge of the purpose, went with him and was present, assisting in the conflict, the jury were well warranted in finding them both guilty of murder." It will be observed that in these cases each of the prisoners had a deadly weapon and acted in pursuance of a previous understanding. They cannot, therefore, be considered as authority for sustaining a conviction of murder upon the facts embodied in the foregoing propo-

sition. All of the authorities (and they are too numerous to be cited) agree that in such a case, in order to impute the felonious act of one participant to the other, they must have entered into the fight by preconcert; otherwise, there is no malice in the act of the other, and without malice there can be no murder.

His Honor, in the seventh instruction, charged the jury as (862) follows:

"If you believe from the evidence that Henderson Burnett and the prisoner, Furman Howard, were standing in the store, by the fire, as detailed by the witnesses, and as soon as the difficulty between Dock Howard and the deceased (Josh Cannaday) commenced, they both rushed upon Josh, either of them having a deadly weapon in his hand (and the court charges you that a razor or knife, such as described, is a deadly weapon), and pressed him back upon the molasses barrel and then down the store 15 feet, and inflicted the wound upon him from which he died, the prisoner is guilty of murder, whether the deadly weapon was in his hand or that of Burnett."

The instruction ignores the phase of the testimony to which we have adverted, and without qualification is in itself erroneous.

NEW TRIAL.

Cited: *S. v. Price,* 158 N. C., 649; *S. v. Greer,* 162 N. C., 652; *S. v. Orr,* 175 N. C., 776.

STATE v. T. N. WOMBLE.

Working on Public Roads—Exemption—Constitutional Law—Repeal by Implication.

1. Section 25, chapter 147, Laws 1852, which exempts the officers, servants and employees of the Fayetteville and Western Railroad Company (now the Cape Fear and Yadkin Valley Railway Company), incorporated thereby, from working on the public roads, is constitutional.

2. Such exemption, being contained in a private act, is not repealed by section 2017 of The Code, which requires all able-bodied male persons between the ages of 18 and 45 to work on the public roads, since by section 3873 of The Code it is provided that "no act of a private or local nature shall be construed to be repealed by any section of this Code."

CLARK, J., dissents *arguendo.*

INDICTMENT for failure to work on the public road, tried at (863) February Term, 1893, of CHATHAM, before *Bryan, J.*

The jury returned the following special verdict: The defendant was a depot agent at Goldston, Chatham County, in the employ of the Cape Fear and Yadkin Valley Railway Company, and was duly summoned by the overseer of the road in the township to work the same, to which he had been assigned by the board of supervisors. Defendant received the summons, but failed to appear and work as required, and refused to pay any amount in lieu thereof, claiming that he was an employee of said company and in its actual service, and was exempt by its charter from working the public road. Thereupon the court held the defendant not guilty, and the solicitor for the State appealed from the judgment rendered.

Attorney-General and A. W. Haywood for the State.
R. T. Gray for the defendant.

AVERY, J. Conceding that the section in the charter of the "Cape Fear and Yadkin Valley Railway Company," which provides that the "officers, servants and employees of the corporation shall be exempt from the performance of ordinary militia duty, working on public road, and serving on juries" (section 25, chapter 147, Laws 1852; chapter 67, Laws 1879), constituted no part of the contract between the State and the company, it remains to be determined whether that particular section has been repealed by the enactment of sections 2018 and 2059 of The Code, which declare that certain classes of persons, and no others, shall be exempt from liability to work on the public roads. Those provisions of the general road law are clearly repugnant to, and operate as a repeal of, that portion of the charter which granted the exemption, unless the older statute was, in contemplation of law, "local or private in its nature" and was "saved from repeal" by sections 3867 and 3873 of The Code. *Shepherd v. Comrs.*, 90 N. C., 115. It has been settled that acts incorporating railroad companies are private statutes. *Durham v. R. R.*, 108 N. C., 399; *Hughes v. Comrs.*, 107 N. C., 598. But it is contended that the charter of a railroad company may contain some provisions of a public and some of a private nature, and that under a proper construction of the saving provisions cited in enacting The Code the Legislature repealed not the whole, but every section of every railroad charter theretofore granted by the State which could be singled out and shown to operate upon the whole of the public. It would be difficult to foresee the effects of such a ruling upon the charters of public, *quasi*-public, and strictly private corporations in this State. The safer and more natural interpretation of the saving statutes is, that private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of The Code. The language of

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section 3873 is, that "No act of a private or local nature . . . shall be construed to be repealed by any section of this Code," as we think, in whole or in part. Any other construction would involve an endless scrutiny of both municipal and railroad charters to ascertain how much of every particular one is still left intact. The fact that so much of a private act as creates a criminal offense, applicable alike to all citizens of the State, is so far public that the courts will take judicial notice of its existence without offering it in evidence, is not inconsistent with a purpose on the part of the Legislature to save from repeal, not simply certain sections, but the whole of an "act of a private nature." If the charter of the North Carolina Railroad and that of the Atlantic and North Carolina Railroad are private acts, as both have been held to be (*Durham v. R. R.* and *Hughes v. Comrs., supra*), then that (865) under consideration is also a private statute, and all three, from beginning to end, remain unaltered by the repugnant provisions of The Code.

It is true that section 2017 of The Code constituted a part of chapter 82, Laws 1879 (being section 4), and that by section 12 of said chapter all laws and clauses of laws in conflict with its provisions were repealed. But it does not necessarily follow that the effect of that statute was to establish a sweeping rule, without any such exception as had been previously made by law. The very next section (2018), which then constituted a part of the Revised Code, provided that "No persons between the ages prescribed shall be exempt, except such as shall be *exempted by the General Assembly* or the board of supervisors," etc. The Code Commissioners, finding no conflict between the two sections, brought forward both, yet, if the act of 1879 is to receive the construction contended for, there could be no exception, not even when the General Assembly had specifically declared certain persons exempt. When the charter of the railroad company was granted, in 1858, the Revised Code, ch. 101, sec. 9, made it the duty of the overseer to "summon all white males between the ages of 18 and 45," etc. (the act of 1879 being a reënactment of it), and a subsequent section (112) of the same chapter excepted (just as The Code, sec. 2018, has done) all such persons as "shall be exempted by the General Assembly." By reference to the Revised Statutes, ch. 104, secs. 10 and 12, we find the same provisions—first, that "all males between 18 and 45" shall be summoned and shall be liable to a penalty for failing to work; and, second, that no person shall be excused, except such as are or shall be exempted by the General Assembly, etc. By going still further back to the fountain-head, it appears that those two sections of The Code (sections 2017 and 2018) were enacted in the years 1784 and 1786, the first (866)

being substantially the same as section 3, chapter 256, Laws 1786, and the second the same as section 8, chapter 227, Laws 1784, the latter of the two being by its terms merely amendatory of the former. 1 Potter's Revisal, chs. 227 and 256. So, at every stage of the history of legislation on this subject, by construing all the statutes in force together, and giving effect to all laws in existence, we reach inevitably the conclusion that the statutory general rule has at all times made all such persons between 18 and 45 liable, but the exception has kept pace with the rule and has provided for the exemption of such as had been or should be, by any special legislation or by the action of the county authorities, for certain specified reasons, excused. It is clear that the charter was enacted in 1858 in the face of the same sweeping rule, followed by the same exception (of "such as shall be exempted by the General Assembly," etc., Revised Code, ch. 101, secs. 9 and 12) as in the present Code, the two having stood together in perfect harmony since 1784, and the immunity given was manifestly intended to be placed, and to stand until repealed, within the exception.

The Legislature of 1879 reënacted section 9 and declared all clauses inconsistent with it repealed. Does it follow that section 12 was thereby repealed? If they were repugnant, as is contended, how could they have been left standing in the Revised Code as sections in the same chapter and on successive pages? Not only did the eminent men who codified the laws in 1855 consider them consistent with each other, but the commissioners, in 1883, upon reviewing the history of legislation upon the subject, brought forward both as a part of the existing statutory law and recommended a reënactment. In construing the law, both
(867) commissioners adopted the views of Nash, Battle and Iredell in bringing forward the same provisions from the acts of 1784 and 1786. How, then, could the provision in the charter be repugnant to a statute which has stood side by side with another, specially excepting such provisions at every moment of time from 1786 to 1883, when The Code became the law? End. on Inter. Stat., secs. 227, 228.

But it is contended that if the exempting clause was not repealed by implication, it was nevertheless void *ab initio* as a vain attempt to grant a special privilege to particular persons. Every presumption is in favor not only of the constitutionality of laws passed by the Legislature, but of the good faith of all law-making bodies. Where, therefore, it appears to have been within the purview of its power to enact a law in order to effectuate a public purpose, the courts are not at liberty to question the motives of a coördinate branch of the government. Indeed, unless the law itself declares the intent with which it was passed, it is the duty of the courts to enforce it as they find it enacted, assuming that of sev-

eral conceivable motives the lawful one only operated to cause its enactment. *S. v. Moore,* 104 N. C., 714; 74 Am. Dec., 595, notes; *Hoke v. Henderson,* 15 N. C., 1; *S. v. Moss,* 47 N. C., 66.

We take it for granted, then, that the purpose, in embodying in the act the section exempting employees from road duty, was to provide for the safety and security of property and persons that might be transported by the company as a common carrier of freight and passengers. It was not only the right but the duty of the General Assembly, to provide, to the uttermost limit of its power, ample protection for passengers and property against exposure to unnecessary risks as well as against injury from negligence. *Bagg v. R. R.,* 109 N. C., 279.

Were we to concede that in passing upon the constitutionality (868) of a provision in one charter we are allowed to search the private as well as the public laws passed by the Legislature for the last fifty years to ascertain whether similar exemptions have been granted to employees of other *quasi*-public corporations, and that such examination would reveal the fact that no such immunity from serving on juries or working on the public roads has been extended to the servants of any other company in the State, it would still be our duty to infer that on account of the peculiar location and environments of that particular line of railway it was necessary, in the opinion of the Legislature, for the public security that experienced operatives in its service should not be left liable to be detached on public duty and have their places filled by less vigorous or less skillful men. We can readily conceive that some such motive may have led to the exemption of lockkeepers, who were often stationed at remote points on the Dismal Swamp Canal, from military service, though no such immunity was granted to persons discharging similar duties on the canal of the Roanoke Navigation Company and other canals that were being used when the law was passed. The Code, sec. 3164; Rev. Code, ch. 70, sec. 2. It is true that the law (The Code, sec. 2059) afterwards enacted and still later repealed by acts of 1887, ch. 93, sec. 4, excused from such service in all parts of the State all ferrymen, keepers of public grist mills and lockkeepers on public canals; but the immunity was granted, not because the organic law imposed the duty of including the whole of a class, but because in the judgment of the Legislature the public interest and safety required that all of these persons, should be at all times, as public servants, ready to serve their customers. The width of public highways, except such as are causewayed or run through cuts, are required to be kept clear of obstructions to the passage of vehicles for the space of eighteen feet, but the roads lying in all counties where by law they have (869) been classified of different widths, as low as twelve feet, are excepted out of the act. These acts were passed in every instance because

in the judgment of the Legislature the physical conditions in certain sections justified some peculiar legislation applicable to the highways situate within them. Surely the General Assembly is not restricted to county lines in adapting the laws to the "lay of the land," so that the same rule must be made to apply to swamps or plains as to mountains, constituting different sections of the same county. We would not be at liberty to question, because of unconstitutional discrimination, the validity of a statute exempting from military duty and liability to serve on juries the road workers assigned to a highway running across the hills and mountains or the swamps of many different counties. It would be our duty to draw the inference, in such a case, that a coördinate branch of the government had exercised its powers from the best motives and for the promotion of the public interest. While, except in cases of extraordinary damage to the highway, no person residing east of the Blue Ridge can be compelled to work on the public road more than six days in any year, those living west of that line, which runs through and divides many counties, may be required to work as many as ten days during the same period. The Code, sec. 2017. It is the duty of the members of the General Assembly to inform themselves as to the condition and wants of the people in every section. If they deem it best for the public safety to extend the same exemption to the servants and employees of a particular *quasi*-public corporation, as to ferrymen, lock-keepers and public millers, we must infer that the law was passed by them for the purpose of protecting life and property, just as the general statute was intended, either to attain the same end or to avoid
(870) subjecting the patrons of the persons excused, to inconvenience.

The charter confers no special privileges on a private individual or individuals as such, but exempts from a public burden the servants of an important public agency created by the Legislature for the benefit of the people, presumably to prevent the withdrawal of the exempt persons from their duties. The courts are not authorized to declare that their information was unreliable, their reasons for passing the act insufficient, or their motives improper. *Mayor v. Baltimore,* 74 Am. Dec., 572; *Hoke v. Henderson,* 15 N. C., 1 (25 Am. Dec., 677).

While the General Assembly has very frequently passed special legislation for particular counties, at the request of representatives of such political divisions, or for towns within them, it does not follow that any provision of the Federal or State Constitution fixes the boundaries of counties or any other geographical lines as criteria in determining the limit to the exercise of police power. The test is involved in the question whether, from an examination of the act itself, it becomes manifest that the law was passed for the purpose of unjustly discriminating in favor of or against a particular person or class of persons or corpora-

tions, and not for the public good. Every doubt must be resolved not only in favor of the constitutionality of the law, but of the honest intent of the law-makers. Though, as a rule, a grant of a special privilege, not conferred upon persons generally, to a particular man for his own peculiar benefit, naming him, may be unconstitutional, the Legislature unquestionably has the power, in order to provide for the public convenience or to facilitate transportation of persons and property, to confer on a designated person the right to build a bridge or establish a ferry, with the power to charge tolls for the use of such crossings, and, in addition, to exempt the servant who may be placed (871) in charge, from all public burdens. It has never been contended that the courts have the power, in passing upon the validity of such acts, to take judicial notice of every other private charter granted by the Legislature and declare ninety and nine unconstitutional because the grant of exemption is omitted in one. The power to institute condemnation proceedings and have private property appropriated to the use of corporations is an important privilege, in the exercise of which all of the people of the State owning land along the line are deeply interested; but it does not follow that the clause in a charter granting the privilege to one company to take one hundred feet on each side of the center of its track may be declared void because only fifty feet on either side is allowed to be condemned as a right-of-way by another similar corporation.

The grant of exemption does not purport upon its face to be exclusive. Upon its face, however, even if the exemption has not been granted to the employees of another corporation in the State, the act was one which the Legislature had unquestionably the right to pass.

We have hesitated to cite the case of *Bank v. Taylor,* 6 N. C., 266, because, though it sustains fully the principle we have stated, it goes much further in conceding the authority of the Legislature to give to a particular bank a summary remedy, not enjoyed by any other person or corporation, for the collection of debts. *Hall, J.,* said, in concluding the opinion: "Although it is the duty of this Court when they believe a law to be unconstitutional to declare it so, yet they will not undertake to do it in doubtful cases. Mutual tolerance and respect for the opinions of others require the exercise of such power only in cases where it is plainly and obviously the duty of the Court to act. It is not for this Court to judge of the expediency of the measure, nor to estimate its anticipated or actual benefit or injury to the community. (872) These are considerations strictly of a legislative nature, and the competent authority has pronounced upon them."

We have preferred to rest the right of the Legislature to grant this exemption to a particular corporation, not upon the ground that it

constituted one of the mutual considerations of the contract, but upon the idea that it was an exemption voluntarily given and liable to be taken away, when in the judgment of the Legislature it should be no longer needed for the protection of the public.

For the reasons given we think there was no error in holding, upon the special verdict, that the defendant was not guilty, and the judgment of the court below must be

AFFIRMED.

CLARK, J., dissenting: The defendant claims to be exempt from working the public roads by virtue of section 25, chapter 147, Laws 1852. This is the charter of the Western Railroad Company, since altered by chapter 67, Laws 1879, to the "Cape Fear and Yadkin Valley Railway Company," but retaining the same rights, powers, privileges, immunities and franchises. Said section 25 provides, "That all the officers of the company and servants and persons in the actual employment of the company be and are hereby exempt from performing ordinary militia duty, working on public roads and serving as jurors."

If it be conceded that the Legislature had the power to grant this exemption still the right to the service of its citizens for the performance of military, road and jury duty is an essential element of sovereignty. It cannot be the subject of contract or inalienably bargained away. *R. R. v. Alsbrook,* 110 N. C., 137. Like similar exemptions of other classes of the community, it is subject to revocation by any future Legislature, which can, according to its judgment, modify (873) the exemptions, or repeal them, or change the ages at which any citizen shall become subject, or cease to be liable, to render such duties. Exemptions of particular classes of men, or in particular localities, are very common, and it would essentially cripple the powers of the sovereign if such exemptions were construed to be contracts and irrevocable. The fact that the exemption in this case is found in a clause of a railroad charter makes it a contract no more than if found in the charter of a city or town or in the incorporation of a firemen's or military company, in which they are not unusual. The exemption is like the exemption of "public millers," which is a revocable privilege extended to that necessary class of the community, but which is not a contract with mill owners that the legislative policy shall not be changed. In truth, such exemptions are mere privileges, revocable at the legislative will. That has been exercised as to this exemption by the general act (Laws 1879, ch. 82, sec. 4) which repeals all previous exemptions from road duty by providing that *"all* able-bodied male persons between the ages of 18 years and 45 years shall be required, under the provisions of this act, to work on the public roads, except," etc. Section 12 of this

act provides, "All laws and clauses of laws in conflict with this act are hereby repealed." The act itself makes some exemptions, and others have since been made by the Legislature.

The grant of exemption from public duty to any class of citizens is a public matter, whether the grant is in a special or general act, or in a clause in a private or public statute. The Legislature has power to revoke the exemption, and this has been done by repealing "all laws and clauses of laws" (without excepting any) which conflict with the new statute, that *all* persons between the ages specified (with the exception named in the act) shall be liable to road duty. Endlich on Stat., 231. It was not required that the Legislature should seek out (874) and recite every statute, public or private, which contained an exemption. It is sufficient, as this act does, to make *all* able-bodied persons of the ages named liable to road duty and to repeal "all laws and clauses of laws" in conflict with this requirement. Nor can it make any possible difference that this general repealing act passed in 1879 was brought forward in The Code adopted four years later.

Upon the special verdict the defendant should have been adjudged guilty. The case should be remanded to the end that the judgment be so entered, and that the Court may proceed to sentence according to law.

Cited: Wilson v. Jordan, 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215; *S. v. Cantwell,* 142 N. C., 609, 610, 614; *S. v. Gettys,* 181 N. C., 583.

STATE v. TONY ROGERS.

Criminal Law — Confessions by Prisoner — Examination of Prisoner When Manacled—Duty of Committing Magistrate to Caution Prisoner.

1. Where, on a trial for murder, it did not appear that the prisoner asked and was denied time and opportunity to advise with counsel prior to making his statement before a committing magistrate, the confessions of the prisoner will not be excluded as evidence on the ground that he did not have such time and opportunity.

2. While the practice, if it exists, of keeping a prisoner tied or manacled during the preliminary examination before a committing magistrate, is not to be commended, yet the fact that a prisoner charged with murder was so tied during such examination would not, in itself, constitute a valid

objection to the admission, as evidence, of confessions then made, unless it appeared that he was tied in such manner as to produce pain or to tend to induce or extort from him a confession.

3. It is not necessary that a committing magistrate at the commencement of the examination of a prisoner shall use the precise words of the statute (The Code, sec. 1145) in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirements of the statute and if the magistrate inform the prisoner, in plain language, of his rights in the premises.

4. On the trial of a prisoner charged with poisoning his wife, the court properly refused to allow counsel for defendant, while addressing the jury, to read to them from a treatise on toxicology, which could not have been admitted as evidence, and concerning which no witness had been examined.

(875) INDICTMENT for murder, tried before *Winston, J.*, and a jury, at December Term, 1892, of RICHMOND.

The State offered evidence tending to prove that the prisoner bought a box of "Rough on Rats" at Laurinburg on a certain Saturday; that prisoner inquired when he bought it whether it would kill people, and was told that it would, and was cautioned to keep it out of the way of children and his "eatables"; that he carried it home and administered part of it to his wife, Rhoda Rogers, who died from the effects thereof on the next day, Sunday.

M. J. Edwards, a witness for the State, was offered for the purpose of proving confessions of the prisoner. Witness testified: "I was committing justice; warned him and told him of his rights under the statute, and told him if he did not choose to testify, the failure to do so would not be used to his prejudice; that he was at liberty to refuse; that he need not testify if he did not wish to do so; read the warrant to him and informed him of the charge; the prisoner was tied at the time paper was read over to him, but not frightened, and he signed it with his mark."

The State proposed to read the paper above referred to as a confession of the prisoner. The prisoner's counsel objected upon the grounds:

1. Because the prisoner was not allowed a reasonable time to
(876) send for and advise with counsel.

2. Because the prisoner was tied while being examined.

3. Because the prisoner was not told and cautioned that he was at liberty to refuse to answer any question that might be put to him.

4. Because the prisoner was not cautioned that his refusal to answer should not be used to his prejudice at any stage of the proceedings.

The defendant was convicted, and appealed.

Attorney-General for the State.
W. H. Neal for the defendant.

MACRAE, J., after stating the facts: There is nothing in the case to indicate that the prisoner was not allowed a reasonable time to send for and advise with counsel, as suggested in the first ground of exception to the admissibility of his statement upon preliminary examination before the committing magistrate. If it had been made to appear that he had asked and was denied such time and opportunity, a serious question might have arisen as to the admissibility of his statements.

The fact that the prisoner was tied during his examination would not in itself constitute a valid objection to the evidence, unless it appeared that he was tied in such a manner as to produce pain or to tend to induce or extort from him a confession. *S. v. Cruse,* 74 N. C., 491.

We do not commend the practice, however, if such there be, of keeping the prisoner shackled or tied while before the committing magistrate on the preliminary examination. The law should be the same there as upon his trial; the dictates of humanity would require that unless there should be some strong reason to the contrary, he should be freed from such physical restraint. In a note to Wharton's Cr. Pl. & Pr., sec. 699, quoting from 2 Hawks P. C., ch. 28, and from other authorities, it is well said in regard to his arraignment: "The prisoner is to be brought to the bar without irons, shackles or other restraint, unless there be danger of escape; and ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no terror or uneasiness other than what proceeds from a sense of his guilt or the misfortune of his present circumstances." (877)

The statute, section 1146 of The Code, is in these words: "At the commencement of the examination the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings."

The testimony of the committing magistrate, as set out above, shows a substantial and full compliance with the requirements of the law. We do not understand it to be necessary that the magistrate shall use the precise words of the statute in giving the prescribed caution; indeed, it might be better in some instances to give it in simpler language. It should always be plain enough to inform him of his rights in the premises.

We find another exception noted: "Counsel proposed to read to the jury in the course of the argument from 'Rule's Toxicology,' etc., which the court declined to permit him to do, the same not having been offered

in evidence, and not being under oath, and no witness having been examined concerning the same. The defendant excepted to this ruling of the court."

(878) The book itself could not have been offered in evidence, neither could it be read by counsel as part of his argument. The matter was very fully discussed and explained by *Mr. Justice Bynum* in *Huffman v. Click,* 77 N. C., 55.

We have carefully examined the record in this case and find

NO ERROR.

Cited: S. v. DeGraff, 113 N. C., 692; *Butler v. R. R.,* 130 N. C., 18; *S. v. King,* 162 N. C., 581; *Tilghman v. R. R.,* 171 N. C., 657.

STATE v. WILLIAM S. MILLER.

Criminal Law—Manslaughter—Evidence—Instructions.

1. On a trial of a defendant charged with murder, it appeared that while he and others were engaged in friendly conversation the deceased, a powerful man, came up on horseback in a gallop, halloing twice and applying an insulting epithet to his horse, which defendant misinterpreted as applicable to himself; a demand for explanation by the defendant was followed by an insult from the deceased, who advanced with threatening aspect and words, upon the defendant, who retreated until overtaken and knocked or pushed down by deceased, and while upon the ground, and during the struggle, inflicted nine cuts or stabs with a pocketknife, from which deceased died: *Held,* that the repeated cutting of deceased, with the knife during the fight, resulting in the death of deceased, was not murder, since there was no evidence of express malice or of a previous preparation for the fight by the defendant, or that he used the knife after deceased had been taken off his prostrate body, but such killing, being the result of passion produced by the fight, was manslaughter at the most.

2. Although, when killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner to show mitigation or excuse, yet, when it appears that, in no aspect of the testimony, and under no inference fairly deducible from it, the prisoner is guilty of murder, it is error in the court to refuse the prayer for an instruction to the jury that they must not return a verdict for any higher offense than manslaughter.

3. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is the province of the court, when all the facts are developed and known, to tell the jury whether, in every aspect of the testimony, such presumption is rebutted.

STATE *v.* MILLER

INDICTMENT for murder, tried before *Boykin, J.*, and a jury, (879) at Fall Term, 1892, of IREDELL.

The defendant was convicted, and appealed.

The facts are stated in the opinion of *Associate Justice Avery.*

Attorney-General for the State.
R. Z. Linney for defendant.

AVERY, J. The court was asked to instruct the jury, in substance, that in the most unfavorable aspect of the testimony for the defense the prisoner was not guilty of murder. In refusing this request we think there was error, which entitles the prisoner to a new trial.

The Attorney-General contends that upon the admission that the killing was done by the prisoner with a pocketknife, which was a deadly weapon, the State having shown *prima facie* that the prisoner was guilty of murder, and shifted the burden of proof upon him, it was not the province of the judge, in any event, to tell the jury that they were not at liberty to find him guilty of murder, no matter what were the subsequent developments of the testimony, but that the jury should have been left with appropriate instructions, as to the law, to determine upon a consideration of the whole of the evidence whether the killing was done under such provocation as would mitigate it to manslaughter or justify or excuse it.

Collating from the testimony of the various witnesses, that most prejudicial to the prisoner, and putting the whole into a connected narrative, it would present about the following state of facts: The prisoner was returning in a cart, with the witness C. J. Yount, from Sharon Church, when they overtook, at the cross-roads, the witnesses, George Douglass and Will Stewart, and after the four had been engaged in conversation three or four minutes the deceased, Jack Wilfong, came up on horseback in a fast gallop or rack, and passed to a (880) point about twenty-seven feet beyond the cart in which the prisoner and Yount were sitting, when he jumped off his horse. Deceased had "whooped" or yelled twice very loud as he approached them, and as he jumped from his horse he said either, "I'm a son of a bitch and I'm loose" or, according to other witnesses, "You are a son of a bitch," his horse having dodged as he came up, whereupon the prisoner, Miller, getting out of the cart and taking a position at the shaft, replied: "Don't call me a son of a bitch," or "You had better not call me a son of a bitch." Wilfong then drew off his coat and came down to the wheel of the cart. Douglass said to Miller as deceased was coming down, "He was talking to his horse." C. J. Yount, who was in the cart, said, "Jack, were you talking to your horse?" Wilfong said, "Yes."

Miller again said, "You had better not call me a son of a bitch." Miller repeated this language several times. When this was said both were at the cart, Miller near the shaft and Wilfong at the wheel. Wilfong then said, "I can call you a damn liar; you made an attempt to draw a pistol on me." Miller said he had no pistol. Wilfong said, "You have got one, or a razor. I saw it shining." Miller said he did not. Wilfong said, "You are a damn liar if you say you have not." Wilfong then went towards Miller, saying, "You are a God damn liar if you say you have no pistol or razor." Wilfong advanced on the prisoner as he said this, and prisoner retreated, walking backward until the deceased overtook and knocked or pushed him down. As Miller was backing, the deceased was saying, "You are a damn liar, I did not call you a son of a bitch, but I can put it on you." Miller, as he was backing, said in reply, "Jack, I am your friend," or, according to another witness for the State, "Jack, you and I are good friends; we were in the (881) calaboose together." Deceased said, "You are a damn liar, you have got a pistol, and I intend to whip you." The witness Stewart, who walked off as Wilfong began to advance, testified that Miller's hand was then open and that he had no knife in it then. According to the testimony of the third eye-witness of the encounter, who was examined for the State, deceased said, on first approaching the cart, "I didn't call you a son of a bitch, but I can do it. I'm not like the man that can't. You are a son of a bitch," and started toward Miller, saying, as stated by the other witnesses, "You have a pistol or a razor," and that Miller said then, "I have not, but don't crowd me. You and I have been good friends, but if you come on me you will not find me Hose Stewart or Ave Miller," and was backing when he said it.

The only one of the three witnesses present, who testified at all as to the matter, stated that as Miller backed he had his hands at his side. All the witnesses testified that deceased knocked or threw prisoner down and then the sound of licks was heard in rapid succession until the witness Stewart pulled deceased off Miller, and found that he was cut and bleeding. The deceased struck the prisoner a number of blows with both hands, and both seemed to be striking at each other while on the ground. Deceased was carried to the house of Douglass near by. A witness then looked and saw Miller at the cart; he said he had no pistol or razor, and the witness found in his vest pocket a small knife, and in the pocket of his pants a larger one. Miller said he was not hurt badly, but was wiping his face with his handkerchief.

According to all of the witnesses, deceased was a very powerful man, larger than the prisoner, and when drinking was considered violent and dangerous. Both deceased and prisoner had been drinking on that night.

It was in evidence that a physician examined prisoner after- (882)
wards, on the next day, and saw no external bruises or injury on his face. The deceased was slightly stabbed in the left cheek, and cut to the bone on the left side of the chin; his clothing cut and the skin grazed on the left shoulder; his index finger was cut as if by catching the knife and having it drawn through the hand; the fatal wound was on the right arm, the knife having been apparently drawn upward into the joint of the arm and then pulled diagonally across the arm; there were cuts in the back of the coat; there was a cut on the right sleeve; there were two little gashes on the right side of the forehead and two stabs in the nose; there were nine cuts on the body; Wilfong died from hemorrhage from the wound on the arm that night.

Doctor Yount testified that Miller said it was his knife that Wilfong saw in the moonlight when they were at the cart.

A witness, C. J. Dellinger, was telling prisoner some two weeks before the homicide of a fight that Wilfong had had with some one, and said if Jack Wilfong ever attacked him he would defend himself. Prisoner said he had nothing against Wilfong, but if he or any other big man came on him he would knife him.

Four neighbors were engaged in friendly conversation when the deceased came upon the ground in a gallop, his approach being heralded only by his hallooing twice. An insulting epithet is applied by him to his horse, and his language being evidently misinterpreted by the prisoner, the demand for explanation leads almost immediately to insult and a threatening advance, ending in an assault. If the prisoner had stood his ground or met the deceased half way and the combat had been mutual from the beginning, there would have been no evidence of premeditation on the part of the prisoner. At most, it is a case (883)
where "two men upon a sudden quarrel get into a fist fight, and one without notice draws a knife and stabs the other to the heart," and, as was said in *S. v. Curry,* 46 N. C., 280, "It is manslaughter because, out of regard to the frailty of our human nature, the killing is supposed to be the effect of passion brought on by the high excitement of the fight." *S. v. Massage,* 65 N. C., 480.

The prisoner went into the fight with no weapon but his pocketknife, with which he inflicted the fatal wound. So that there was no evidence of such preparation as tended to show a premeditated purpose to kill. Though a number of wounds were inflicted, the cutting was all done while the parties were engaged in the struggle, giving and receiving blows. If by any possibility the inference could be drawn that the prisoner began to cut with a pocketknife when the deceased was rushing upon the prisoner, threatening to whip him, and continued only till deceased was taken off his prostrate body, still it would be an unpre-

meditated combat, in which one of the parties in the heat of passion, engendered by the contest, struck the other a fatal blow with a weapon he would be supposed to carry always for other purposes. As there was no evidence of previous preparation for the fight on the one hand, there was on the other not a scintilla of testimony tending to show a persistent use of the weapon after the mutual struggle was over, and nothing in the manner of killing inconsistent with the idea that the wounds were all inflicted under the influence of blinding passion in the dark, when there was no means of knowing how severely a powerful adversary, who still held the prisoner down, had been punished.

(884) "Whenever force is used upon the person of another, under circumstances amounting to an indictable offense, such force is a legal provocation." *S. v. Cæsar,* 31 N. C., 391. Though such provocation is given, if it be shown that the accused previously procured a weapon for the express purpose of using it, if he should get into a fight with deceased at a particular time or place or on a certain contingency, and at the appointed time or place, or on the happening of the event mentioned, did slay deceased with the weapon, the offense would ordinarily be murder. *S. v. Hogue,* 51 N. C., 381. And if upon engaging in a combat, where the parties are equally matched, both enter into it willingly, but one begins the fight with an unusual deadly weapon, such as a bowie-knife or pistol, and slays his adversary, the law demands some explanation of the use, in the inception of the affray, of such disproportionate force upon one who is using only his fists; but the fact that the deceased was a violent and dangerous man, and more powerful than the accused, would even in such a case repel the inference of malice. *S. v. Floyd,* 51 N. C., 392. In our case the weapon was not of such a character as to warrant the inference that it was prepared for the purpose and there was no express evidence to that effect.

Though several wounds seem to have been inflicted with the knife, indicating that many cuts or thrusts were made, yet it appears from the testimony that the knife was not used after the deceased was pulled off the prostrate body of the prisoner, and that, under the circumstances, striking as he was in the dark at an adversary who had thrown or knocked him down and was holding him to the ground, there was no such evidence of the willful use of excessive force as to warrant the inference that the killing was prompted by malice and not done in the heat of passion, aroused by the fight. *S. v. Ramsay,* 50 N. C., 195. In *Ramsay's case* the deceased, who was drunk, persisted in catching hold of prisoner's bridle rein and stopping his horse, when the prisoner

(885) dismounted, knocked the deceased down with a gallon jug full of molasses, and, when both arose from the ground, knocked deceased down a second time and struck him two severe blows in the

face with the jug after he was prostrate and apparently senseless upon the ground, mashing his nose and breaking his skull, and saying to him then, "Damn you, lie there." *Battle, J.*, for the Court, said: "The fall was well calculated to excite his (prisoner's) passions still higher, and then to strike again and again with what he still held in his hands was the impulse of blind fury. There was no appearance of 'coolness, deliberation or reflection' in his conduct, and the exclamation which follows—'Damn you, lie there'—was the dictate and the evidence of a *furor brevis,* which had just so fatally expended itself. . . . We do not think that the provocation was slight, nor was it great. It was sufficient to arouse passion even in an ordinarily well-balanced mind, and the killing, though done with an excess of violence, was not out of all proportion to the provocation." In no phase presented by the evidence does it appear that the prisoner in our case continued to cut with his knife beyond the time when he was being assailed by a powerful man, who still held him upon the ground, and he was not required, under the circumstances, to weigh with golden scales the amount of force used on an antagonist so situated. There being neither evidence of express malice, of preparation for the encounter (from which it might have been argued), nor of deliberate cruelty and coolness in the manner of inflicting the wound, the offense was at most manslaughter.

It is true that when the killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so, from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true. *S. v. Vann,* 82 N. C., 631; (886) *S. v. Willis,* 63 N. C., 26; *S. v. Brittain,* 89 N. C., 481. But when it appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict for any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all of the facts are developed and known, to tell the jury whether in every aspect of the testimony the presumption is rebutted. *S. v. Roten,* 86 N. C., 701; *Doggett v. R. R.,* 81 N. C., 459; *Ballinger v. Cureton,* 104 N. C., 474.

There was testimony tending to show that the killing was justifiable on the ground of self-defense, and much of the charge was directed to the aspects of the evidence relied upon for that purpose. It is not necessary for us to go further than to say that there was error in refusing

the eighth prayer for instruction (to wit, that from all the evidence in the case, in no view of it can the prisoner be convicted of murder), and the prisoner is entitled to a

NEW TRIAL.

Cited: *S. v. Rollins,* 113 N. C., 734; *S. v. Covington,* 117 N. C., 863; *S. v. Wilcox,* 118 N. C., 1133; *S. v. Rhyne,* 124 N. C., 852; *S. v. Foster,* 130 N. C., 670; *S. v. Quick,* 150 N. C., 824; *S. v. Baldwin,* 152 N. C., 830; *S. v. Pollard,* 168 N. C., 120, 124; *S. v. Kennedy,* 169 N. C., 294; *S. v. Johnson,* 172 N. C., 924.

(887)

STATE v. J. A. PORTER.

Criminal Law—Cruelty to Animals, etc.—Shooting Pigeons for Sport.

1. The shooting and killing or wounding of pigeons used as targets, for amusement and sport, is indictable as a violation of section 2482 of The Code.

2. The statute does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering knowingly and willfully permitted.

INDICTMENT tried before *H. B. Carter,* judge of the Criminal Court of BUNCOMBE, at July Term, 1892.

The defendant was indicted under section 2482 of The Code, found guilty, and fined by a justice of the peace, and on the trial of his appeal to the Criminal Court the jury found, as a special verdict, in substance, as follows: "That the defendant was a member of the 'Asheville Gun Club,' and, together with other members of said club, owned forty live pigeons, which they had obtained and kept in confinement for the purpose of using them as targets; that at the time stated in the indictment the pigeons were placed in traps, singly, and released therefrom, and then and there shot as targets, for sport and amusement, by the defendant and other members of the club; that some of the pigeons were shot and killed outright by defendant, while some were wounded and then captured and immediately killed by persons employed for the purpose; others, shot by defendant, escaped apparently unhurt, while others escaped apparently more or less wounded; that of those which escaped apparently unhurt, it was impossible to know whether all were unhurt, or not, or whether any were seriously injured, or not; that the wounding of said birds was not for the purpose of inflicting pain or

torture the same by wounding, but resulted from want of skill, (888) the purpose of defendant being then and there to kill the birds outright; that the pigeons which were killed outright or wounded and then captured and killed were subsequently used as food by the defendant and others, and that said pigeons were useful fowls."

Upon this special verdict the defendant was adjudged guilty and fined, and appealed.

Attorney-General for the State.
W. H. Malone for defendant.

BURWELL, J. The statute under which the defendant is indicted is very comprehensive in its terms. It forbids (The Code, sec. 2482) the willful wounding, injuring, torturing, or tormenting, and the needless mutilation or *killing* of any useful beast, fowl, or animal, and declares (section 2487) that any person who shall do any act toward the furtherance of an act of cruelty to any animal shall be guilty of a misdemeanor, and that "the words 'torture,' 'torment,' and 'cruelty' shall be held to include every act of omission and neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted," and then, as if to emphasize the prohibition by stating what is permitted, it enacts that "nothing in this chapter shall be construed as prohibiting the lawful shooting of birds, deer, and other game for the purposes of human food."

As was said of a similar statute, in *Commonwealth v. Turner,* 145 Mass., 296, this act does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering, knowingly and willfully permitted.

By the special verdict it is found that the suffering and death, for the permission or infliction of which the defendant is indicted, were so inflicted "for amusement and sport." Man's desire for amusement and sport is no justification for the infliction of suffering (889) or death upon any of the creatures protected by the statute now under consideration. It was enacted to protect the public morals, which the commission of cruel and barbarous acts tend to corrupt. *Commonwealth v. Turner, supra.* Since its enactment it has been unlawful in this State for man to gratify his angry passions or his love for amusement and sport at the cost of wounds and death to any useful creature over which he has control. Knowing that men of intelligence and refinement often differ as to what constitutes cruelty in one's treatment of dumb creatures, the Legislature has seen fit to define that word, and also the words "torture" and "torment," and has thus made its intent very plain.

Upon the facts established by the special verdict, we think the defendant was properly adjudged guilty.

NO ERROR.

Cited: *S. v. Neal,* 120 N. C., 618, 619.

STATE v. JAMES WOLF.

Criminal Law—Common Nuisance—Public Road.

1. Where, in the trial of an indictment for creating a common nuisance by maintaining a slaughter-pen, there was no testimony showing that the community generally were annoyed or affected injuriously by the noxious odors complained of, the court properly declined to submit to the jury the question whether such an injury to the residents of the neighborhood as amounted to a public nuisance had been shown.
2. The mere use of a way for twenty years by persons generally, for vehicles or traveling on foot, does not constitute it a public highway, nor in the absence of evidence of condemnation or actual dedication does the fact that the public have exerted control over it for any period less than twenty years tend to show that an easement has been acquired by user, which raises the presumption of a grant.
3. To sustain an indictment for keeping a slaughter-pen producing offensive odors, constituting a public nuisance to all citizens passing along an adjacent public road, it is necessary to prove that the road upon which the citizens were annoyed was a public highway.
4. Where, on the trial of an indictment for creating and maintaining a common nuisance to persons "passing along a common road and public highway," there was no evidence tending to show that any person while passing along the road was actually annoyed or that the public had acquired an easement in such road, the court erred in failing and refusing to instruct the jury that the defendant was not guilty in any aspect of the testimony.

(890) INDICTMENT for creating a common nuisance, by causing unwholesome odors at a slaughter-pen, tried at April Term, 1892, of BUNCOMBE, before *Carter, J.*

The charge in the indictment concluded, "to the great damage and common nuisance of all good citizens of the State, going, returning, and passing through and along the said common road and public highway and being and residing near thereto."

The defendant excepted to the charge of the court, for that the (892) court instructed the jury that if the defendant allowed his slaughter-pen to be and remain in such condition that the stench arising therefrom seriously annoyed the public traveling said highway, he would be guilty; that it was not necessary for the public to be actually present on said highway, but that if such of the public as did travel said highway were seriously annoyed and inconvenienced by said odors the defendant would be guilty. No question was made on the trial as to whether or not this was a public highway, nor did the court charge the jury whether or not it was a public highway according to the evidence, nor did it tell the jury what constituted a public highway, nor did the defendant request the court so to do, but the charge was based upon the idea that the road was a public highway. The defendant excepted, for that the court did not instruct the jury as to what constitutes a public road, and did not tell the jury that the evidence did not show this to be a public road. There was a verdict of guilty, and the defendant appealed from the judgment rendered.

Attorney-General and T. A. Jones for the State.
Charles A. Moore for defendant.

AVERY, J. There was no attempt to prove that any person (893) other than the witness Britt lived in the vicinity of the slaughter-pen or was subject to annoyance at his house by the offensive odors emanating from it. There was no testimony, therefore, tending to show that the community generally were affected injuriously by such noxious smells, and the court very properly declined to submit to the jury the question whether such an injury to the residents of the neighborhood had been shown as amounted to a public nuisance. *S. v. Holman,* 104 N. C., 861. The question whether Britt has sustained any wrong as an individual, for which he can maintain a civil action, is one that can be tested without invoking the aid of the criminal process of the State.

The court, assuming that the road which ran within 380 yards of the pen was a public highway, told the jury that "if such of the public as did travel said highway were seriously annoyed and inconvenienced by said odors, the defendant would be guilty." It seems that the attention of the solicitor was directed to the necessity of proving that the road had been devoted to public use, since testimony was offered tending to show that the location of it had not been actually changed at that point for more than twenty years, and that it had been worked as a public road for four or five years. When objection was made to the admissibility of the testimony that Britt was annoyed by the noxious smell at

his house, the court assigned as a reason for declaring the evidence competent that it tended to show the nuisance to persons passing on the highway. There is no such offense known to the criminal law as a public nuisance to persons passing along a private country road, created by disagreeable or noxious smells. 2 Bishop Cr. Law, sec. 1266 (1). It was, therefore, of the essence of the charge that the annoyance
(894) should have been suffered by persons who were then using the road as a public highway. 1 Bishop, *supra,* sec. 531 (2), note 3. The mere use of a way for twenty years by persons generally for vehicles or traveling on foot does not constitute it a highway (*Stewart v. Frink,* 94 N. C., 487), nor, in the absence of evidence of condemnation or actual dedication, does proof that the public have exerted control over it for any period less than twenty years tend to show that an easement has been acquired by user, which raises the presumption of a grant. *Kennedy v. Williams,* 87 N. C., 6; *Boyden v. Achenbach,* 79 N. C., 539; *S. v. McDaniel,* 53 N. C., 284; *S. v. Johnston,* 61 N. C., 140; *S. v. Long,* 94 N. C., 896. The guilt or innocence of one charged with a nuisance in obstructing a public road or creating an odor that is unwholesome or disagreeable to those who travel along it, depends not upon the question whether all the inhabitants of the neighborhood are actually accustomed to travel over it, but whether they have a right to use it is a highway. 1 Bishop, *supra,* sec. 245; *S. v. Smith,* 100 N. C., 550. If an indictment for obstructing the passage of a private cartway, or for creating odors offensive or noxious to those entitled to use it, would lie at all, it would be essential to charge and to prove that it had been "established by law" for a particular person or persons as a means of ingress and egress to and from a certain place. *S. v. Purefoy,* 86 N. C., 681.

It is not necessary to discuss the other question to which our attention has been directed and which gave rise to an exception in the course of the trial; yet, if it should be proved or admitted on another trial that the road was a public highway, it might be well to consider whether testimony tending to prove that the odor of the pen was offensive to persons at a distance of 270 yards from it should be submitted to
(895) the jury without additional evidence to show that persons passing along a highway 110 yards further in the same direction were annoyed by it.

There was an absence of evidence tending to show either that any one while passing along said road was actually annoyed, or that the public had acquired an easement in it; therefore the prosecution has failed to make good an essential charge in the indictment by proving

annoyance to persons passing along "a common road and public highway," and the court erred in failing and refusing to tell the jury that the defendant was not guilty in any aspect of the testimony.

The verdict must be set aside.

NEW TRIAL.

Cited: S. v. Eason, 114 N. C., 796; *S. v. Haynie,* 169 N. C., 283.

STATE v. THOMAS WHITMIRE ET AL.

Practice—Appeal—Affirmation of Judgment for Lack of Assignment of Error.

Where, in an appeal, there is neither statement of case, assignment of error nor any error apparent in the record, the judgment below will be affirmed.

The defendants were indicted for larceny and tried at Spring Term, 1893, of TRANSYLVANIA, before *Graves, J.,* and appealed from the judgment pronounced upon a verdict of guilty.

Attorney-General for the State.
No counsel contra.

PER CURIAM. There is no statement of the case on appeal, (896) nor any assignment of error set out in the record, nor does any error appear in the record. The judgment must therefore be

AFFIRMED.

STATE v. A. G. GLOVER.

Jurisdiction—Extradited Criminal.

1. Except in the case of a fugitive surrendered by a foreign government under treaty stipulations, when a person is within the jurisdiction of a court and there properly charged with crime, the court may hold him and try him, no matter how he was brought within such jurisdiction.

2. Upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for

any other offense than that specified in the requisition for his rendition, and in so trying him against his objection, no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied.

INDICTMENT for embezzlement, heard before *H. B. Carter, Judge* of the criminal court of BUNCOMBE, at January Term, 1893.

From a judgment overruling the State's demurrer to a plea to the jurisdiction the solicitor appealed.

Attorney-General for the State.
Cobb & Merrimon and W. W. Jones for defendant.

SHEPHERD, C. J. The defendant was indicted in the criminal court of Buncombe County for the embezzlement of certain funds which came into his possession while he was acting as the agent or servant for the Asheville Kaolin Company. Upon his arraignment he pleaded, among other things, that the court had no jurisdiction of his person, (897) and the court upon demurrer sustained the said plea and ordered that the defendant be discharged from custody. From this judgment the State, through its solicitor, appealed to this Court.

It is a general principle of law, as laid down by the English and adopted by the American courts, that when one is within the jurisdiction of a court, and there properly charged with crime, the court may hold him and proceed to his trial without any reference to the circumstances under which he was brought within such jurisdiction; and so firmly established is this principle that the Supreme Court of the United States has held that it would give no relief even where a person had been kidnapped in a foreign country and brought by force (without reference to any extradition treaty) within the jurisdiction of the State whose laws he had violated. And it was remarked by the Court that "there are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offense, and presents no valid objection to his trial in such court." *Kerr v. Illinois,* 119 U. S., 436; *Mahon v. Justice,* 127 U. S., 700; *S. v. Smith,* 1 Bailes, S. C., 283.

It is insisted, however, by the defendant that the principle above stated does not apply to his case, for the reason that he was surrendered by the State of Pennsylvania to answer a charge of obtaining money from the said Asheville Kaolin Company under false pretense, and he urges that the charge cannot be varied and that he cannot be arrested or put upon trial for the embezzlement of the money of the said company, or indeed for any other offense until the particular

charge upon which he was extradited has been disposed of and (898) he has had reasonable time and opportunity to return to the State from whence he was taken.

In support of this position we have been able to find but two cases in which the precise question now presented has been decided in this country. These are *S. v. Hall,* 40 Kansas, 338, and *Ex parte McKnight* (Ohio), 28 N. E. R., 1034; and an examination of the opinions will disclose that they are founded upon a supposed analogy to the case of *U. S. v. Rauscher,* 119 U. S., 407, in which it is decided that the principle contended for prevails in cases where fugitives from justice have been surrendered by foreign countries under the stipulations of extradition treaties. There are two other cases (*In re Cannon,* 47 Mich., 481; *Complin v. Wilder,* 40 Ohio St., 130) in which a similar view was taken, but as they related to arrests in civil actions of persons who had been extradited for criminal offenses, they cannot be considered in point. In response to these it may be said that "a controlling distinction to be noted is that a person against whom it is sought merely to establish or enforce a civil liability has personal rights which are violated by his being brought into the jurisdiction by fraud while an offender against the criminal laws of the State acquires no right by his flight or absence from the jurisdiction which the courts, in the administration of those laws, are bound to regard when he is again found within the jurisdiction." *Lascelle v. State of Georgia.*

In opposition to the foregoing cases there is a very great preponderance of judicial authority. *Ham v. S.,* 4 Tex. Cr. Appeals, 645; *S. v. Stewart,* 60 Wis., 587; *Post v. Cross,* 135 N. Y., 336; *Comrs. v. Wright,* Mass., 82; *In re Nules,* 52 Vt., 609; *In re Noyes,* 17 Albany L. J., 407.

We are relieved, however, of the duty of passing upon the (899) merits of these conflicting views, as the question involves the construction of a provision of the Federal Constitution and the laws made in pursuance thereof, and a recent decision of the Supreme Court of the United States has authoritatively put an end to all controversy upon the subject. The decision referred to is *Lascelle v. Georgia, supra,* which was carried by writ of error to the Supreme Court of the United States and decided at its present term. The reasoning of the learned opinion of *Lumpkin, J.,* of the Supreme Court of Georgia, is approved by the Court, and the distinction between the rights of a fugitive from justice under international and interstate extradition laws is clearly defined. A discussion of the question by this Court would amount to but a repetition of the reasoning contained in the opinions delivered in the above-mentioned case, and it is believed that the following extracts from the opinion of the Supreme Court of the United States will be

sufficient to indicate the principle upon which the jurisdiction of the courts of the demanding State in this and similar cases is sustained: "The case of the *U. S. v. Rauscher, supra,* has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a *treaty* between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offenses that were extraditable, and the statutes of the United States, passed to carry it and other like treaties into effect, constituted the supreme law of the land, and was construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for his surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded (900) as establishing any compact between the States of the Union, such as the Ashburton treaty contained, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description punishable by the laws of the State where the forbidden acts are committed. It is questionable whether the States could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offense for which fugitives would or should be surrendered. But it is settled by the decisions of this Court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence or by abuse of legal process. *Kerr v. Illinois,* 119 U. S., 436; *Mahon v. Justice,* 127 U. S., 700; *Cook v. Hart,* 146 U. S., 183. . . . . If a fugitive may be kidnapped or unlawfully abducted from the State or country of refuge, and be thereafter tried in the State to which he is forcibly carried, without violating any right or immunity secured to him by the Constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a State's authority or jurisdiction to try him for another or different offense than that for which he was surrendered. . . . . but aside from this it would be a useless and idle procedure to require the State having custody of the alleged criminal to return him to the State by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offenses on which it is desired to prosecute him. The Constitution and the laws impose no such condition or require-

ment upon the State. Our conclusion is that upon a fugitive's (901) surrender to the State demanding his return in pursuance of national law he may be tried in the State to which he is returned for any other offense than that specified in the requisition for his rendition, and that in so trying him against his objection, no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied."

The principles thus declared are applicable to this case, and the decision must be followed by the Court. Cooley Const. Lim., 18. It is but just to his Honor that we should state that when he made this ruling there was, as we have seen, much conflict of judicial opinion upon the question, and that the case of Lascelle had not then been decided.

For the reasons given, the judgment must be

REVERSED.

(902)

STATE v. DAVID EDWARDS.

Manslaughter—Declarations of Prisoner, Admissibility of—Evidence—Instructions.

1. The declarations of a prisoner made immediately after and not during the transaction constituting the offense with which he is charged are not admissible in evidence, except as corroborative of his evidence if he has availed himself of the privilege of testifying in his own behalf.

2. On a trial for murder the defendant cannot complain of the exclusion of his declarations made after the struggle and shooting which resulted in the death of his antagonist, if, in a subsequent period of the trial, all of such declarations were admitted after the State had called out a part of them.

3. On a trial for murder the solicitor was permitted to ask a female witness (for whose favor the deceased and the prisoner were rivals, and who was sitting in the lap of the deceased just before the fatal struggle,) whether the prisoner, when he came toward her and the deceased, appeared to be mad or in fun, the reply being that he seemed to be mad: *Held*, that such question being only a simpler form of an inquiry as to what the manner of defendant was when he approached deceased, was not improperly admitted.

4. On a trial for murder it appeared that the prisoner, the deceased and others were together in a house; defendant went out and declared to a witness that he came near killing the deceased because he had cut him out of his (the prisoner's) girl; on reëntering the house he saw the girl sitting on the lap of the deceased, and after lying for a while on a bed with a pistol in his hand he arose and approached the deceased and said

with an oath, "I am going to kill you"; deceased then pulled his pistol and asked for peace, and the girl having left his lap, he arose and immediately the struggle began between him and the prisoner; bystanders grabbed the pistols of the men, the deceased saying he was willing to give up his—defendant refusing to surrender his; the men were then released and began pushing each other; defendant's foot went through the floor and his pistol was discharged; deceased then shot at but missed defendant, who thereupon fired again, fatally wounding the deceased, who again fired at but missed the defendant: *Held*, that the declarations of the defendant when he went out of the house and all of his actions upon his return evinced a deadly purpose and the evidence showed no such change of purpose and effort by him to avoid a conflict, and no notice to deceased of such change after he had declared his purpose to kill the deceased, as would warrant the jury in finding that the killing was done in self-defense, and the court properly refused to instruct the jury that defendant was not guilty if his pistol went off by accident the first time and deceased began to shoot at him and defendant shot to save his own life or to escape great bodily harm.

The defendant was indicted for the murder of DeWitt Lovin and tried before *Bynum, J.*, and a jury, at Fall Term, 1892, of SWAIN.

On the trial, Louisa Justice, a witness for the State, after testifying that she saw defendant and prisoner at a neighbor's house where they were "deviling and drawing their pistols on each other and saying
(903) they were going to shoot one another," said: "Next saw them at Holder's; I went home; defendant and Lovin went with me; they would grab one another, deviling one another, and pull out their pistols; we told them to put them up and they did; defendant was laughing and going on with his devilment; defendant came in the house and sat down on the bed; I began peeling potatoes; Edwards began peeling them and made like he was going to throw them at me; he took out his pistol; we told him to put it up; he laid it on the shelf; Lovin and me reached to push it further on the shelf; defendant saw us and reached and got it and put it in his pocket; we told them again to put up their pistols; Lovin broke his pistol and dropped the cartridges in my sister's lap; defendant would not do it; don't remember his language; he stuck his pistol in his pocket and my sister handed the cartridges back to Lovin; he said they had four apiece; Lovin put two of them in his pistol and put it in his pocket; after this, defendant got on his all fours and shot in the clothes press; he said he was shooting at a little diamond; he got up and came to the fireplace; got his hat and stuck his knife through it in the floor and told Lovin to step back and shoot at it; Lovin said he would not; my husband said he would have no more shooting, and picked up the knife and put it in his pocket, and he and my brother Billy took Edwards out of the door; I got supper and called them to come in; Edwards lay on the bed; Lovin was sitting before the fire and

my sister was sitting in his lap; we begged defendant to come to supper; he said he was sick and could not eat; Lovin would not eat either; defendant had his pistol in his hand when he came in the house and lay down on the bed with it in his hand, and came up before where Lovin was sitting with my sister in his lap and said, 'Lovin, God damn you, I am going to kill you'; Lovin said, 'No, I reckon not, surely; let's have no fuss at all'; Lovin went to raise up, my sister threw (904) his hands off so as to get out of his lap, and I grabbed her and threw her across the fireplace; by that time defendant said, 'Damn you, Lovin, you have got to die'; Lovin was begging for peace; they rose up, were wound up together; when defendant told Lovin he had to die, he jerked his pistol out and dropped his hand by his side; my husband grabbed defendant's pistol; brother Billy grabbed Lovin's and begged them to give up their pistols; Lovin said he would give his up; defendant said he would not do it; Justice and Billy let loose the pistols and turned around and stepped back a step; defendant and Lovin began shoving each other again; defendant fell through the floor with his left foot and his pistol went off, etc.; then Lovin shot at him; defendant jerked his hand back and the ball went in the logs; then defendant shot Lovin in the stomach; Lovin started backwards and defendant shot again, ball passed over my shoulder; Lovin stepped back and shot at defendant again; defendant went to the bed, squatted down and pointed his pistol towards the door at my breast; Lovin went out of the door and fell flat on his back and said, 'I am dead'; defendant told me to shut the door or he would kill the first man that came in the house; I shut the door; Lovin was shot Saturday night about 10 o'clock and died the following Monday about 12:15; defendant called my sister his Georgia gal; I and my sister washed Lovin's clothes; they were bloody and black; three holes shot through his shirt; just as defendant's left foot went through the floor he shot; defendant asked me after the shooting what I would swear; I told him I would swear the truth; he drew his pistol on me; my husband told him not to do that; he stepped back and said, 'Brother, I ain't going to hurt her.'" Upon cross-examination witness stated that "when Lovin got up from his chair he was near the wall; Edwards walked around and when Lovin turned they were (905) near together and facing each other, when they clinched; as the defendant stepped through the floor his left hand went down, his right hand went up and his pistol fired; Lovin then fired immediately; after this I saw the defendant's pistol fire—the light right at Lovin's stomach; he fired this shot just as he jerked his foot out of the floor; then Lovin fired his second shot; the shots were almost together—could hardly tell one from the other; Edwards said he had shot Lovin; while defendant was squatted down by the bed Lovin was snapping his pistol at him."

Defendant's counsel proposed to ask the witness what Lovin said to her about the shooting, and in reply to question by solicitor, witness stated that what defendant said to her was about a minute after he had shot Lovin and after Lovin had fallen out of the door and she had shut the door, having been told by the defendant to shut it. Solicitor objected. Defendant insisted it was competent as a part of the *res gestæ*. The objection was sustained. (This declaration was subsequently admitted from another witness, the State having called for a part of them). "After Lovin shot he went backward a little and out of the door; defendant was then behind the bed; after Lovin got out of the door I heard the pistol snapping; that is the time of conversation with the defendant, when I told defendant I would swear the truth; he said that was right." The prisoner proposed to ask witness if a little after the shooting defendant did not say he wanted them to send for a physician, and that he had the money to pay for it. This was offered to rebut malice. Objection sustained. Proposition to ask witness if defendant did not tell her, after Lovin was shot and after he was out of the door and before defendant had seen Lovin, that the first shot was an accident. Objection sustained. The witness then proceeded and stated that defendant and Lovin both were pretty drunk; when defendant got
(906) off of the bed he had his pistol by his side; it was a self-acting pistol; witness did not notice the lock.

James Justice, introduced for the State, testified substantially the same as above, except that he said the defendant and Lovin were at his house when he got home, and that defendant lay down on the bed and it broke through with him, and he asked Lovin to help him fix it up, which he did; they sat and talked a while; Lovin went and sat down near the fire and pulled Theresa (witness' wife's sister) down in his lap. She tried to get loose. Defendant was then still on the bed. He sat there a minute; got up, whispered to Billy Garrett (witness' wife's brother) and they went out the door. "In five or ten minutes I went out to where they (defendant and Billy) were sitting. Heard defendant bring out an oath. Said 'I came damn near killing DeWitt in there a while ago.' Don't know whether I asked him why or not, but he said, 'I told him today as we were coming along that if he cut me out of my Georgia gal I would kill him, and you see how he is doing, don't you?' I told him not to do it, as it would make him feel awful to kill a man. He said he knew the feeling, had shot a man in the eleventh rib, and supposed he was in hell; that he had killed another man and killed his wife. He asked me and Billy to go in the house and arrest Lovin and have some fun. We told him no. My wife asked us in to supper. Defendant said he liked Theresa mighty well and Lovin was cutting him out. Theresa was sitting in Lovin's lap before

defendant went out and was sitting in his lap when defendant came back in the house. Before this, she had been sitting on the bed talking to defendant a minute or two and then left him. When we went in the house defendant went to the bed and lay down. When defendant told Lovin he had to die he drew his pistol by his side and stepped a step or two, laid his hand on defendant and said 'let's have peace and none of this. Ed, I will give up my pistol if you will, (907) and we will pass it off as fun.' I went and took hold of Edwards' pistol and he said no, he'd be God damn if I got it. Billy caught hold of Lovin as I took hold of Edwards. I then turned defendant loose, stepped a step from them and turned my head. Heard a fuss, turned my head and saw defendant's pistol in his hand go off. Light of it went over Lovin's shoulder. Lovin dodged his head and jabbed his pistol in defendant's breast. Defendant knocked it off and it shot in the side of the house. Then defendant presented his pistol at Lovin's breast; Lovin knocked it down and it shot him in the stomach. Lovin stepped back towards the door two or three steps and shot at defendant again. Defendant shot again and it went over my wife's head to right of the door. Lovin stepped outdoors and fell. Defendant squatted by side of the bed, presented his pistol. Lovin fell; said he was dead. I stepped to him, asked him where he was shot, and he pulled up his shirt and showed me. It was about one and a half inches above the navel and to left side. It was not over a minute after I turned Edwards' pistol loose until first shot fired. Billy Garrett is eighteen; Theresa Garrett sixteen years old. After the shooting, defendant tried to get us to save him. Told him I would swear the truth. Upon cross-examination witness stated that Edwards tried to get us to swear Lovin fired the first shot. Defendant said the first shot was an accident, that he did not intend to shoot at Lovin; said he shot Lovin in self-defense; said he had fifty dollars, to send for doctor. Seemed to regret it very much after the shooting. Defendant got off the bed and came to Lovin and they got in the scuffle. I thought we had talked them out of it, and turned around; heard a noise; defendant had his pistol right in Lovin's face; it fired." Rest of this witness' testimony substantially (908) same as his wife's.

Theresa Garrett, witness for State, testified substantially the same as her sister, Louisa Justice, except that on cross-examination she said "Lovin and defendant had a quart bottle nearly full of liquor when they came to my sister's, and it was all drunk up when the shooting took place."

On her redirect examination the solicitor proposed to ask her if the last time Edwards came up to Lovin, when witness was sitting in Lovin's lap, Edwards appeared to be mad or appeared to be in fun. Objection;

overruled; exception. Witness answered that he appeared to be mad. Witness was further allowed to testify, under the objection of the defendant, on the redirect examination, as follows: "Right smart little after the shooting the defendant kissed his pistol on the side and said it was his pet, and that it was the third man he had shot; that he had killed his wife and two children." Being again cross-examined she said that Justice and his wife and Billy Garrett were present at this conversation.

Billy Garrett, witness for the State, testified substantially to the same facts as Louisa and James Justice except that when defendant shot Lovin he aimed at his breast, and Lovin knocked it down and it hit him in the stomach; defendant said afterwards he aimed to hit him about the left suspender buckle. And further, on cross-examination, when Justice and the witness turned him loose they did not agree to stop; they did not say they would or they would not; witness thought it was stopped. And further testified on cross-examination: "Right smart while after the shooting, the defendant said he would give fifty dollars for a doctor; 'poor fellow, I hate it; I shot him in self-defense.' "

Defendant's counsel asked the court in writing to instruct the jury as follows: "That if the jury shall find from the testimony that the prisoner and the deceased had stopped the first difficulty, and
(909) that after the witnesses, James Justice and William Garrett, turned around to go to their supper, and one minute or one and a half minutes later the prisoner's foot fell through the floor and his pistol went off by accident, and that the deceased then began to shoot at the prisoner, and the prisoner shot to save his life or great bodily harm, that the prisoner would not be guilty."

This instruction was refused by the court, except as it is contained in the charge as given. (The charge of the court is not material to an understanding of the opinion.)

There was a verdict of not guilty of murder, but guilty of the felonious slaying of DeWitt Lovin, and the prisoner appealed from the judgment rendered.

Attorney-General for the State.
W. H. Malone and J. W. Cooper for defendant.

MACRAE, J. The first exception was to the refusal of his Honor to permit the declarations of the prisoner, made after the deceased had been shot and had gone out of the house and the door was shut, to be given in evidence. Unless the declarations form a part of the transaction, they are not receivable in evidence. What the prisoner might have said during the struggle, or while giving the blow or firing the

pistol, is competent to be considered as explanatory of the act; but it is too late after the fact has been accomplished to make the explanation. *S. v. Tilly,* 25 N. C., 424; *S. v. Hildreth,* 31 N. C., 440; *S. v. Brandon,* 53 N. C., 463.

It is true that such declarations are now competent by way of corroboration of the prisoner's evidence if he has availed himself of the right to testify as a witness in his own behalf, but in any other view the law is unchanged. It seems in this case that, the State having at a later period of the trial offered some of the declarations (910) of the prisoner, as a matter of course all of them made at the same time were given in evidence. The prisoner, then, has had the full benefit of the evidence which was at first excluded, but afterwards admitted. This will apply also to the second exception, for refusal of his Honor to permit the State's witness, Louisa Justice, to be asked, upon the cross-examination, "If, a little after the shooting, defendant did not say he wanted them to send for a physician, and he had the money to pay for it," by which counsel proposed to rebut a presumption of malice arising from the killing with a deadly weapon. But we do not mean to intimate that such declarations, made after the act, would have been competent for the purpose indicated.

The solicitor was permitted to ask the witness, Theresa Garrett, if the last time Edwards came up to Lovin, when witness was sitting in Lovin's lap, Edwards appeared to be mad or appeared to be in fun, the reply to which question was that he appeared to be mad. We can see no merit in this exception. If the question had been, What was the manner of the prisoner when he approached deceased? there would probably have been no objection. We presume that the question was put in a simpler form to reach the comprehension of the witness.

There was also an objection to the testimony of this witness as to the remark of the prisoner, "Right smart little after the shooting," which probably means a short time thereafter; that he kissed his pistol and said it was his pet, and it was the third man he had shot, and that he had killed his wife and two children. But no exception was taken to the admission of this testimony.

The prayer for special instructions offered by the prisoner's (911) counsel was neither warranted by the testimony nor by the law. We can conceive of no view of this case, in the light of the evidence, in which the homicide would have been excusable. Taking all the testimony, the prisoner was the aggressor and the deceased gave no provocation, but rather sought to avoid the conflict.

While the prisoner and deceased had been rough in their actions toward each other, both of them unhappily being under the influence of spirituous liquors, there is no evidence of any bad blood between them

until the prisoner seemed to take offense at the familiarity of deceased with the young woman. The declarations of the prisoner to William Garrett when they went out together, and all of his acts upon his return into the house, up to the moment of the final catastrophe, went far to evince a deadly purpose. The acts of the deceased showed a disposition from the first to avoid any difficulty. We think his Honor exercised all the humanity of the law when he presented the case to the jury in such a light as to enable them to reduce the grade of the crime from murder to manslaughter.

The careless or reckless handling of the pistol by the prisoner, if, under the circumstances detailed, it had gone off by accident and killed deceased, would have taken away all excuse, and if it had not shown "a heart so fatally bent on mischief" as to supply malice, was at any event such gross carelessness as to have made the killing felonious, though wanting in express malice.

Under the circumstances as detailed by the witnesses, there was no retreating, no evident change of purpose and effort to avoid a conflict, and notice to deceased of such change after the prisoner had approached deceased and expressed his intention to kill him, as would enable
(912) the jury in any view of the case to have reached the conclusion that the killing was done in self-defense.

There were no exceptions to the charge as given, as there could not have been on the part of the prisoner with the least show of merit.

We conclude, upon examination of the record and the case, that there is no ground for the motion in arrest of judgment, nothing having been suggested to us to that effect, and that perhaps it is fortunate for the prisoner that this Court finds no error of which he can complain, and that he is not to be put on his trial again.

NO ERROR.

Cited: *S. v. Medlin,* 126 N. C., 1133; *Britt v. R. R.,* 148 N. C., 41; *Barnes v. R. R.,* 178 N. C., 269.

APPENDIX

PORTRAIT OF CHIEF JUSTICE PEARSON

PRESENTED TO THE SUPREME COURT ON WEDNESDAY, 15 MARCH, 1893

Attorney-General Osborne, addressing the Court, said:

May it please your Honors: Complying with a request that I could not refuse, feeling grateful for a selection which is, indeed, an honor to me, at the same time distrustful of my ability to perform the delicate task in a befitting manner, I am before you today in behalf of his family to present the portrait of Chief Justice PEARSON to this Court.

His life is a part of the history of our State, known and read of all men. Nothing that could now be said could add to his fame as a lawyer, his reputation as a man and a patriot. Not intending, therefore, to utter anything original, nor to unfold any novelties concerning him, there are still some things which I wish to say, as the representative of his students, who loved him, and to whom that fame and reputation are and always shall be dear. That he was great and held high honors amongst his people as a fitting reward of that greatness is admitted by all; but that he was a kind father, a tender husband, a faithful friend, the possessor of quiet virtues, hidden from the gaze of the world, those alone know who knew him as we knew him; and thus knowing him, of course, I could speak only words of gratitude and praise concerning him—no undeserved praise, however, for I could do no greater wrong to his memory and to his living friends, nor more poorly represent the dead than to exaggerate his virtues or conceal his faults. It is said that when Oliver Cromwell sat for his portrait, and the artist proposed to omit the wart from his face, he replied: "Paint me as I am; let posterity see me as I was, and not as thou wouldst have me to be." That was a grand reply. If Chief Justice PEARSON were beside me today, he would command me to paint him as he was, and if not that, as he seemed to be, for no man ever lived on this earth that was nearer exactly just what he seemed than was the Chief Justice. He loved the truth for its own sake; it was to him the one thing beautiful; he despised all ornamentation and gloss, but show him a genuine emotion or a true thought, he worshipped it. Place him in contact with a true man, recognizing a kindred spirit, he loved him. He would not deceive others; analyzing his own motives, he could not deceive himself. He builded his life on this principle, for he knew that the love of truth was the "oak around which all other virtues cling; that without it they fall and wither, and die in weeds and dust."

This plain and simple man, thus discarding the false and clinging to the genuine, carried his principles so far into social life that he neglected all conventionalities, discarded all mannerism, and sometimes seemed to be even blunt and rude to his friends, but beneath that rough exterior, that seeming bluntness and rudeness, there beat a heart warm, tender and generous, keenly alive to all human suffering, responsive to every lofty thought and manly desire. Rather than pretend to virtues which he did not possess, he concealed those that were his own, and left his faults bare and open to the gaze of all; thus he was generous, and the world knew it not, for he was one of those who did his alms in secret. He was not prodigal of his substance, for all that he had, he had earned in the sweat of his face. He had learned the value of

money in a hard school. That school was poverty—not the "chill penury which represses noble rage and freezes the genial currents of the soul," but the poverty which is the strongest incentive to tireless exertion—that poverty which has really been the foundation of the careers of a Clay, of a Webster, of an Andrew Jackson, and nearly all the great ones of this republic. Judge PEARSON was poor like these, and having like them determined to succeed by his own exertions, he did succeed. Assisted in early life by the generosity of a distinguished brother, he could not forget the kindness, and he showed his appreciation of it by assisting all others who struggled as he had struggled. He willingly helped any one who was thus battling with adverse fortune to begin an honorable career. He never turned a student from his door for lack of means. He invited all such to come to him. He trusted to their honor and ability to pay him in the future; if that failed, he quietly endured the loss. This was his habitual charity, but he gave to others of his accumulated fortune. Pursuing such a course as this, he won the heart of every young man with whom he was thrown in contact, and as much by these unselfish acts as by the teachings of a powerful intellect he gained through his students such an influence as has never been exercised before or since by any judge over the bench and bar of this State. For, year by year, for over forty years, there went forth from his home at Mocksville, and afterwards from the quiet shades of Richmond Hill, a small body of men, thoroughly instructed in the law by the finest teacher in State, prepared to take their rank in the front ranks of the profession which for a long time has controlled its destinies—some to fill the position of Governor, others to sit upon the Superior Court bench, and, in the person of one of your Honors, to adorn the Supreme Court. And when Judge PEARSON'S hour of trial came, as come it must to every man of prominent position and positive convictions in stirring times, these men, well knowing the purity of his character, his great ability, and having an abiding faith in his love for his native State, which with him was a passion, rallied as one man to sustain and defend him. His life up to that time had been singularly successful, not only in attaining high position, but also in inspiring confidence in his fellow-men.

Born in 1805, in the town of Mocksville; graduating at Chapel Hill at the age of 18 with the highest honors of his class; receiving his license at 21; elected to the Legislature for four successive years; placed upon the Superior Court bench at 31; promoted to the Supreme Court at 41; elected by his associates Chief Justice at 53, and holding that position until 1868, when, as the nominee of both political parties, he was again reëlected—surely, in the presence of such a record, I am justified in saying that no man in our State ever held higher positions in quicker succession, nor more largely inspired the confidence of his fellow-men.

Far be it from me to refer to these days for the purpose of stirring up the ashes of old political fire. For over fourteen years the dust has lain upon his coffin. I believe that all political animosity lies buried beneath that dust. In the grave should all passions and prejudice born of conflict lie buried. "Justice should hold the scales in which the acts of the dead are weighed," but the time has come when we can pass upon the motives which inspired the great Chief Justice in his decision of the famous *habeas corpus* case. Here, before your Honors, in this the highest Court of the State, where you daily mete out justice to the living, I claim this measure of justice for the dead, that the judgment rendered in our political haste should be reversed, and that hereafter men in passing upon the motives which inspired Judge PEARSON, in *Ex parte Moore* (63 N. C., 397), shall find that they are the same which guided him in a long line of able decisions universally acquiesced in by the profes-

sion—love of justice and of truth. Judge PEARSON himself cared not for difference of opinion as to the law, but that those whom he respected should for one moment doubt the sincerity of his convictions, or question the disinterestedness of his conduct, was, indeed, to his proud and sensitive heart, a deep and serious wound. How he bore that wound, how he endeavored to parry the thrusts and stabs of his political foes, have been described by those who knew him in those days better than I, and were far abler to describe them. One friend has said that he complained bitterly of the injustice done him; another, that he suffered as the martyr suffers, crying aloud when pain was past endurance. As for me, I saw none of this, though I knew him but a short time after the exciting scenes to which I refer. There was no murmur then. He was as silent then as his portrait is silent now. He presented to my mind the aspect of some moral hero who, conscious of the rectitude of his own intentions, had elevated himself to a position of independence upon that consciousness, looked down upon his detractors, and, expecting no justice from his contemporaries, placed his vindication upon his exposition of the law, and confidently expected a complete triumph in the judgment of posterity. Surely that appeal will not be in vain, for none dare willingly to appear before that bar who have not done, written or said something worthy to be remembered. The forgotten are not there, the base fear to come. Judge PEARSON, fired by an honorable ambition that burnt as fiercely in his heart as it ever burned in the heart of a Cæsar or Napoleon, wrote to conquer distant thought. He wrote his decisions, not for his own day, "nor for an age, but for all time"; and when the recollection of the Kirk war shall have passed away, when persecutors and persecuted are alike forgotten, men, in reading that splendid biography written by his own hand in the pages of our Supreme Court, will gladly admit that he was a great judge and upright man. As was said of another, "For, high above all his marvelous intellectual gifts, beyond all the positions that he held, the ermine that he wore, rises his integrity like some grand old mountain peak—there it stands, firm as the earth beneath, and pure as the stars above."

North Carolina has, indeed, produced great statesmen, like her Badger, orators like her Miller, but their fame is unsubstantial and traditional, in that they have left behind them but little written record of their greatness. They entrusted their best thought to the evanescent spoken word. She must depend for her intellectual eminence upon her great jurists, her RUFFINS and her PEARSONS, and these two—the one, by common consent, her great expounder of equity, the other the grandest common-law lawyer of the land—have sustained her prominence not only among her sister States, but carried it across the sea and firmly fixed it in the birthplace of English law. It is impossible to think of either one of these great judges without thinking of his great rival. The difference between their intellects has been best described by Justice READE: "If RUFFIN had more scope, PEARSON had more point; if RUFFIN had more learning, PEARSON had more accuracy; if RUFFIN was larger, PEARSON was finer; both were great."

Permit me to add one more word to this distinction: PEARSON was more original; and it was well for this State that he did possess originality, for the lines of his life fell in the days when a great revolution swept over this country, sweeping away all ancient landmarks. New principles were established upon the field of battle, an old Constitution was abolished, a new one erected upon its ruins. Reconstruction laws were passed, statutes enacted in pursuance thereof. It became his duty to expound and apply all these new laws. He could not depend upon precedent, for there was no precedent to guide him in this darkness. He had to blaze a new road through an unbroken forest, where the footstep of a man had never trod. Such an exigency required more

than a mere case lawyer, than an index to decisions, a follower of the opinions of others. The times demanded a lawyer profound and original, and such a man was PEARSON. He knew all the great authorities that set in motion and directed the currents of legal thought. In the words of another, "He traced these currents back to their fountain-head to ascertain the reason of the law, and ran them forward to their logical conclusion, making them by their expansiveness and flexibility to cover and protect every possible phase and condition of human affairs."

Not only did he display his originality, driven by the necessity of the times, but he did it from his own habit of thought. He did not walk in the same intellectual ways as other men. He could not bend his mind in humble idolatry to the past, and so he reversed time-honored decisions, more so than any judge of our State. As has been well said, it is a marvelous testimony to the strength of his intellect that the greatest lawyers acknowledged the wisdom of his judicial departures.

The distinguishing feature of his style was its clearness. There was no obscurity about his ideas, and consequently none in their expression. After he had once sent forth his opinion to the world, there was no mistaking its meaning. Explanation was useless, modification was impossible, for if you modified it, you reversed it. If he was wrong, there was no escape from his error, except by positive, unequivocal retraction. No flowers adorned the river of his thought. In a strong, clear current it surmounted every obstacle and rushed to a conclusion. Indeed, his writings abound with a wealth of homely illustrations that can scarcely be called ornamental, but, in the language of a great preacher of the present day, they served his purpose, for they *illustrated*. I do not say he always wrote well, nor in a manner worthy of himself, but he has written some things that we cannot permit to die—that will live as long as the English language lives and is used to convey legal thought.

If time does not fail me, one more word I wish to add concerning that intuitive perception with which he looked through a vast mass of irrelevant matter, long files of pleading, to the point in the case, more quickly even than those who had made the matter a subject of intense study; of his method of expounding the law to his students; how his object seemed to be to teach the pupil to think for himself, and not to overload his memory. In so expounding the law he did not seem to be producing, but, as was said of another, to be remembering, to be recalling from the vast storehouse of his admirably constructed and capacious memory, thoughts that had lain there in their proper receptacle for years, ready to be used as occasion demanded. Thus we did not see "his opinion in the making, but it came forth all cut and nicely shapen and fitted for its proper position, as the pillars of that temple where the sound of the saw and the hammer was not heard."

This is, indeed, but a feeble picture of the mental attributes of this great judge, but the portrait I present correctly represents his face and bust. You can see his clear, dark complexion, his brown hair, his small, symmetrically shaped head, his prominent brow and slightly Roman nose, delicately cut. It fails only where all portraits must fail—no limner can make the human eye speak from the canvas. Who can paint that window through which the soul looks out to its fellows? The crystal and its color are there, but gone forever is the light behind. And his eye distinguished him amongst his contemporaries as did the eyes of John Marshall and Aaron Burr as they looked at each other across the bar in the famous trial for treason in Richmond. Indeed, it was beautiful. It sparkled as the star, and in every ray there shone the light of a splendid intellect.

It is said that at the banquets of the Athenians and Romans it was their custom to bring forth the images of their illustrious dead and to place them

beside the living at the festal board, in order that the virtues of the past should be remembered and posterity inspired to imitate them by this continual presence of the dead. It may be in obedience to such a custom that these portraits now adorn these walls. I know not. But this I have read, that "fortunate is the State which is great enough to recognize its great," both living and dead. "For what would this world be without its memories and its graves? 'Tis the voiceless only that speak forever."

Judge PEARSON was great, and his State recognizes his greatness. It is, therefore, fitting that his portrait should hang upon these walls, surrounded by his illustrious predecessors and associates, and look down upon your Honors, his successors, silently admonishing you of the brevity of human life, and inspiring you with the durability of human fame.

Chief Justice Shepherd, responding for the Court, said:

We accept with much gratification the portrait of the great Chief Justice who for so many years presided over this Court. His profound knowledge of the law, and most remarkable clearness of expression, as well as other rare qualities as a judge, are so universally recognized by the profession that they require no extended comment from us on the present interesting occasion. Fifteen years ago the members of this bar assembled for the purpose of doing honor to the illustrious dead, and their resolutions and eulogistic addresses have been incorporated into the records of the Court. These tributes of respect, together with his learned and luminous opinions, form even a more enduring testimonial of his greatness than the imposing structure which his devoted students have created to his memory.

Time, which, in its steady and unrelenting progress, obscures the brilliancy of so many reputations, only serves as a background to bring into increasing prominence this distinguished figure in the judicial history of North Carolina.

The memory of departed greatness may be revived by an occasional view of some monumental pile which affection has reared over the last resting place of all that is mortal, but to few has been vouchsafed the inestimable privilege of perpetuating their memory by works which do live after them. Chief Justice PEARSON lives in his opinions. Through them we still feel the power of his great intellect, and the influence of his deep and accurate learning. They continue to shed their light upon our jurisprudence, and are pointed to with pride by the people of our State. These, as well as the great example he has set of wholly devoting himself to the duties of his high position, will long preserve his memory in the minds and hearts of his professional brethren.

It is ordered that his portrait be placed in a suitable position on the walls of this chamber, by the side of the other great judges with whom he was so long associated in the labors of this Court.

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The acts or conduct relied upon as evidence of the abandonment of a contract must be positive, unequivocal and inconsistent with the contract. *Taylor v. Taylor*, 27.

ACTION.

For damages, 293, 709, 720, 743, 747, 759, 769.
For money had and received, 127.
For penalty, 111.
On note, 754.
To redeem mortgage, 842.

ACTION ON NOTE UNDER SEAL.

1. Where a note under seal was executed by a father and delivered to his daughter, or to another for her, and in an accompanying and contemporaneous paper the fact appeared that the payee was his daughter and that the note was intended to be paid out of his estate after his death, in addition to her distributive share: *Held*, such fact was not sufficient to rebut the consideration imported by the seal, and, although the bond was voluntary and intended as a gift, the seal imported a consideration and rendered it enforceable. *Ducker v. Whitson*, 44.

2. A deceased father had executed and left with his attorney a sealed note, payable to his daughter, with a contemporaneous writing, stating that the notes were to be paid out of his estate, and not to be reckoned as advancements; the administrator defendant alleging lack of consideration, undue influence, mental incapacity, and nondelivery, and that the note and contemporaneous writing constituted an executory contract, not binding on deceased, in favor of a distributee: *Held*, that issues as to mental capacity, undue influence and delivery were insufficient. *Ib.*

3. The attorney having testified as to the execution of the note and the accompanying paper, it was proper, on the question of delivery, to ask him what deceased told him to do with the note, whether to hold it, subject to his order, or deliver it to the payee. *Ib.*

ACTION TO RECOVER DISTRIBUTIVE SHARE.

An administrator who, through mistake, paid a distributive share of an estate to one not entitled thereto, and took a refunding agreement in case any claim should come against the estate, is alone entitled to bring an action for the recovery of such sum. *Norwood v. O'Neal*, 127.

ACTION BY PRINCIPAL OR AGENT.

An action may be brought either by the principal or agent on a contract not under seal, made by the agent in his own name for an undisclosed principal, but if the principal sue in his name, the defendant will be entitled to be placed in the same position as if the agent had been acting for himself. *Barham v. Bell*, 131.

ACTION AGAINST PARTNERS.

An action may be brought by a creditor of a partnership against any one, or several, or all of the members, although the assets may be in the hands of a receiver and insufficient to pay the debts of the partnership. *Hanstein v. Johnson*, 253.

ACTION AGAINST A PARTNERSHIP.

In an action against a partnership for the proceeds of goods sold on consignment, a statement of account rendered by one of the partners long after the dissolution of the copartnership, showing the indebtedness of the firm, not to plaintiff, but to a third party, between whom and plaintiff no privity is shown, is not admissible as evidence, either to bind the defendants or to contradict a deposition of one of the partners. *Detrick v. McLean*, 840.

ACTION FOR SLANDER.

An action by a husband for slander of his wife, the wife not being a party, will be dismissed where the complaint alleges no special damage to the husband. *Harper v. Pinkston*, 293.

ACTION TO SET ASIDE DEED, 412.

Where a husband purchased land with his wife's separate estate, taking deed to himself with her consent and agreeing to convey to her at her request, and did so convey to her just before making a general assignment for benefit of creditors: *Held*, that in an action by creditors to set aside the deed it was immaterial to inquire as to whether the intent of the husband in making the deed to his wife was to hinder and delay his creditors. *Brisco v. Norris*, 671.

ACTION TO ENFORCE SUBCONTRACTOR'S LIEN.

1. Where, in an action against the owner of a building and the contractor by a subcontractor to enforce his lien, the contractor admits his liability to plaintiff, and the owner of the building does not resist the judgment adjudicating the lien and ordering its enforcement, the defendant contractor has no right to object to the judgment because the satisfaction of the debt which he admits he owes to the subcontractor is imposed upon his codefendant, the owner of the building. *Lumber Co. v. Sanford*, 655.

2. The fact that a subcontractor sought in one action to enforce his lien against the owner of the building without joining the contractor cannot estop the plaintiff from recovering a judgment against the contractor in another action in which the latter and the owner of the building are parties. *Ib.*

ACTION TO RECOVER LAND, 783, 791.

1. Where, in an action to recover the possession of land, it appeared that C., intending, but not disclosing his purpose, to act as agent for his minor son, C., Jr., purchased the land from F., the defendant's grantor, under an agreement to reconvey the land by way of mortgage to secure the purchase-money, and F., supposing that he was dealing with C., executed the deed to him, and C. caused the abbreviation, "Jr.," to be added after his own name and had the deed so recorded, at the same time executing notes and mortgage in his own name to

ACTION TO RECOVER LAND—*Continued.*

F., to secure the purchase-money: *Held*, that a conveyance by "C., Jr.," or his heirs, to plaintiff, who had knowledge of all the facts, did not divest F.'s title to the lands. *Sawyer v. Northan*, 261.

2. Minor children of a deceased person who were made parties to a proceeding for the sale of their father's land to pay his debts, and failed to claim homestead rights in the land, cannot, after coming of age, maintain an action against the grantees of an innocent purchaser under a decree of sale, rendered in such proceedings, to set aside the sale and recover possession of the land, on the ground that it was the homestead of the deceased and, as such, exempt from payment of his debts "during the minority of the children or any one of them." *Dickens v. Long*, 311.

3. The purchaser at an execution sale, under a judgment rendered on a debt contracted prior to 1868, may recover the land, free from any claim of the widow of the debtor, but subject to her dower. *Buie v. Scott*, 375.

4. In an action to recover land and to set aside as fraudulent a judgment under which it had been sold, it appeared that a widow, the mother of plaintiffs, had procured an *ex parte* proceeding to be brought in the name of herself and children for the sale of the land in which she had dower and which she had contracted to sell and have conveyed by good title to the defendant or one under whom the latter claimed. The proceedings were not conducted to a decree for sale, but a judgment for court costs was taken therein against the petitioners, and the land was sold under execution issued thereon, and defendant became a purchaser at an insignificant price. The plaintiffs (heirs of the decedent) testified that they were not cognizant of the proceedings, and that the attorney who conducted the same for their mother had no authority to represent them, but there was no evidence that the defendant (the purchaser) knew that the attorney had no such authority: *Held*, that the facts that defendant was distantly connected with the widow (mother of plaintiffs) and occupied the *locus* as a renter for two years, and during the time when the *ex parte* petition was filed, and that before she purchased at the execution sale she held the land under, and had possession of, deeds which contained recitals showing that the widow had no authority to sell the fee, were not evidence from which the jury might infer that the defendant had notice of the fraudulent purpose and character of the *ex parte* proceedings in which the judgment for costs, under which she now claims, was rendered. *Williams v. Johnson*, 424.

5. Where, in ejectment, the jury found that "plaintiff did advise or induce defendant to buy the land before he purchased the same," such finding is not sufficient to create an estoppel against plaintiff when it was not also found that plaintiff knew of her title when she gave the advice, or that defendant did not know of plaintiff's title or that he was deceived by such advice. *Bishop v. Minton*, 524.

6. A finding by a jury that defendant in ejectment did not purchase from another in good faith and without knowledge of plaintiff, is not inconsistent with another finding that plaintiff advised or induced the defendant to buy the land before he purchased it. *Ib.*

ACTION TO RECOVER LAND—*Continued.*

7. While one tenant in common suing a trespasser in ejectment and proving title to an undivided interest is entitled to judgment for the possession of the whole land, if the evidence establishing his right demonstrates that others than the defendant hold as cotenants the other undivided interests, and that the action inures to their benefit, yet, when the defendant is a cotenant, the plaintiff should have judgment only for the recovery of the interest to which he shows title. *Foster v. Hackett*, 546.

8. In an action to recover land, brought by one who purchased at a mortgage sale, and who, the defendant claimed, was a partner of the mortgagee and knew that the whole amount was not due, as claimed by the mortgagee, a reference to state an account would not be proper until the issues as to the partnership, *bona fides* of the purchaser and his knowledge of the state of account between mortgagee and mortgagor could be determined. *McMillan v. Baxley*, 578.

9. In an action to recover land by the purchaser thereof at a sale under the power contained in a mortgage given by the defendant, the deed executed by the mortgagee reciting the sale in pursuance of the power is *prima facie* evidence that all the terms of the power and all requirements as to notice have been complied with. *Lunsford v. Speaks*, 608.

10. Where, in an action to recover land, it appeared that plaintiff's grantor had previously conveyed it to his daughter, a *feme covert*, who, after retaining the deed for a year without having it recorded, returned it to her father just before her death with instructions to destroy it, which he did: *Held*, that plaintiff was not entitled to recover the land from defendants, the heirs of the daughter, who were in possession under the equitable title acquired from her. *Miller v. Church*, 626.

11. Where, in an action to recover land, a record of proceedings for the sale of land, to which plaintiff was a party, was relied upon as an estoppel against the plaintiff, and there was nothing in the record to show that the land to which the proceedings related was the same as the land for which the action was brought: *Held*, that such record cannot be admitted as an estoppel against the plaintiff. *Garrison v. Tinley*, 652.

12. In an action for the recovery of land, plaintiffs claimed title as the heirs and devisees of two tenants in common who originally owned the land; the claimant of the interest of one of the original tenants submitted to nonsuit upon the improper exclusion of a will, under which he claimed, as evidence; of the remaining plaintiffs, heirs of the other original tenant in common, one was a minor, the other two adults; defendant claimed by adverse possession and color of title as against all the heirs and representatives of both the original tenants in common, except the infant plaintiff; in deraigning their title to one-half, plaintiff's testimony showed title to the other half in the nonsuited plaintiff; on the trial the court required the jury to find whether the defendant had acquired title against either the adult or minor plaintiffs, and instructed them, if they should find that defendant had acquired title against neither, then they should find that his

ACTION TO RECOVER LAND—*Continued.*

possession of the whole was wrongful: *Held*, (1) that such instruction was proper, for a finding that the defendant had not acquired title by his alleged color, as against any of the heirs of one of the original tenants in common, necessarily established that his possession had not been such as to mature his title against the heirs or devisees of the other original tenant in common; and (2) that judgment in such case was properly given for plaintiffs for title to one-half and for recovery of possession of the whole to inure to benefit of the owner of the other half. *Moody v. Johnson*, 804.

ADMINISTRATOR.

1. An administrator to whom a promise to refund was made by one to whom he erroneously paid a distributive share of an estate, is alone entitled to bring an action for the recovery of such sum so paid. *Norwood v. O'Neal*, 127.

2. In proceedings by an administrator for leave to sell land to make assets to pay decedent's debts, the heir has a right to show that judgments taken against the administrator after the commencement of the proceedings were wrongfully suffered to be entered against him. In such case, it seems, the judgment creditors ought to be made parties. *Tilley v. Bivens*, 348.

3. After a presumption of abandonment or settlement of a claim against an administrator has arisen, it will not be rebutted as to the sureties on the administrator's bond by the filing of an account by the administrator showing a balance due the distributees. *Thompson v. Nations*, 508.

4. Where one claims personal property as the distributee of an ancestor, an action to recover the same can be maintained only by the administrator or executor of the deceased. *Varner v. Johnston*, 570.

5. W. S., in whom a legacy had vested, died without issue or next of kin, except his father, J. S., who died subsequently; V. was appointed administrator of both, and in both capacities sued to recover the legacy: *Held*, that it is immaterial whether judgment was rendered in favor of V. as administrator of the father or of the son, as, in either case, he is bound by the judgment. *Ib.*

6. Where there are conflicting claimants of a fund in the hands of an administrator, and he resists the recovery by one of the claimants, for whom judgment is finally given in an action to recover the fund, costs should not be awarded against the administrator, personally, but should be paid out of the fund, unless the court should adjudge that there has been mismanagement or bad faith in his defense to the action. *Ib.*

7. A private sale of a *chose in action* by an executor or administrator, if made in good faith, is valid. *Dickson v. Crawley*, 629.

8. A sale by one of several executors will pass title to the purchaser. *Ib.*

9. Where a judgment was obtained against an administrator of a decedent and his surety in 1869 on a cause of action arising and in a suit commenced before the adoption of the Code of Civil Procedure, the judg-

ADMINISTRATOR—*Continued.*

ment being *quando* as to the administrator, and absolute and final as to the surety, an action on the latter is a new *causa litis* and governed by the statute of limitations as prescribed in The Code, while the statute of presumptions under the prior law is alone applicable to the action on the *quando* judgment against the administrator. *Ib.*

10. Where an administrator, against whom a judgment *quando* was taken in 1869, in an action begun prior to the Code of Civil Procedure, died soon thereafter and administration *de bonis non* was not taken out until 1886, and the suit was brought on such judgment in 1890: *Held*, that no presumption of payment can arise, inasmuch as in computing the time under the statute the period during which there was no administration must be excluded. *Ib.*

11. An administrator *cum testamento annexo* has all the rights and powers and is subject to the same duties as if he had been named as executor. *Smathers v. Moody*, 791.

AGENCY, 261.

A general agent of a corporation may delegate to another authority to buy supplies for the corporation. *Luttrell v. Martin*, 593.

AGREEMENT BETWEEN COUNSEL, 756.

An alleged verbal agreement between counsel, if denied, will be deemed as legally nonexistent, on the hearing of an appeal. *Sondley v. Asheville*, 694.

ALTERATION OF BOND AND MORTGAGE AFTER EXECUTION, 370.

ANCILLARY PROCEEDINGS.

Orders in, 141.

Motions in ancillary proceedings may be heard by a judge out of court anywhere within the district to which he is assigned. *Parker v. McPhail*, 502.

APPEAL, 318, 838.

1. An appeal from an order of commitment of a party to jail, made in an ancillary proceeding, before trial of the main action will not be dismissed as premature. *Bradley Fertilizer Co. v. Taylor*, 141.

2. An appeal from a motion to dismiss an action is premature and will not be entertained. On such refusal the defendant should cause an exception to be noted and proceed to answer or demur. *Mullen v. Canal Co.*, 109; *Joyner v. Roberts*, 111; *Kellogg v. Mfg. Co.*, 191; *Luttrell v. Martin*, 593.

3. A record on appeal which does not show that a Superior Court was opened and held at all in the county from which the appeal comes is fatally defective. *High v. R. R.*, 385.

4. Where, after an appeal from the refusal of a judgment for the restitution of personal property the appellant has come into the possession

APPEAL—*Continued.*

of the property, or its equivalent, the Supreme Court will not hear the matter merely to adjudicate the costs, but will dismiss the appeal. *Russell v. Campbell*, 404.

5. The statutory requisites as to appeals cannot be dispensed with, except with the assent of counsel entered in the record or evidenced by a writing. Rule 39 of Supreme Court. *Sondley v. Asheville*, 694.

6. Where, in an appeal, there is neither a statement of case, assignment of error nor any error apparent in the record, the judgment below will be affirmed. *S. v. Whitmire*, 895.

APPEAL, MOTION TO REINSTATE.

1. A motion to reinstate an appeal dismissed for failure to print the record must be made at the same term, and will only then be allowed for good cause shown. *Pipkin v. Green*, 355.

2. A motion to reinstate an appeal dismissed for failure to docket at the first term of this Court after the trial below is fatally defective where it does not show that the delay was without appellant's laches. *Ib.*

3. An appeal which has been dismissed for failure to print the record will not be reinstated on motion of appellant based on an affidavit that, before he could raise the money to print, the case was reached and dismissed. *Turner v. Tate*, 457.

4. Where an appeal has been dismissed for failure to print the record a motion to reinstate will not be allowed on the ground that such failure was caused by the neglect of counsel, for the neglect of counsel is the neglect of the party himself, and does not excuse. *Neal v. Land Co.*, 841.

APPEAL, IN FORMA PAUPERIS.

1. An appeal *in forma pauperis* is only permissible when the statutory requirements have been complied with. *S. v. Jackson*, 849.

2. Where the substance only of the affidavit for leave to appeal *in forma pauperis* is set out in the case on appeal and the Court sees that it is insufficient, the appeal will be dismissed on motion of the appellee, not as a matter of discretion but of right. *Ib.*

3. An affidavit to obtain an appeal *in forma pauperis* which lacks the statutory requirement of an averment of good faith is insufficient and unavailing. *S. v. Rhodes*, 856.

APPEARANCE BY ATTORNEY.

Parties appearing by counsel, though the latter's appearance is unauthorized, are bound by the adjudication in the suit if the court has jurisdiction of the subject-matter. *Hackett v. McMillan*, 513; *Williams v. Johnson*, 424.

ARBITRATION.

A tenant in common of land conveyed his undivided interest therein to a creditor under an agreement that the value of the interest should be afterwards ascertained by two men, one to be selected by each party, and they to select an umpire in case of disagreement, and the difference between the debt and the value of the land should be then adjusted between the parties; such arbitration was not had, but the land was divided between the grantee and the other tenants in common by arbitrators of their own selection, who placed a valuation on the several shares: *Held*, in an action by the debtor against his creditor for the difference between the debt and the valuation fixed upon the land by the arbitrators, the report of the arbitrators as to the respective shares was improperly admitted, such arbitrators not having been selected according to the agreement. *Hays v. Forbes*, 845.

ARBITRATION BOND.

Where a surety on an arbitration bond guaranteed in a certain sum that one of the parties to the arbitration would in "all respects fairly and fully abide by the award to be made by the arbitrator": *Held*, that the bond was not simply a guaranty that his principal would not withdraw from the arbitration, but an obligation to see that the award should be in all respects performed, the liability of the surety being limited to the sum named in the bond. *Pass v. Critcher*, 405.

ARREST AND BAIL.

A motion to vacate an order of arrest may be heard by a judge out of court anywhere in the district to which he is assigned. *Parker v. McPhail*, 502.

ASSESSMENT OF DAMAGES.

For land taken by municipal corporation, 747, 759, 769.

ASSESSMENT FOR SPECIAL BENEFITS.

1. Where an act creating a new charter for a city provides no method of levying special assessments of any character, either for past or future improvements, it seems that, as to the latter, they must be made under the general law (The Code, sec. 3803); but as the new charter, after declaring that all existing laws in conflict with it are repealed, provides that such repeal shall not "affect any act done or right accruing or accrued or established, but the same shall remain in full force, and be preserved and enforced and enjoyed," etc., the act does not operate to repeal the old mode of assessment for improvements commenced before the new charter took effect, though not assessed for until afterwards. *Greensboro v. McAdoo*, 359.

2. The power to levy assessments upon owners of property for special and peculiar benefits accruing to the same from improvements is not inherent in a public corporation, but must be directly conferred by statute. *Ib.*

3. Where a statute conferring authority on a municipal corporation to make assessments on property for special benefits prescribes the mode in which that power shall be exercised, that mode must be strictly pursued, except as to entirely immaterial matters. *Ib.*

ASSETS FOR PAYMENT OF DEBTS.

Where a wife is debtor of a deceased husband whose deed to her to secure the debt is set aside as fraudulent the land will be decreed to be sold and (the validity of her debt not being attacked) she will be entitled to share in the proceeds with the other creditors. *Nadal v. Britton*, 188.

ASSIGNMENT OF ERROR.

An appeal from an adjudication upon an agreed state of facts is a sufficient assignment of error by the party against whom the ruling was made. *Greensboro v. McAdoo*, 359.

ASSIGNMENT.

Of bond unendorsed, 243.

Of mortgage. See Mortgage.

For benefit of creditors, 278.

ASSIGNEE FOR BENEFIT OF CREDITORS.

It is the province and duty of the Court to pass on the qualifications of an assignee in an assignment for benefit of creditors. *Preiss v. Cohen*, 278.

ATTACHMENT.

To obtain an attachment it is not necessary that the affidavit shall state that the defendant "cannot, after due diligence, be found within this State." Such averment is necessary, however, in an affidavit to procure publication of summons. *Luttrell v. Martin*, 593.

ATTORNEY IN FACT.

A deed of an attorney in fact, duly executed, probated and recorded, is sufficient to show color of title, though the power of attorney be not produced. *Smith v. Allen*, 223.

ATTORNEYS AND SOLICITORS.

1. Attorneys and solicitors are officers of the courts, expressly empowered to represent litigants, and parties about to acquire rights under the judgment of courts are not bound to inquire into the authority of the attorneys who profess to represent the plaintiffs or petitioners; and where such rights have been acquired by one who had no notice of the lack of authority on the part of an attorney who professed to represent the owners in a proceeding for the sale of land, no evidence tending to disprove the existence of such authority ought to be admitted to overthrow the rights so acquired. *Williams v. Johnson*, 424.

2. In a suit, of the subject-matter of which a court has jurisdiction, appearance by counsel gives jurisdiction of the parties thus appearing though counsel have no authority to appear, and an innocent purchaser under a judgment rendered therein will be protected. *Hackett v. McMillan*, 513.

3. Where, in such case, parties estopped and injured by the adjudication, lose property to which they are entitled, they may maintain an action

ATTORNEYS AND SOLICITORS—*Continued.*

for damages against those who combined to procure the adjudication. (CLARK, J., holds that, if the property of which the parties have so been deprived is *in esse*, an action may be maintained by them for its specific recovery, provided they are not barred by the statute of limitations or by an estoppel arising from a judgment in a suit to which they have been made parties by process served upon them or by appearance of attorney actually authorized to appear for them.) *Ib.*

AUTHENTICATION OF RECORDS.

1. When duly certified, full faith and credit will be given to the records of a sister State by the courts of this State, reserving, however, the right to determine what forms and ceremonies shall be essential to the valid transfer of title to land lying in the borders of this State. *Moody v. Johnson*, 798.

2. Neither comity nor principle precludes the Legislature of this State from prescribing regulations as to passing upon authenticated records from another State preliminary to recording them. *Ib.*

BENEFITS AND DAMAGES, ASSESSMENT FOR, 359, 759, 769.

BETTERMENTS, ALLOWANCE FOR, 227.

BEST EVIDENCE.

The rule requiring the production of a writing itself as the best evidence does not apply to notices of sale under a power in a mortgage, the posting of which may be proved by parol evidence. *McMillan v. Baxley*, 578.

BOND.

Official, suit on, 89, 646.

To secure arbitrator's award. See Arbitration Bond.

UNENDORSED.

A bond is nonnegotiable until after endorsement, and an assignee of an unendorsed bond takes it subject to any equities or other defenses existing in favor of the maker at the time of or before notice of the assignment. *Loan Assn. v. Merritt*, 243.

ALTERATION OF.

Where a husband, without the consent or knowledge of his wife, altered a bond executed by them by "raising" the amount before delivery to, and without the knowledge of, the obligee: *Held*, that the bond was rendered void as to the wife by such alteration. *Cheek v. Nall*, 370.

BURDEN OF PROOF.

1. Where, in an action by a purchaser at a mortgage sale to recover the land from the mortgagor (the mortgagee being joined as party plaintiff), the judge presiding at the trial charged the jury that the burden was on the plaintiff to prove everything fair and honest, and no advantage taken of defendants, it was not error to refuse to

BURDEN OF PROOF—*Continued.*

charge the jury that the burden of proof was on the plaintiff to show that he was not the partner or agent of the mortgagee when he bought the land. *McMillan v. Baxley*, 578.

2. Under the statute (chapter 33, Acts of 1887) which requires that, in actions for the recovery of damages resulting from the negligence of the defendant, contributory negligence, if relied upon as a defense, shall be set up in the answer and proved on the trial, there can be no presumption of contributory negligence; therefore it was error in the judge to charge that the burden of the proof was upon the plaintiff in such an action, to show that she was not herself guilty of negligence, though the defendant offered no testimony. *Jordan v. Asheville*, 743.

BURNT RECORDS.

1. The limitation of five years, prescribed in section 67 of The Code, as the time in which burnt records may be restored after destruction, as provided in section 59 of The Code, applies to a proceeding begun in 1886 to restore the record of a will destroyed in 1875, notwithstanding the act of 1893, ch. 295, which amends section 67 by abolishing the limitation. *Varner v. Johnson*, 570.

2. The statutory method of establishing the contents of a lost or destroyed record, as prescribed in section 55 *et seq.* of The Code, does not have the effect to exclude parol evidence to prove such contents; therefore, where, in an action to recover property alleged to have been disposed of by a will, a referee found that the will had been duly probated and the record of it destroyed and that no copies were extant, but refused to admit testimony as to its contents, the court below should, on the exception of the one offering such evidence, have remanded the case to the referee for his findings as to the contents. *Ib.*

CAPE FEAR AND YADKIN VALLEY RAILWAY COMPANY.

Officers, employees, etc., are exempted from work on public roads, *S. v. Womble*, 862.

CASE ON APPEAL, 756.

1. Where, in the case on appeal, there is not a sufficient recital of the evidence or of the facts admitted or proven to point the exceptions or to enable the Court to ascertain what errors of law are complained of, this Court will affirm the judgment below. *Faulkner v. Thompson*, 455.

2. Where the report of a referee, which was set aside below and a jury trial had, is sent up unnecessarily with the transcript and no intelligible case on appeal is filed, this Court cannot know that the evidence reported by the referee is identically the same as was produced on the trial before the jury, or that the judge's rulings were on the same state of facts, and could it do so, this Court will not wade through the entire evidence to ascertain what the case on appeal should clearly state. *Ib.*

3. Failure to settle or furnish a case on appeal is not good ground for a motion to dismiss, but for a motion to affirm, since there may be

CASE ON APPEAL—*Continued.*

errors on the face of the record, which the Court will inspect of its own motion, and which may entitle the appellant to a reversal. *Hamilton v. Icard*, 589.

4. No formal "case on appeal" is required on an appeal from an order granting an injunction until the hearing. *Ib.*

5. Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by this Court. *Marshall v. Stine*, 697.

6. Where no exception of any kind appears in the case on appeal, and no error appears on the record proper, the judgment below will be affirmed. *Ib.*

7. An amendment or correction to a case or transcript on appeal cannot be made by a party himself without *certiorari* granted. *S. v. Jackson*, 849.

CAUTION TO PRISONER ON PRELIMINARY EXAMINATION.

It is not necessary that a committing magistrate, at the commencement of the examination of a prisoner, shall use the precise words of the statute (The Code, sec. 1146) in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirements of the statute and if the magistrate inform the prisoner, in plain language, of his rights in the premises. *S. v. Rogers*, 874.

CERTIORARI.

1. Where a *certiorari* has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the Superior Court returns that appellant failed to perfect his appeal or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed. *Broadwell v. Ray*, 191.

2. A motion by a plaintiff for a *certiorari* to correct a case on appeal by having it to state that a motion for judgment after verdict was made on admissions in the testimony of the defendant on the trial, as well as on the pleadings, will be denied where it appears that plaintiff did not ask for instruction on that aspect of the case, nor file any exceptions to the judge's charge. *Lewis v. Foard*, 402.

3. An amendment or correction to a case or transcript on appeal cannot be made by a party himself without *certiorari* granted. *S. v. Jackson*, 849.

4. While the Court may, in matters of grave concern, permit *certiorari* to issue on motion of a party without notice to the other side, or *ex mero motu*, this will not be done where the record shows only technical and not substantial grounds of exception to the proceedings below. *Ib.*

5. A *certiorari* in lieu of a lost appeal should be moved for before the appeal is regularly called for argument. *S. v. Rhodes*, 857.

CESTUI QUE TRUST.

A *cestui que trust* may have relief against a trustee who withholds the trust estate, but a stranger cannot volunteer to ask redress. *Monroe v. Trenholm*, 634.

CHARTER, ACCEPTANCE OF.

1. A corporation being a creation of law, whose foundation is the grant of a franchise, there must be an acceptance of the grant or charter before it can take effect. *Fertilizer Co. v. Clute*, 440.

2. Where a joint-stock association, after the passage of an act allowing it to accept and adopt the act of incorporation, simply continued in business without signifying in any unequivocal way its acceptance of said act, such continuance in business did not in itself relieve the association of its character of a partnership. *Ib.*

3. Where a county alliance which, subsequent to, but without mentioning the act of Assembly, authorizing it to become incorporated, adopted a resolution declaring that the alliance "will organize a stock company to enlarge the facilities of the alliance store," etc.: *Held*, that such resolution constituted an acceptance of the act of incorporation and rendered the alliance a body corporate from the date of such resolution. *Ib.*

CLAIM AND DELIVERY, 377, 404.

1. Where no time is fixed for the division of a crop between landlord and tenant, the former is not obliged to wait until the whole crop has been gathered before bringing his action of claim and delivery. *Rich v. Hobson*, 79.

2. The sale by one of two parties to the other of his interest in a crop, accompanied by an agreement that the title thereto should remain in the seller until the purchase price should be paid, placed title in the whole crop in the seller and entitled him to an action of claim and delivery. *Buffkins v. Eason*, 162.

CLAIM AGAINST DECEDENT'S ESTATE, WHEN BARRED, 505.

CLERK OF SUPERIOR COURT.

1. In an order of court appointing "J. A. M., clerk of the Superior Court," receiver of infant's estate, the word "as" was omitted before the word "clerk": *Held*, that the clerk was appointed receiver in his official capacity as clerk. *Waters v. Melson*, 89.

2. Under section 52, chapter 53, Battle's Revisal, the court had authority to appoint the Superior Court clerk receiver of an infant's estate, and the sureties on his official bond are liable for any breach of his duties as receiver. *Ib.*

3. The failure of the clerk of the Superior Court to docket a judgment is a breach of official duty, and renders the sureties on his bond liable for any loss resulting therefrom. *Young v. Connelly*, 646.

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COLLATERAL ATTACK, 122, 424.

Where, in an action of ejectment, the defendant sets up a counterclaim or equity, such defense is not a collateral attack on plaintiff's title. *Kimsey v. Munday*, 816.

COLLATERAL SECURITY.

Where, in an action on a note for which collateral had been deposited, it appeared that plaintiff had rehypothecated the collateral, the rights of the defendant were properly guarded by the judgment, which set out that the collateral had been deposited with the clerk, to be delivered to defendant on the payment of the judgment. *Barnard v. Martin*, 754.

COLOR OF TITLE, 804.

1. A patent for land, reserving land within its limits as previously granted, is not color of title to the land so excepted. *Basnight v. Smith*, 229.

2. A deed duly executed, probated, and recorded, by an attorney in fact, is sufficient to show color of title, though the power of attorney is not produced. *Smith v. Allen*, 223.

3. Likewise as to a deed to one as trustee who signs the same, if probated as to the grantor, although not probated as to the trustee. *Ib.*

4. Likewise as to a deed of a trustee where the *cestui que trust* is a *feme covert*, although her privy examination is not taken. *Ib.*

COMMITTING MAGISTRATE.

At the preliminary examination of a prisoner, the magistrate need not use the precise words of the statute (The Code, sec. 1146) in giving the caution prescribed thereby, but it is sufficient if he comply substantially with the statute and inform the prisoner, in plain language, of his rights in the premises. *S. v. Rogers*, 874.

CONFLICT OF LAWS.

1. Where a married woman, domiciled in this State, not being a free-trader and not having the written assent of her husband, made a contract in another State, according to whose laws a *feme covert* can contract: *Held*, that such contract cannot be enforced in the courts of this State. *Armstrong v. Best*, 59.

CONFLICT OF LAWS—*Continued.*

2. A contract, if made payable in another State to avoid the usury laws of this State, will be adjudged usurious, whatever may be the law of that State. *Meroney v. Loan Assn.*, 842.

CONSOLIDATION OF ACTIONS.

Where a party had obtained in this Court an affirmance of a judgment establishing his subcontractor's lien against the owner of a building, but the cause was remanded for the reason that the contractor was not a party, and the plaintiff thereupon brought another action, in which the contractor was made a party defendant: *Held*, that the two actions were properly consolidated by the court below. *Lumber Co. v. Sanford*, 655.

CONTEMPORANEOUS AGREEMENT, 778.

A note and contemporaneous article of agreement are frequently taken together as one agreement, the terms of the agreement expounding and limiting those of the note. *Carrington & Co. v. Waff*, 115.

CONTINGENT REMAINDER, 769.

1. A limitation to M. J. P. for and during the term of her natural life, and, in the *event* that R. O. P. shall survive her, then to him for and during the term of his natural life, and after the termination of the said life estate, then to the heirs of R. O. P., the latter takes a contingent remainder, and until the happening of the contingency the rule in *Shelley's case* cannot operate so as to vest in him an indefeasible fee. *Starnes v. Hill*, 1.

2. A warranty deed by one having only a contingent remainder in land passes the title by way of estoppel to the grantee as soon as the remainder vests by the happening of the contingency, upon which such vesting depends. *Foster v. Hackett*, 546.

3. Although parties who are entitled to land by way of contingent remainder may not sell the same for partition because their respective shares therein cannot be ascertained until the happening of the contingency, yet such property may be taken in the exercise of eminent domain by the sovereign or the one to whom it delegates that right, and the fund awarded as damages will be substituted for the realty, and upon the happening of the contingency, will be divided among the parties entitled in the same manner as the realty would have been if left intact. *Miller v. Asheville*, 759.

CONTRACT, 304, 440, 529, 845.

1. Although a contract, if valid in the State where it is made, is valid everywhere in respect to its execution, interpretation and validity, yet, as to the capacity of the contracting party, the law of the domicile prevails. Hence the contract of a married woman domiciled in this State, not being a free-trader and not having the consent of her husband, although valid in the State where made, cannot be enforced here. *Armstrong v. Best*, 59.

2. Parol evidence is admissible, in an action on a note, to show fraud, illegality, or want of consideration. *Carrington & Co. v. Waff*, 115.

CONTRACT—*Continued.*

3. A note and contemporaneous article of agreement are frequently taken together as one agreement, the terms of the agreement expounding and limiting those of the note. *Ib.*

4. Even if it were settled (which is not the case) that an undisclosed principal cannot maintain an action on a contract made by his agent with another, this rule would not apply where the parties are residents of different States of the American Union, for such States are not foreign to each other in such sense as to permit the operation of the rule stated. *Barham v. Bell*, 131.

5. Where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it, and if the latter sue, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party. *Ib.*

6. Where one of two partners bought the interest of the other in a crop, and agreed that the title should be in the seller until the purchase-money should be paid, the effect of the contract was to place the title of the entire crop in the seller until the payment of the purchase-money, and entitled the latter to bring claim and delivery. *Buffkins v. Eason*, 162.

7. Where county commissioners contracted with E. & Co. to build a courthouse, who sublet the plumbing and piping to S., who, in his turn, assigned it to B. and took B.'s note, and, in payment of a small sum due the contractors by him, transferred it to the contractors, with an agreement, assented to by B., that they would pay to S. the amount of the note (less the small sum due by S. to them) out of the money to become due to B. from them, and B. subsequently became indebted to R. & Co. for materials used in completing his plumbing contract, and the commissioners, by a lien filed by R. & Co., the materialmen, paid the latter the balance due E. & Co. on the contract for the whole work: *Held*, (1) that a courthouse cannot be subjected to a lien for labor or material; (2) that the county commissioners are liable to S. for the amount which the contractors agreed to pay him out of the sum due B. from them; (3) the materialmen, R. & Co., being creditors of B. only, are entitled to recover of the money in the county commissioners' hands no more than was due B. under the agreement in force when the claim for materials originated, which was the difference between the contract price of the work done by B. and the sum which the contractors had agreed to pay to S., B.'s assignor. *Snow v. Comrs.*, 335.

8. A contract of sale conditional upon the payment of the purchase price in successive installments cannot be modified or its legal effects avoided by the fact that it is called a "lease" and the installments are called "rent"; therefore, where a lease contract provided that the "lessee" of a machine should pay as rent $330 in installments, and, on full payment, title should vest in him as owner, but, if the installments should not be paid in full as they became due, all payments made should be forfeited and the claims of the lessee to the leased property should be at an end, and it was found by the jury that all

CONTRACT—*Continued.*

but $70 of the "installments" had been paid by the lessee, and that the latter was entitled to $26 damages for a breach of contract by the lessor: *Held,* that it would be inequitable to allow the "lessor" to take the property and declare all payments forfeited; but defendant should be allowed a reasonable time to pay the balance due (after deducting the damages allowed him), and in default of such payment a foreclosure sale should be ordered. *Puffer v. Lucas,* 377.

9. Where a contract recited that plaintiffs would sell their goods to no one in defendant's town except to defendant, and that defendant would sell no goods of that sort except those manufactured by plaintiffs, and that he would keep his assortment up to the amount of the then order of $100, and would not sell at less than the established price, and the terms of payment for the goods were prescribed: *Held,* that such contract was one of *sale* and did not constitute the defendant a factor or commission merchant or agent for the sale of the goods. *Kellam v. Brown,* 451.

10. While the entire construction of a written contract, whose terms are ascertained—that is, the ascertainment of the intention of the parties is a pure question of law for the court—and the sole office of the jury is to pass on the existence of the alleged agreement, yet, where the language of the written contract is doubtful in the sense of requiring explanation by experts or by evidence of the usage of trade, such testimony is admissible and should be submitted to the jury under proper instructions. *Simpson v. Pegram,* 541.

11. Where defendants, in an action on a contract growing out of written correspondence, introduced testimony tending to show the meaning of certain terms used in the contract under the customs and usage of trade, they cannot complain that the trial judge submitted such testimony to the jury for that purpose instead of construing the contract by the written correspondence alone. *Ib.*

12. Nor can the defendant object in such case after having introduced several letters in relation to other transactions between him and the plaintiffs for the purpose of showing the course of dealing between the parties. *Ib.*

13. Where a contract of a corporation, not in writing, has been executed and is not executory, it is not invalid under section 683 of The Code. *Luttrell v. Martin,* 593.

14. A contract made by a creditor with a principal debtor for forbearance to sue for a fixed and limited period, founded on a sufficient consideration, without reserving the right to proceed against the surety, and made without his assent, releases the surety. *Chemical Co. v. Pegram,* 614.

15. Where an agency contract, to which defendants were sureties, provided that the agent of plaintiff (the principal debtor) would give his promissory notes for goods sold by him, payable at the times fixed in said contract, defendant sureties being liable therefor, and said notes were executed, and the creditor at the maturity of said notes had a settlement with the agent (the principal debtor) and surrendered the

CONTRACT—*Continued.*

old notes to him, accepting notes due at future dates in renewal of and substitution for the same, without reserving any rights against the sureties or obtaining their consent to the extension: *Held*, that such acceptance of new notes constituted a contract on the part of the creditor to postpone action against the principal debtor until they matured, and hence discharged the sureties. *Ib.*

16. Where a married woman promised her husband, in his last sickness, in the presence of his creditor, that she would pay the debt out of moneys received from insurance on his life in her favor, and the creditor, in consideration of such promise, forebore enforcement of his demand: *Held*, that such promise was substantially and in effect a promise to the creditor to pay the debt of her husband, and cannot be enforced against the separate personal estate of the defendant, as it was not in writing, was not made with the written assent of her husband, and did not charge such personal estate. *Coffey v. Shuler*, 622.

17. If the promise should be conceded to have been made to the husband, the creditor, not being a party to the contract, could not sue upon it. *Ib.*

18. An agreement contained in a note to pay counsel fees for its collection cannot be enforced in an action on the note. *Brisco v. Norris*, 671.

19. Where, on issues raised by the allegations in two causes of action—one on a special contract and the other on a *quantum meruit*—with the corresponding denials in the answer, the jury found that plaintiffs had not complied with the terms of the written contract and defendant was not indebted to them thereon, but that defendant was indebted to them for work and labor done for the amount claimed: *Held*, that the findings were not inconsistent or contradictory. *Simpson v. R. R.*, 703.

20. In such case, although plaintiffs had not complied with the contract in all respects, if defendant took advantage of the work done and accepted, and used the same without giving plaintiffs notice of objection and an opportunity to correct defects and complete the job, but completed it with its own force, plaintiffs are entitled to recover the reasonable value of the work done, not exceeding the amount demanded in the complaint. *Ib.*

21. A writing containing a statement of sums to become due at different dates, followed by an authorization to a third person to pay the amounts, as specified, to another, becomes, when accepted, a contract by the acceptor to pay such sums, and in the absence of any collateral or contemporaneous agreement the legal effect of such writing is a matter for construction by the court. *Penniman v. Alexander*, 778.

22. A contract, if made payable in another State to avoid the usury laws in this State, will be adjudged usurious, whatever may be the law of that State. *Meroney v. Loan Assn.*, 842.

CONTRACT OF AN INFANT. See Infant.

CONTRACT RELATING TO LAND.

1. An alleged contract of purchase made by a minor (whose infancy is undisclosed), or by one pretending to act as his agent under an agreement to mortgage the land back to secure the purchase-money, is a nullity. *Sawyer v. Northan*, 261.

2. Where, in an action to recover the possession of land, defendant claimed the same upon an alleged contract embraced in a writing, as follows: "Wilkesboro, N. C., 19 April, 1880.—James Harris has paid me $20 on his land; owes me $6 more on it": *Held*, that the receipt, as a contract to convey land, is void for uncertainty, and ineffectual to pass any interest whatever in the land of the defendant, and it was improper to admit parol testimony at the trial for the purpose of explaining what land was referred to therein. *Lowe v. Harris*, 472.

3. While the Legislature has power to modify or repeal the whole of the statute of frauds, in so far as it relates to future contracts for the sale of land, it has no authority to give the repealing statute a retroactive operation, so as to affect or destroy rights already vested. *Ib.*

4. An act of the Legislature changing the rules of evidence cannot be construed as operating retrospectively, so as to affect existing rights. *Ib.*

5. The power of the Legislature to enact *remedial* statutes, giving effect to contracts relating to land, extends only to those cases where those claiming under them had, previous to the enactment, an equitable right, and not to cases where the policy of the law, or the express provision of a statute, prevented the transmission of any interest whatever by the agreement or instrument relied on. *Ib.*

6. There is a general presumption against the retroactive operation of statutes where it would impair vested rights; therefore, the act of 1891 (chapter 465), providing that "in all actions for the possession of, or title to, any real estate, parol testimony may be introduced to identify the land sued for and fit it to the description contained in the paper-writing offered as evidence of title or right of possession," cannot be held to operate retrospectively, so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of such act of the Legislature. (*Shepherd, C. J.*, concurs, but further holds that the act has not the effect of changing the existing law in reference to contracts or deeds relating to land; the word "description," as used in the act, meaning a "description" which has a legal susceptibility of being aided by testimony so as to identify the land, and not a "description" which, in law, is no *description* whatever.) *Ib.*

7. *Quære*, whether a conveyance or assignment of a contingent interest in land for a valuable consideration would be upheld by a Court of Equity as an equitable assignment or contract to convey upon the happening of the contingency and the vesting of the estate. In such case, however, the grantee should set forth and plead specifically such equity. *Foster v. Hackett*, 546.

CONTRIBUTORY NEGLIGENCE, 720.

Under the statute (chapter 33, Laws 1887), which requires that, in actions for the recovery of damages resulting from the negligence of the defendant, contributory negligence, if relied upon as a defense, shall be set up in the answer and proved on the trial, there can be no *presumption* of contributory negligence; therefore, it was error in the judge to charge that the burden of proof was upon the plaintiff, in such an action, to show that she was not herself guilty of negligence, though the defendant offered no testimony. *Jordan v. Asheville*, 743.

CONTROVERSY WITHOUT ACTION.

Where controversy without action is submitted for the sole purpose of obtaining the opinion of the court upon a question, the effect of which might be to derange for a time the administration of the public-school system, this Court will decline to entertain the controversy. *Board of Education v. Kenan*, 566.

CORPORATION.

1. A proceeding in the nature of a creditors' bill, with or without a prayer for its dissolution, may be brought by the State or a county against a corporation against which taxes have been assessed, and for the payment of which no property can be found to be levied upon. *State and Guilford v. Georgia Company*, 34.

2. Where a joint-stock (unincorporated) association is succeeded by an incorporated company, whose stockholders are the members of the joint-stock association and pay their subscriptions to the stock of the new, not in cash, but in stock of the old concern, they are debtors to the full amount subscribed by them, and if they are also creditors of the corporation and it becomes insolvent, they cannot share in any part of the assets until their liability has been paid in full. In such case the receiver should retain all dividends on debts due to stockholders thus indebted to the corporation until he is ready to make a final settlement with all the creditors. *Bain v. Loan Assn.*, 248.

3. Sections 1 and 3 of Article VIII of the Constitution do not create joint-stock associations, but are directions to the General Assembly not to grant special charters to corporations (which word, by force of section 3, includes joint-stock associations), except where the object cannot be attained under the general law. *Hanstein v. Johnson*, 253.

4. A corporation being a creation of law, whose foundation is a grant of a franchise, there must be an acceptance of the grant or charter before it can take effect. *Fertilizer Co. v. Clute*, 440.

5. Officers of a corporation, from the highest to the lowest, are only the agents thereof, and their acts and contracts are binding on their principal only when within the scope of their authority, express or implied. *Rumbough v. Improvement Co.*, 751.

6. The scope of the authority of one officer of a corporation, as to a past transaction at least, cannot be proved by the unsworn declarations of another officer or agent. *Ib.*

CORPORATION—*Continued.*

7. In an action on a draft drawn by and on an agent of a corporation, and accepted by him in the name of the corporation, the declarations of the president, made after the alleged acceptance, were inadmissible to show the agent's authority to bind the company. *Ib.*

8. An *executed* contract of a corporation, not in writing, is not invalid under section 683 of The Code. *Luttrell v. Martin*, 593.

9. Although a corporation not authorized to build and operate a railroad would be acting *ultra vires* to engage in such business, yet it may render itself liable for "railroad supplies" purchased and used by it, especially where the articles bought were not such that the seller would have notice that the corporation would not have need of them in its business, and where the seller had no notice that the goods were to be used for any other purpose than the regular business of the company. *Ib.*

10. A general agent of a corporation may delegate to another authority to buy supplies for the corporation. *Ib.*

CORPORATION, SERVICE OF PROCESS ON, 189.

CORPORATION, MUNICIPAL, 759, 769.

1. The power to levy assessments upon owners of property for special benefits accruing to the same from improvements is not inherent in a public corporation, but must be directly conferred by statute. *Greensboro v. McAdoo*, 359.

2. Where a statute confers authority on a municipal corporation to make assessments on property for special benefits, and prescribes the mode of exercising the power, that mode must be *strictly* pursued, except as to entirely immaterial matters. *Ib.*

COSTS.

1. The failure of a judge to adjudicate as to costs does not affect or render invalid as a final judgment an adjudication upon another matter embraced therein. *Young v. Connelly*, 646.

2. In an action on a note against a husband, the wife being joined as grantee in a deed which the action also sought to set aside as fraudulent, there was judgment against husband on the note, but the deed was not set aside: *Held*, that costs were properly granted to the wife. *Brisco v. Norris*, 671.

COUNSEL. See, also, Attorneys and Solicitors.

1. FEES.

Counsel fees for collection, although provided for in a note, cannot be recovered in an action on a note. *Brisco v. Norris*, 671.

2. AGREEMENT BETWEEN.

An alleged verbal agreement between counsel, if denied, will be deemed as legally nonexistent in matters affecting an appeal. *Sondley v. Asheville*, 694; *Hemphill v. Morrison*, 756.

COUNSEL—*Continued.*

3. NEGLECT OF.

Where an appeal has been dismissed for failure to print the record, a motion to reinstate will not be allowed on the ground that such failure was caused by the neglect of counsel, for the neglect of counsel is the neglect of the party himself, and does not excuse. *Neal v. Land Company*, 841.

COUNTERCLAIM.

1. Where it appeared that, during the pendency of an action of claim and delivery to recover a soda-water machine leased to defendant, plaintiff had agreed to deliver a new machine to defendant and take back the one in controversy at a certain value: *Held*, that the agreement being executory and not executed, did not bar the further prosecution of the action, and its breach by the plaintiff did not furnish ground for a proper counterclaim, since it did not exist at the commencement of the action. *Puffer v. Lucas*, 377.

2. The measure of damages to defendant for such breach was the difference between the cost of a similar machine purchased by him from another manufacturer and the new machine which plaintiff agreed to furnish. *Ib.*

COURTHOUSE.

A courthouse cannot be subjected to a lien for materials. *Snow v. Comrs.*, 335.

COURT RECORDS.

Cannot be collaterally attacked. *Forbes v. Wiggins*, 122.

COVENANT RUNNING WITH LAND, 688.

CURTESY. See Tenancy by the Curtesy Initiate.

CUSTOMS AND USAGES OF TRADE. See Contract, 11 and 12.

CREDITOR.

Forbearance by, to sue principal, releases surety. *Chemical Co. v. Pegram*, 614.

CREDITOR'S BILL.

The State and county, either or both, may bring a creditor's bill against a corporation for the collection of taxes due by it, when the sheriff can find no property to levy upon. *State and Guilford v. Georgia Company*, 34.

CRIMINAL EXTRADITED, 896.

CROPS.

1. Claim and delivery, 79, 162.

2. Mortgage of wife's, by husband, 283.

3. Intermixture of, who responsible, 283.

CRUELTY TO ANIMALS.

1. The shooting and killing or wounding of pigeons used as targets, for amusement and sport, is indictable as a violation of section 2482 of The Code. *S. v. Porter*, 887.

2. The statute does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering knowingly and willfully permitted. *Ib.*

DAMAGES, 720.

1. TO LAND.

Damages caused by diversion of water are not covered by the statute (section 1943 *et seq.* of The Code) providing for the acquirement of rights of way by railroad companies. *Ward v. R. R.*, 168.

2. For detention of land, 227.

3. Exemplary, when allowed for personal injuries, 323.

4. ACTION FOR, AGAINST ATTORNEYS.

Parties who, by being estopped by an adjudication in a suit where counsel have appeared without authority to represent them, lose property to which they are entitled, may maintain an action for damages against those who combined to procure the adjudication. *Hackett v. McMillan*, 513.

5. Assessment of, for land taken by municipal corporation in the exercise of eminent domain, 747, 759, 769.

6. INQUIRY AS TO, ON JUDGMENT BY DEFAULT.

Inquiry as to damages cannot be executed at same term at which judgment by default is taken, unless allowed by statute. *Brown v. Rhinehart*, 772.

DEBT, OLD.

The widow of an execution debtor is not entitled to homestead in the land sold under a judgment taken on a debt contracted before 1868, but the purchaser takes the land subject to the widow's dower. *Buie v. Scott*, 375.

DEED, 158, 652.

1. A deed is presumed to have been delivered at the time it bears date, but the presumption may be rebutted by evidence *aliunde*, in which case it becomes operative from the actual date of delivery. *Vaughan v. Parker*, 96.

2. A deed duly executed, probated and recorded by an attorney in fact is sufficient to show color of title, though the power of attorney be not produced. *Smith v. Allen*, 223.

3. A deed to one as trustee who signs the same, if probated and registered as the deed of the grantor, is color of title, though not probated as to the trustee. *Ib.*

DEED—*Continued.*

4. The deed of a mortgagee to the purchaser of land sold under the power of sale contained in the mortgage, reciting the sale in pursuance of the power, is *prima facie* evidence that all the terms of the power and all requirements as to notice have been complied with. *Lunsford v. Speaks*, 608.

DEED, UNREGISTERED.

1. The equitable interest in land created by an unregistered deed can ordinarily be extinguished by a return of the consideration and surrender of the deed. *Miller v. Church*, 626.

2. The proviso to section 1, chapter 147, Laws 1885 ("Connor Act"), that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." *Cowen v. Withrow*, 736.

DEMURRER.

1. A ruling in this Court, on a former appeal, that the lower court ought to have sustained a demurrer to one of the causes of action set up in the complaint, did not warrant that court in excluding evidence on such cause of action as *res judicata*, but it should have entered judgment sustaining the demurrer, and then might have permitted the plaintiff to amend. *Maggett v. Roberts*, 71.

2. Misjoinder of parties should be taken advantage of by demurrer, and not by motion to strike out a party. *McMillan v. Baxley*, 578.

DESCRIPTION, 472.

1. Where, in a patent to B. setting out the boundaries of a grant of land, there is an exception as follows: "Within which boundaries there hath been heretofore granted 22,633 acres," the exception is not void for uncertainty if it can be shown what land was included in the excepted grant. *Mfg. Co. v. Frey*, 158.

2. Recitals in a deed made by a commissioner of court, in proceedings to which plaintiff was a party, containing no reference to the description of the land described in the petition, are not evidence of the identity of the land sued for with that described in the petition. *Garrison v. Tinley*, 652.

DISCRETION OF JUDGE.

It is within the discretion of the presiding judge, under The Code, sec. 274, to permit a plaintiff to file a reply, though by reason of laches he may not be entitled to do so. *McMillan v. Baxley*, 578.

DISTRIBUTIVE SHARE.

Where money was paid by an administrator to one supposed to be entitled as a distributee "in full of his distributive share and on his promise to refund should any lawful claim come against the estate," no cause

DISTRIBUTIVE SHARE—*Continued.*

of action accrued to those who were rightly entitled, and the money can only be recovered by the administrator to whom the promise was made. *Norwood v. O'Neal*, 127.

DIVORCE.

1. *A mensa et thoro.*—Where a wife has obtained a divorce *a mensa et thoro* she is entitled to recover from her husband the possession and use of her lands acquired after the act of 1848 (section 1840 of The Code), and whatever rights her husband had in such lands are suspended until a reconciliation, or until, by her death, he may become tenant by the curtesy initiate. *Taylor v. Taylor*, 134.

2. *A vinculo matrimonii.*—Declarations of paramour admissible, when, 152.

EASEMENT.

1. Where, in the grant of an easement, a reservation is made by the grantor of a yearly sum to be paid him, it is a covenant, and the grantor may bring an action of debt for the nonpayment of the sum so reserved. Such covenant runs with land to which it is appurtenant, and a subsequent purchaser of the land takes it subject to the burden of the easement, and is entitled to collect the compensation. *Raby v. Reeves*, 688.

2. The grantee who accepts and acts under a deed granting an easement and reserving rental is bound by its covenants. *Ib.*

EJECTMENT.

Where, in an action for the recovery of land, the defendant, whether he might rightfully claim the relation to the plaintiff of lessee or tenant in common, waives his right and disregards his opportunity to admit by answer or disclaim the true interest of the plaintiff, he cannot, after disputing the plaintiff's title, fall back on a denial of the ouster when every other defense has failed him. Nor, after failing to establish his ownership, can he, by his pleadings, make his occupancy adverse *ab initio* so as to mature title against the plaintiff, when, in fact, he has held under the plaintiff or those under whom he claims. *Vaughan v. Parker*, 96.

ENDORSER.

Part payment of a note by the payee who has endorsed it will not repel the bar of the statute of limitations as against the maker, the statute, The Code, sec. 371, confining the act, admission or acknowledgment, as evidence to repel the bar, to the associated partners, obligors, and makers of a note. *LeDuc v. Butler*, 458.

EMINENT DOMAIN, 769.

1. Where a corporation, having the right of eminent domain, and whose charter imposes the duty of ascertaining, by a prescribed method the damages or benefits resulting to the owner in case of disagreement, takes and occupies land without having taken any valid legal proceedings to have the damages, etc., assessed, and refuses on the de-

EMINENT DOMAIN—*Continued.*

mand of the owner to proceed to have such assessment made, such owner is entitled to a writ of *mandamus* compelling the performance of the duty imposed by the charter. *McDowell v. Asheville*, 747.

2. Although land limited over by way of contingent remainder may not be sold for partition until the contingency happens, yet it may be taken in the exercise of eminent domain, and the fund awarded as damages will be substituted for the realty, to be divided among those entitled when the contingency happens. *Miller v. Asheville*, 759.

ENTRIES AND GRANTS.

1. Where enterers of Cherokee lands, as to the acquisition of which a mode of procedure different from that applicable to other public lands was in force prior to 1 November, 1883 (see sections 2465, 2466, and 2477 of The Code), laid their entries in 1855 and 1860, and failed to comply with the requirements of law and to pay the purchase-money and take out grants until February, 1890: *Held*, that their long delay was an abandonment of the equity which their entry gave them to acquire title to the lands so entered, and having obtained grants, they held the legal title to the lands in trust for a grantee of the same land issued in October, 1890, under an entry made in December, 1889, and this would be so even if the later grantee had made his entry with notice of the previous entries of 1855 and 1860. *Kimsey v. Munday*, 816.

2. A grant of land made under a lapsed entry is not necessarily void, and where, in an action of ejectment involving conflicting entries, the plaintiff seemed to have the senior entry and a senior grant, but the defendant, junior grantee under a junior entry, in his defense alleged that the plaintiff's senior entry had lapsed, and set up his equity to have the plaintiff declared a trustee for defendant under his later entry: *Held*, that such assertion of counterclaim or equity was not a collateral attack on plaintiff's title. *Ib.*

3. Where plaintiff claims under grants issued under lapsed entries he cannot fall back on a subsequent entry made a short time before such grants were issued. *Ib.*

4. Where a junior grant under a junior entry is good against a senior grant under a lapsed senior entry the question of the priority of survey is of no moment, nor is vagueness in the junior grantee's entry if cured by his survey and grant. *Ib.*

EQUITABLE INTEREST IN LAND.

When created by an unregistered deed the equitable interest in land may ordinarily be extinguished by a return of the consideration and a surrender of the deed, but where the grantee is a *feme covert* the deed of herself and husband, with her privy examination, is necessary. *Miller v. Church*, 626.

ESTOPPEL, 747, 759.

1. Where, in ejectment, the jury found that "plaintiff did advise or induce defendant to buy the land before he purchased the same," such finding is not sufficient to create an estoppel against plaintiff when

ESTOPPEL—*Continued.*

it is not also found that plaintiff knew of her title when she gave the advice, or that defendant did not know of plaintiff's title, or that he was deceived by such advice. *Bishop v. Minton*, 524.

2. A warranty deed by one having only a contingent remainder in land passes the title, by way of estoppel, to the grantee, as soon as the remainder vests by the happening of the contingency upon which such vesting depends. *Foster v. Hackett*, 546.

3. Where, in an action to recover land, a record of proceedings for the sale of land to which plaintiff was a party was relied upon as an estoppel against the plaintiff, and there was nothing in the record to show that the land to which the proceedings related was the same as the land for which this action was brought: *Held*, that such record cannot be admitted as an estoppel against the plaintiff. *Garrison v. Tinley*, 652.

4. The fact that a subcontractor sought in one action to enforce his lien against the owner of a building without joining the contractor, cannot estop the plaintiff from recovering a judgment against the contractor in another action, in which the latter and the owner are parties. *Lumber Co. v. Sanford*, 655.

5. Where an employee or servant of lessees of mining rights works for them in exploring the minerals on the land, and afterward acquires from the lessors the mineral rights on the land, he is not estopped from denying the title of his former employers to such mineral rights, the lease thereof having been forfeited by nonuser. *Maxwell v. Todd*, 677.

EVIDENCE, 304, 833, 845, 859, 875.

1. While a deed is presumed to have been delivered at the time it bears date, evidence *aliunde* may be admitted to rebut such presumption. *Vaughan v. Parker*, 96.

2. The declarations of an alleged paramour made to or in the presence of a party to a suit for divorce *a vinculo matrimonii*, tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to such declarations, are admissible in evidence and do not come within the prohibition of section 1288 of The Code. *Toole v. Toole*, 152.

3. A declaration made by a husband to his wife as follows: "Laura, I have told you before, and I tell you again, I don't want to catch Palmer at my house any more," made in the presence of a witness who testified to witnessing improper and suspicious conduct between the *feme* defendant and Palmer, the alleged paramour, was not such a confidential communication between husband and wife as is privileged, but a command uttered in the presence of another, and was competent testimony when offered by a third party in connection with testimony concerning the *feme* defendant's improper conduct. *Ib.*

4. In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the costs of a criminal prosecution against her alleged paramour was competent, not in any sense as a confes-

EVIDENCE—*Continued.*

sion of her guilt, but as tending to show interest in and association with him and as corroborating other testimony as to adulterous intercourse between the parties. *Ib.*

5. Minutes of court are admissible as evidence to establish the validity of proceedings when the original papers of a cause have been lost or burnt. *Smith v. Allen*, 223.

6. Where in an action on a note, the plaintiff, in explanation of a credit thereon, offered to prove the declarations of a former owner as to a statement made to him by another former owner to whom the payment had been made: *Held*, that such declarations being hearsay, were inadmissible. (*Harper v. Dail*, 92 N. C., 394, distinguished.) *Spencer v. Fortescue*, 268.

7. The whole admissions in pleadings must be taken together; therefore where, in an action on a note, the plaintiff had offered the first article of defendant's answer admitting the debt, it was proper to admit as evidence for defendant the second article of the answer, which was a qualification of the first. *Ib.*

8. An act of the Legislature changing the rules of evidence will not be construed as operating restrospectively so as to affect existing rights. *Lowe v. Harris*, 472.

9. The rule requiring the production of a writing itself, as the best evidence, does not apply to notices of sale under a power in a mortgage, and hence parol evidence of the posting of such notices is admissible in an action to recover possession of land sold in pursuance thereof. *McMillan v. Baxley*, 578.

10. A deed executed by the mortgagee, reciting the sale in pursuance of the power, is *prima facie* evidence that all the terms of the power and all requirements as to notice have been complied with. *Lunsford v. Speaks*, 608.

11. No question is competent which puts the witness in giving an answer to it in the place of the jury, or offers his opinion for their adoption upon a matter involved in the issues, or upon some question of fact to be passed upon by them preliminary to a finding upon an issue. *Wolf v. Arthur*, 691.

12. Where, in a proceeding to determine the validity of an order of arrest, the issue was as to whether a deed had been executed by the defendant with intent to defraud his creditors, etc., it was error to permit the grantees to answer a question whether the trade between them and defendant was a *bona fide* transaction and without fraud. *Ib.*

13. In an action on a draft drawn by and on an agent of a corporation and accepted by him in the name of the corporation, the declarations of the president, made after the alleged acceptance, were inadmissible to show the agent's authority to bind the company. *Rumbough v. Improvement Co.*, 751.

14. Where, in an action to recover land, the defendants sought to introduce in evidence a record of a suit then pending between the plaintiff and

EVIDENCE—*Continued.*

another for the purpose of showing that that case was between the same parties and for the same cause of action, and it appeared that none of the present defendants was a party to such suit: *Held*, that the record was properly excluded. *Carr v. Alexander*, 783.

15. Where, in a statement of an account between partners, the only testimony as to an item of charge against one partner was the testimony of witnesses that the said partner sold to them, and they paid him the money for certain articles of personal property, such as was dealt in by the firm: *Held*, that such testimony was sufficient to support the finding by the referee charging such item against the partner. *Biggs v. Waters*, 836.

16. In an action against a partnership for the proceeds of goods sold on consignment, a statement of account rendered by one of the partners long after the dissolution of the copartnership, showing the indebtedness of the firm, not to the plaintiff, but to a third party, between whom and plaintiff no privity is shown, is not admissible as evidence either to bind the defendants or to contradict a deposition of one of the partners. *Detrick v. McLean*, 840.

17. On a trial for murder, the solicitor was permitted to ask a female witness (for whose favor the deceased and the prisoner were rivals, and who was sitting in the lap of the deceased just before the fatal struggle) whether the prisoner, when he came towards her and the deceased appeared to be mad or in fun, the reply being that he seemed to be mad: *Held*, that such question, being only a simpler form of an inquiry as to what the manner of defendant was when he approached deceased, was not improperly admitted. *S. v. Edwards*, 901.

18. The declarations of a prisoner made immediately after and not during the transaction constituting the offense with which he is charged, are not admissible in evidence, except as corroborative of his evidence, if he has availed himself of the privilege of testifying in his own behalf. *Ib.*

19. On trial for murder the defendant cannot complain of the exclusion of his declarations made after the struggle and shooting, which resulted in the death of his antagonist, if in a subsequent period of the trial all of such declarations were admitted after the State had called out a part of them. *Ib.*

EXCEPTION TO JUDGE'S CHARGE.

1. Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel before the close of the evidence as provided by section 415 of The Code. *Lee v. Williams*, 510.

2. Exceptions to the judge's charge, filed in the clerk's office after the settlement of the case on appeal, are not properly a part of the transcript on appeal, and should not be sent up. *Hemphill v. Morrison*, 756.

EXCEPTION TO JUDGE'S CHARGE—*Continued.*

3. The purpose of requiring exceptions to be made specifically in appellant's statement of case is that the judge, in settling the case, may send up such parts of the testimony as are pertinent to the parts of the charge excepted to, and that the appellee may be apprised at the "settlement" of the case and before argument here of the true grounds upon which the appeal is based. *Ib.*

4. The judge below has no authority without the consent of the appellee to extend the time fixed by the statute for filing exceptions, and no agreement of counsel, when denied and not entered upon the record or in writing, will be considered by this Court. *Ib.*

EXCUSABLE NEGLECT.

Where a judgment has been rendered on a *verdict*, the judgment and verdict cannot be set aside for excusable neglect, etc., under section 274 of The Code. *Brown v. Rhinehart*, 772.

EXECUTOR. See also, Administrator.

1. Application by, for construction of will, 102.

2. RIGHT OF, TO POSSESSION OF LAND.

Where an executor was charged with the management of land, which implied the right of possession until the trust should be fully carried out, upon his death and the appointment of an administrator *de bonis non, cum testamento annexo*, the latter became entitled to the possession of the land, and can recover the same from those withholding it. *Smathers v. Moody*, 791.

EXECUTION SALE.

1. A purchaser at an execution sale, a stranger to and having no notice of any irregularity or fraud in the judgment under which he buys, has only to inquire if the court from which the execution issued had jurisdiction of the parties and the subject-matter. *Williams v. Johnson*, 424.

2. Inadequacy of price bid at an execution sale is no ground for contesting the title of the purchaser by the debtor. *Ib.*

EXEMPTION RIGHTS, PRESENT VALUE OF.

The Court having no rule by which to determine the present value in cash of exemption rights, the present division of a fund representing such exemption must be attained by arbitration or agreement among the claimants. *Vanstory v. Thornton*, 196.

EXPERT TESTIMONY.

When admissible to explain doubtful language of written contract. *Simpson v. Pegram*, 541.

EXTRADITED CRIMINAL.

Upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for any other offense than that specified in the requisition

EXTRADITED CRIMINAL—*Continued.*

for his rendition, and in so trying him against his objection, no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied him. *S. v. Glover*, 896.

FALSE PRETENSE.

Since the passage of chapter 205, Acts of 1891, defining a felony, in indictment for false pretense which omits the world "feloniously," is fatally defective. *S. v. Bryan*, 848.

FAMILY.

The dependent family of a decedent for whom sections 2116 and 2117 of The Code provide, are those within the prescribed age residing with the widow at the death of her husband, and not at the date of the application. *In re Hayes*, 76.

FELONIOUSLY.

The omission of the world "feloniously" in a bill of indictment for false pretense is a fatal defect. *S. v. Caldwell*, 854.

FEME COVERT.

1. A contract by a *feme covert* cannot, by the terms of the same, in the absence of a deed debarring her from claiming a homestead in her land, be made such a charge upon the land as will deprive her of the right to claim her exemption. *Bailey v. Barron*, 54.

2. Where a judgment of the Superior Court declared the indebtedness of husband and wife to be a "charge" upon the separate estate of the wife and ordered a sale of her land to pay the same: *Held*, such adjudicated charge was subordinate to her homestead and personal property exemptions, and the commissioner should first allot the same and then sell the excess. *Ib.*

3. The common law disability of a married woman to make a contract, except in cases permitted by the statute, obtains in this State. *Armstrong v. Best*, 59.

4. A contract of *feme covert* domiciled in this State, not a free trader and not having the consent of her husband, although made in a State where *femes covert* may contract, cannot be enforced here. *Ib.*

5. A *feme covert* owning land under a settlement by deed in trust is subject to the express restrictions of the deed as to the manner of exercising her control over the same, and cannot dispose of or encumber it otherwise than by strict conformity to the methods prescribed by the deed. *Mayo v. Farrar*, 66.

6. A *feme covert* who puts a lien on her land to secure the debt of another becomes surety to the extent of the property so encumbered. *Davis v. Lassiter*, 128.

7. But if, in such case, the creditor agrees that funds belonging to the principal and coming to his (the creditor's) hands shall be applied to

FEME COVERT—*Continued.*

the payment of the secured debt, but applies such funds to the credit of other notes of the principal debtor, her land will be exonerated and she will be entitled to have the deed canceled. *Ib.*

8. The equitable interest created by an unregistered deed can ordinarily be extinguished by a return of the consideration and a surrender of the deed, but where the grantee is a *feme covert* such equitable estate can only be divested by her deed and privy examination and joinder of her husband. *Miller v. Church*, 626.

9. Where, in an action to recover land, it appeared that plaintiff's grantor had previously conveyed it to his daughter, a *feme covert*, who, after retaining the deed for a year without having it recorded, returned it to her father just before her death, with instructions to destroy it, which he did: *Held*, that plaintiff was not entitled to recover the land from the defendants, the heirs of the daughter, who were in possession under the equitable title acquired from her. *Ib.*

10. Where property has been placed in the hands of a trustee for the sole and separate use of a married woman she has no power of disposition over it except such as is clearly given in the instrument creating the trust and in the manner therein prescribed. *Munroe v. Trenholm*, 634.

FOREIGN RESIDENTS.

Citizens of different States of the American Union are not foreign to each other so as to admit of the operation of the rule (which is not settled) that an undisclosed foreign principal cannot maintain an action on a contract made by his agent with another. *Barham v. Bell*, 131.

FRAUDULENT CONVEYANCE, 83, 180, 278, 671, 691.

1. A voluntary conveyance is fraudulent in law as to existing creditors when the grantor does not at the time of the conveyance retain property fully sufficient and available for the satisfaction of his then creditors. *Clement v. Cozart*, 412.

2. If a conveyance fraudulent in law be declared void at the suit of an existing creditor, all creditors, those existing at the time of the execution of the conveyance and also subsequent creditors, will be entitled to come in and participate in the fund arising from the sale of the property, subject to existing priorities of lien or those obtained by diligence. *Ib.*

3. A creditor whose debt arose subsequently to the conveyance may bring the action and show the fraud in law, and further, that there are debts unpaid and capable of being enforced which were in existence at the time of the execution of the voluntary deed. *Ib.*

4. Where a voluntary conveyance is fraudulent in fact (as upon a secret trust for the benefit of the grantor, and for the purpose of hindering and delaying his creditors) the action may be brought by the subsequent as well as the existing creditor, and the subsequent creditor need not allege and prove that one or more of the existing debts is still unpaid. *Ib.*

FRAUDULENT CONVEYANCE—*Continued.*

5. Where, in an action in the form of a creditors' bill to set aside a conveyance as fraudulent, instituted by a creditor whose claim arose subsequent to the conveyance, the allegations were that at the time of the conveyance, the grantor was insolvent, that the deed was made with intent to hinder, delay, and defraud existing and subsequent creditors, and that the conveyance was voluntary and on some secret trust for the benefit of the grantor, and there was evidence tending to show that the deed was to grantor's children, that it was secretly made and the registration thereof was long delayed, and that the grantor remained in possession: *Held*, that the submission to the jury of the single issue as to whether the deed was made by the grantor with intent to hinder, delay, or defraud the plaintiff (a subsequent creditor) unduly limited the inquiry to the present intent in grantor's mind, at the time of the execution of the deed, to defraud plaintiff. Such special inquiry would not be necessary if the jury were satisfied that there was a secret trust, a continuing fraud evidenced by the grantor's remaining in possession, etc. *Ib.*

6. When presumptions of fraud arise, as from dealings between father and son, the jury must, under proper instructions, find the fraudulent intent, unless it is rebutted by proof. *Ib.*

FRAUDULENT INTENT, 412, 671, 691.

1. Where, in an action to set aside a conveyance made by a deceased husband to a trustee to secure a debt due to his wife, the validity of the debt was not attacked, but it appeared that, at the time of the execution of the deed, the husband was embarrassed by debt and had little or no property except that so conveyed, and that creditors other than she knew nothing of the debt due from the trustor to his wife, or of the deed in trust to secure the debt: *Held*, that these facts constituted no evidence of a fraudulent intent on the part of the trustor or knowledge of such intent on the part of the wife. *Nadal v. Britton*, 180.

2. Where the *bona fides* of a debt was admitted, and the execution and delivery of a deed of trust to secure the same were established, and there was no evidence that the beneficiary withheld the deed from registration to bolster the credit of the trustor, the fact that such deed was not registered for nearly four years after its execution and delivery, was no evidence that the beneficiary, the wife of the trustor, had any knowledge of the fraudulent intent of her husband in making such conveyance. *Ib.*

3. In such case (the principal consideration for the execution of the deed being money then loaned by the wife to the husband) the burden was upon the plaintiffs to prove not only the fraudulent intent of the grantor, but also the fact that his wife, the secured creditor, had knowledge of that intent and participated in it. *Ib.*

4. While a statement made to two of the plaintiffs by the wife, during her husband's last illness, that he owed nothing, and that, therefore, it would not be necessary to sell the house and lot, which she wished her daughters to have, might, perhaps, tend to show that her debt was fictitious, yet, the debt being admitted, it did not tend

FRAUDULENT INTENT—*Continued.*

to show that she had knowledge that her husband, when he borrowed her money and secured its repayment by a deed in trust, was contriving to hinder or delay his creditors, present or future. *Ib.*

FRAUDULENT JUDGMENT.

Innocent purchaser at sale made under fraudulent judgment is not affected by the fraud. *Williams v. Johnson*, 424.

FURNITURE.

What is included in a bequest of "furniture." *Ruffin v. Ruffin*, 102.

GENERAL ASSEMBLY.

An act of the General Assembly ought not to be assumed to be unconstitutional by a subordinate officer of the State government. *Board of Education v. Kenan*, 566.

GUARDIAN AND WARD, 408.

Where a guardian, carelessly and without deliberation, or, at the most, upon the hasty and "horseback" opinion of counsel, until then employed by the debtor and not by himself, and not by way of compromise of a doubtful claim, accepted from a solvent debtor half the sum he should have collected, he is responsible at the suit of his ward for what he failed or neglected to collect. *Culp v. Stanford*, 664.

HEIR.

An heir may contest validity of judgment taken against administrator after proceedings begun for sale of land for assets. *Tilley v. Bivens*, 348.

HOMESTEAD.

1. Where the indebtedness of a husband and wife was adjudicated to be a "charge" upon the wife's land, and a commissioner was appointed to sell it, it was his duty to first allot a homestead and then sell the excess. *Bailey v. Barron*, 54.

2. In such case the allotted homestead cannot be sold to satisfy the "charge" until the homestead estate or right ends. *Ib.*

3. A *feme covert* cannot, by a contract, in the absence of a deed debarring her from claiming a homestead, make a charge upon the land, so as to deprive her of the exemptions allowed by the Constitution. *Ib.*

4. The proceeds of the sale of land outside of the allotted homestead of a debtor should be applied to the payment of a judgment docketed in the county where the land lies, before anything is paid on a mortgage on same land registered subsequently to the docketing of the judgment. *Gulley v. Thurston*, 192.

5. The homestead right, estate or "advantage" is salable or assignable, and the purchaser can hold the land to which it pertains, to the exclusion of an ordinary senior judgment creditor until that right, estate or "advantage" terminates. *Vanstory v. Thornton*, 196.

HOMESTEAD—*Continued.*

6. A judgment debtor who, subsequent to the docketing of the judgment, and with the joinder of his wife, if married, mortgages land, including his homestead, and fails to pay the judgment and mortgage debts, loses his land outside of the homestead, because it must be devoted to the discharge of the judgment lien; he also loses his right to use the homestead land, because by proper deed he has assigned it to the mortgagee, who acquired all his rights to the homestead estate or "advantage." *Ib.*

7. Therefore, where, in an action to which a judgment creditor, junior mortgagees and the judgment debtor were all parties, and the purpose of which was to foreclose the mortgages as well as to reappraise and reallot the homestead by reason of improvements having been put thereon, making it worth much in excess of $1,000, it was consented that the land should be sold and the fund distributed by the court according to the respective claims and liens of the parties, and it was further conceded that the land would sell for more than $1,000, and that the excess over that sum should represent what the land outside of the homestead would have brought if the homestead had been actually allotted and the excess sold: *Held*, (1) that such excess must be applied on the judgment which was docketed prior to the registration of the mortgages; (2) that the sum of $1,000, which represents the newly allotted homestead, remains subject to the lien of so much of the judgment as may not be satisfied by the application of the excess over $1,000 of the proceeds of the sale, but it cannot be applied to the satisfaction of such lien until the termination of the debtor's exemption rights; (3) until such termination, the fund representing the homestead will be invested under direction of the court, and the interest accruing thereon will be applied on the mortgage debts according to the priority of liens, and any remainder of the *corpus*, after paying off the judgment, will be used to pay off any balance remaining due on the mortgages. (CLARK, J., dissenting.) *Ib.*

8. The courts having no rule by which to determine the present value in cash of exemption rights, the present division of a fund representing such exemption, if desired, must be attained by arbitration or agreement among the claimants. *Ib.*

9. In an action to recover land sold under execution on a judgment rendered by a justice of the peace and docketed in the Superior Court, parol testimony was properly admitted (upon proof or admission of the loss of the original papers) to prove that the note was executed prior to the year 1868, when the homestead exemption was established. *Buie v. Scott*, 375.

10. The debt being one prior to 1868, the defendant, the widow of the execution debtor, is not entitled to a homestead in the land so sold, but the purchaser at the sheriff's sale became the owner, and is entitled to recover the land subject only to the widow's right of dower. *Ib.*

HUSBAND AND WIFE, 293, 370, 622, 671.

1. Where land was conveyed to a trustee for the use and benefit of the wife, and she was authorized in the deed to dispose of the same by

HUSBAND AND WIFE—*Continued.*

will or deed (if by the latter, with the joinder of the trustee), she to have the exclusive use and benefit of the land, a mortgage given by her and her husband without the joinder of the trustee was inoperative and void. *Mayo v. Farrar*, 66.

2. Since the act of 1848 (section 1840 of The Code), tenancy by the curtesy initiate confers no rights which the husband may assert *against* the wife as respects her real estate acquired before that act took effect, the intention thereof being to provide a home which she cannot be deprived of, either by her husband or his creditors. *Taylor v. Taylor*, 134.

3. Where a wife has obtained a divorce *a mensa et thoro*, whatever rights her husband had in her lands are suspended until reconciliation shall be effected, or until by her death, he may become tenant by the curtesy consummate, and, therefore, she is entitled to recover possession of her land from him for her own use. *Ib.*

4. Where a husband, without the authority, joinder or knowledge of his wife, mortgaged the crops on her land for supplies, which were expended in making the crops, and the mortgagee had notice of the wife's ownership by recitals in the deed, and there was no evidence of any representations made by his wife by which the mortgagee was misled, the mortgagee acquired no right to such crops as against the wife. *Wells v. Batts*, 283.

5. Acquiescence by a wife for several years previous in the management and control, by her husband, of her lands, and the disposition by him of the crops grown thereon, does not, of itself, authorize the husband as her agent to mortgage the crops to one having notice of her ownership. *Ib.*

6. Evidence of the surrender of the rights of the wife to the husband during their joint occupancy of land must be positive and unequivocal in order to confer proprietary control upon him. *Ib.*

INADEQUACY OF PRICE.

While creditors of an execution debtor may use inadequacy of price bid as an evidence of fraud and collusion between the purchaser and the debtor, the latter cannot make it the ground of contesting the title of the purchaser at the execution sale against him. *Williams v. Johnson*, 424.

INDICTMENT.

1. Since the passage of chapter 205, Laws 1891, which defines a felony to be a crime punishable by death or imprisonment in the State Prison, an indictment for obtaining goods by false pretense is fatally defective if the word "feloniously" be omitted. *S. v. Bryan*, 848; *S. v. Caldwell*, 854.

2. A bill of indictment for felony, though defective, should not be quashed, but the prisoner should be held until the solicitor can send a new bill curing the defect. *S. v. Caldwell*, 854.

INDICTMENT—*Continued.*

3. In an indictment for cruelty to animals, etc., the allegation or proof of torture or cruelty is not required, except as it is involved in unnecessary suffering knowingly and willfully permitted. *S. v. Porter*, 887.

INFANTS.

1. An alleged contract of purchase made by a minor (whose infancy is undisclosed) or by one pretending to act as his agent, under an agreement to mortgage the land back to secure the purchase-money, is a nullity. *Sawyer v. Northan*, 261.

2. The right to avoid a contract on the ground of the disability of nonage is a peculiar personal privilege of the infant, though if he bring suit in his own name, or next friend, for services rendered another, the decree will be conclusive on him as well as the defendant. *Hicks v. Beam*, 642.

3. Where an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, since the infant may repudiate the judgment if rendered before his majority, but such objection must be interposed in apt time and in the prescribed mode, which is by plea in abatement or by defense set up in the answer and before the trial on the merits. *Ib.*

4. Where, in an action by an infant in his own name against defendant for services rendered, the defendant relied upon a general denial of the indebtedness as his sole defense, thereby waiving objection to plaintiff's disability to sue: *Held*, that a motion to dismiss the action after the testimony was all in, was made too late to be entertained. *Ib.*

5. Where an infant institutes an action in his own name and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant. *Ib.*

INJUNCTION.

1. Where, in an action brought to cancel a deed of trust given by a *feme covert* conveying her land to secure the debt of her husband, an application was made for an injunction restraining the sale of her land, and the affidavits raised a well-defined issue involving the equity for exoneration and cancellation, the injunction was properly continued to the hearing. *Davis v. Lassiter*, 128.

2. The prohibition in the general Machinery Act against granting injunctions is applicable by its terms only to such as are levied by that particular act, and does not apply when the right to collect taxes in arrears has been revived by a statute for the benefit of a sheriff's sureties containing no restrictions applicable to a particular case arising thereunder. *Moore v. Sugg*, 233.

3. An act to enable the sureties of a sheriff to collect taxes in arrears contained no provision prohibiting the courts from granting injunctions, but purchasers of land without notice of unpaid taxes were relieved from the encumbrance of a lien for taxes on the land bought by them. In a suit brought by the owner of land to restrain a sale

INJUNCTION—*Continued.*

of land for unpaid taxes, the complaint alleged that he had no notice that the land which he had bought at a foreclosure sale was encumbered by a claim for unpaid taxes; and the defendant, in his answer, averred that the plaintiff had actual notice of such encumbrance. In such case, there being a serious dispute in reference to a very material fact, an injunction was properly granted until the hearing. *Ib.*

4. Where a mortgagor in possession has full defense to an action for ejectment, when brought by a purchaser at a special sale under a mortgage barred by the statute of limitations, an injunction will not issue to prevent the sale under mortgage; otherwise, if there was a contest as to the amount due on the mortgage debt. *Hutaff v. Adrian*, 259.

5. Where there is a serious controversy as to the *bona fides* of an assignment and of the debts preferred, as well as of the fitness of the assignee, an injunction should be granted to prevent the sale of the property pending litigation. *Preiss v. Cohen*, 278.

6. While the fact of insolvency is not decisive of the right to injunctive relief, yet in some cases it becomes material. *R. R. v. Mining Co.*, 661.

7. The fact that one railroad occupies land which is claimed by another road as its right of way, is not in itself an irreparable tort which will justify restraining the defendant from using the land until the question of title can be tried, especially when it is not alleged that the defendant is insolvent, and where it appears that there is room on the disputed territory for the construction of both roads. *Ib.*

8. A restraining order can be issued in any cause by any judge of the Superior Court anywhere in the State, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated. *Hamilton v. Icard*, 589.

9. A perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. *Ib.*

10. The jurisdiction to grant an injunction till the hearing is restricted to the resident judge of the district, or the judge assigned thereto or holding by exchange the courts of the district within which the county wherein the cause is pending is situated. *Ib.*

11. If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days notice to the parties interested. *Ib.*

12. By stipulation in writing, duly signed by their attorneys, they may, under section 337, designate any other judge than those indicated by section 336 of The Code to hear the application. *Ib.*

13. No formal "case on appeal" is required on an appeal from an order granting an injunction until the hearing. *Ib.*

INJUNCTION—*Continued.*

14. Where, in an action to redeem a mortgage on realty under which the trustee has advertised the land for sale, the complaint alleges that the contract, to secure which the mortgage was given, is usurious and was made payable in another State to avoid the usury laws of this State, there is a "serious issue" between the parties, which entitles the plaintiff to an order restraining the sale until the hearing. *Meroney v. Loan Assn.*, 842.

INSOLVENCY OF CORPORATION.

While the fact of insolvency is not decisive of the right to injunctive relief, yet in some cases it becomes material. *R. R. v. Mining Co.*, 661.

INSTRUCTION TO JURY, 720, 778.

1. Requests for special instructions to jury, as well as a request that the judge shall put his charge in writing, should be made at or before the close of the testimony. *Ward v. R. R.*, 168.

2. A request to charge the jury is properly refused where there is nothing in the pleadings or evidence upon which to base it; so, also, when an instruction assumed certain facts as proven, upon which the testimony was conflicting. *McMillan v. Baxley*, 578.

3. Where a prayer for instruction does not appear in the record, an exception to the refusal of the judge to give it will not be considered on appeal. *Ib.*

4. Prayers for instructions to the jury, although in writing, not made at or before the close of the evidence, but after argument was begun on the trial, were not in apt time, and it was not error to refuse them. *Luttrell v. Martin*, 593.

5. Unless a prayer for instruction is made, a mere omission to charge is not error. *S. v. Jackson*, 851.

INTENT. See, also, Fraudulent Intent.

Where presumptions of fraud arise, as from dealings between father and son, the jury must, under proper instructions, find the fraudulent intent, unless it is rebutted by proof. *Clement v. Cozart*, 412.

ISSUES, 44.

1. The only restriction upon the power of a trial judge to settle the issues for a jury is that they shall be such as arise out of the pleadings, such that the court, upon the verdict, may proceed to judgment, and such as will allow the parties to present to the jury any material view of the law arising out of the testimony which counsel may request the court to embody in its instructions to the jury. *Vaughan v. Parker*, 96.

2. Where there is no evidence to support a proposed issue for the jury, the latter should not be submitted. *Vanstory v. Thornton*, 196.

3. An issue framed to ascertain the intent of one party to a contract, rather than the agreement between the parties, should not be submitted to the jury. *Spencer v. Fortescue*, 268.

ISSUES—*Continued.*

4. When an issue submitted by the court is in entire conformity with the answer, and broad enough to comprehend an alleged parol trust set up by the defendant in an action of ejectment, and is substantially the same as the issue tendered by the defendant, it is not error to refuse to submit the latter. *Hamilton v. Buchanan*, 463.

5. Where, by consent of the parties, the judge frames the issues at the close of the testimony, and no exception is made on the trial to such issues or the evidence or charge, objection cannot be raised on appeal that the issues submitted were not such as arose on the pleadings. Exceptions to the issues should be made on the trial, so that the judge may, if he thinks proper, revise and correct them. *Wills v. Fisher*, 529.

6. Exceptions to issues for the jury should be made on the trial, so that the judge may revise and correct them, if necessary. *Ib.*

7. Where the issues submitted by the court were substantially the same as those offered by a party on the trial, it was not error to refuse to submit the latter. *Luttrell v. Martin*, 593.

8. Where exceptions are not taken to a refusal to submit issues tendered or those submitted, until after verdict on a motion for new trial, such exceptions are too late to be considered on appeal. *Carr v. Alexander*, 783.

9. It is not error to refuse to submit issues tendered by a party, in an action of ejectment, when it appears that every pertinent inquiry can be presented in the three issues ordinarily submitted in such actions. *Kimsey v. Munday*, 816.

JOINT-STOCK ASSOCIATIONS, 332.

1. An association of persons doing business as a joint-stock company, having no charter, either by special act of the General Assembly or under the general law, and hence having no corporate existence, is a partnership, and suit may be brought by each creditor against any or all of the members or partners; and where such association becomes insolvent its members or stockholders who are creditors are not entitled to any dividend on their debts until the other creditors shall be paid in full. *Bain v. Clinton Loan Assn.*, 248.

2. Where a joint-stock (unincorporated) association is succeeded by an incorporated company, whose stockholders are the members of the joint-stock association and pay their subscriptions to the stock of the new, not in cash, but in stock of the old concern, they are debtors to the full amount subscribed by them; and if they are also creditors of the corporation, and it becomes insolvent, they cannot share in any part of the assets until their liability has been paid in full. In such case the receiver should retain all dividends on debts due to stockholders thus indebted to the corporation until he is ready to make a final settlement with all the creditors. *Ib.*

3. Individuals associated in business and claiming to be a corporation and exempt from individual liability for its contracts, in order to shield themselves from such liability, must be able to show that the corpo-

JOINT-STOCK ASSOCIATIONS—*Continued.*

ration exists by virtue of a charter granted by the General Assembly or under the general law; when no charter exists, such association is a partnership. *Hanstein v. Johnson*, 253.

4. Sections 1 and 3 of Article VIII of the Constitution do not create joint-stock associations, but are directions to the General Assembly not to grant special charters to corporations (which word, by force of section 3, includes joint-stock associations), except where the object cannot be attained under the general law. *Ib.*

5. Members of a joint-stock association (unincorporated) are individually liable, jointly and severally, for its debts, and the acceptance by such association of an act of the General Assembly authorizing it to become a corporation does not relieve its members from liability for debts contracted before such acceptance; otherwise as to debts contracted after the acceptance. *Fertilizer Co. v. Clute*, 440.

6. Notes given by an agent of a corporation in pursuance of a contract made by him in behalf of a joint-stock association, before the act of incorporation was accepted, are binding upon those who were members before such acceptance. *Ib.*

7. Where an agent of a corporation, under a contract made by him with a fertilizer company on behalf of a joint-stock association before acceptance of an act of incorporation, took notes from those to whom he sold guano, and turned them over to the fertilizer company, which afterwards returned them to him for collection, and the amount collected was mingled with the funds of the corporation and applied to its use: *Held*, that the members of the association who were such before the act of incorporation was accepted are not personally liable for the amounts so collected and converted. *Ib.*

JUDGE.

ASSIGNED TO A DISTRICT.

By the act of 1885, ch. 180, sec. 8, a judge assigned to a district is the judge thereof for six months, beginning either January or July first; and where a restraining order was made returnable before such judge at a place outside of the district, and after the courts were over, but before the end of the term of assignment to the district, such judge had jurisdiction to hear the application and grant the injunction until the hearing. *Hamilton v. Icard*, 589.

Power of, to settle issues for the jury, 96.

Expression of opinion by, what is not, 851.

JUDGE'S CHARGE, 720, 851, 859.

1. It is the province, if not the duty, of the *nisi prius* judge to instruct the jury, upon the testimony, what acts constitute a renunciation of a contract, and it is error for him to leave to them to determine whether the contract still subsists, without giving a definition of what amounts to an abandonment. *Taylor v. Taylor*, 27.

JUDGE'S CHARGE—*Continued.*

2. A request that the judge shall put his charge in writing should be made at or before the close of the testimony, which is the limit of "apt time." *Ward v. R. R.*, 168.

3. A general exception to a "charge as given" by the trial judge cannot be considered on appeal. *Ib.*

4. Where, in an action for assault, there was no material conflict of testimony, and that of the defendant put the matter in the most favorable light for himself, it was not error for the judge to charge the jury that if they believed the defendant's statement as to the facts (which was equivalent to saying that if they believed the evidence in the most favorable light in which it could be considered for the defendant), the plaintiff was entitled to some damages. *White v. Barnes*, 323.

5. In such action, where there was no evidence showing that the plaintiff engaged in or showed a willingness to fight, defendant cannot complain of an instruction "that plaintiff is entitled to recover, even though he entered the fight willingly." *Ib.*

6. A request to charge the jury is properly refused where there is nothing in the pleadings or evidence upon which to base it. *McMillan v. Baxley*, 578.

7. Where a prayer for an instruction does not appear in the record, an exception to the refusal of the judge to give it will not be considered in this Court. *Ib.*

8. An instruction which assumed as proved certain facts upon which the testimony was conflicting was properly refused. *Ib.*

9. Where the prayer for instruction was, "That before a power of sale conferred in a mortgage can have any force, it must be shown to the satisfaction of the jury" that the sale was regular and fairly conducted, it was not error for the presiding judge to substitute the words "by a preponderance of the testimony" for the words "to the satisfaction of the jury." *Ib.*

10. Under the statute (chapter 33, Laws 1887), there can be no presumption of contributory negligence; hence it was error in a trial judge to instruct the jury, in an action for damages resulting from the negligence of defendant, that the burden of proof was upon the plaintiff to show that she was not herself guilty of negligence, though the defendant offered no testimony. *Jordan v. Asheville*, 743.

11. Where, upon an issue as to whether an injury complained of was caused by the negligence of the defendant, the plaintiff made a *prima facie* case, the judge ought to have instructed the jury to find the issue in her favor if they believed her testimony, and it was error to blend his instructions on that issue with those on an issue relating to contributory negligence. *Ib.*

12. Where, in a trial for murder, it appears that in no aspect of the testimony, and under no inference fairly deducible from it, the prisoner is

JUDGE'S CHARGE—*Continued.*

guilty of murder, it is error to refuse a prayer for instruction to the jury that they must not return a verdict for any higher offense than manslaughter. *S. v. Miller*, 878.

13. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is the province of the court, when all the facts are developed and known, to tell the jury whether, in every aspect of the testimony, such presumption is rebutted. *Ib.*

14. A mere omission to charge is not error unless a prayer for instruction is made. *S. v. Jackson*, 851.

JUDGMENT, 311, 424, 655.

1. The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtor's allotted homestead, and the proceeds of a sale of such land should be applied first to the payment of the judgment debt. *Gulley v. Thurston*, 192.

2. A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's lands outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. *Vanstory v. Thornton*, 196.

3. Relief against a final judgment rendered by a justice of the peace, and alleged to have been obtained by fraud and collusion between him and others, cannot be had by means of a writ of *recordari*, but must be sought by an independent action. *King v. R. R.*, 318.

4. W. S., in whom a legacy had vested, died without issue or next of kin, except his father, J. S., who died subsequently; V. was appointed administrator of both, and in both capacities sued to recover the legacy: *Held*, that it is immaterial whether judgment was rendered in favor of V. as administrator of the father or the son, as, in either case, he is bound by the judgment. *Varner v. Johnston*, 570.

5. Where an administrator against whom a judgment *quando* was taken in 1869, in an action begun prior to the Code of Civil Procedure, died soon thereafter, and administration *de bonis non* was not taken out until 1886, and suit was brought on such judgment in 1890: *Held*, that no presumption of payment can arise, inasmuch as in computing the time under the statute the period during which there was no administration must be excluded. *Dickson v. Crawley*, 629.

6. Where a judgment was obtained against an administrator of a decedent and his surety in 1869 on a cause of action arising and in a suit commenced before the adoption of the Code of Civil Procedure, the judgment being *quando* as to the administrator, and absolute and final as to the surety, an action on the latter was a new *causa litis* and governed by the statute of limitations as prescribed in The Code,

JUDGMENT—*Continued.*

while the statute of presumptions under the prior law is alone applicable to the action on the *quando* judgment against the administrator. *Ib.*

7. The failure of a judge to adjudicate as to costs does not affect or render invalid as a final judgment an adjudication upon another matter embraced therein. *Young v. Connelly*, 646.

8. Where it appeared from a will in evidence, without objection, that one of the claimants of land condemned by a city, was entitled to a life estate only therein, a judgment in favor of such claimant for the value of the life estate only, was properly rendered in a suit relating to damages for such condemnation. *Miller v. Asheville*, 769.

9. Where a judgment has been rendered on a verdict, the judgment and verdict may not be set aside for excusable neglect, etc., under section 274 of The Code. *Brown v. Rhinehart*, 772.

10. The motion for arrest of judgment on the ground of the insufficiency of the bill of indictment may be taken in this Court for the first time. *S. v. Caldwell*, 854.

11. A judgment *non obstante veredicto* can only be rendered on the face of the pleadings. *Lewis v. Foard*, 402.

12. A purchaser at a judicial sale will be protected if the sale was authorized by a judgment rendered by a court having jurisdiction of the subject-matter and the person, although the judgment might be impeached for irregularity. *Dickens v. Long*, 311.

JURISDICTION.

1. Of judge assigned to a district, 141, 502, 589.

Of Railroad Commission. See Railroad Commission.

Of State courts, 390, 796, 896.

2. The Superior Court has jurisdiction of an action on the bond of a register of deeds to recover a penalty of $200 for failure to discharge the duties required of him by section 1814 of The Code. *Joyner v. Roberts*, 111.

3. The rule, except by consent or in those cases specially permitted by statute, the judge can make no order in a cause outside of the county where it is pending, applies only to judgment on the merits, or to motions in the cause strictly so called, and does not apply to ancillary proceedings. *Parker v. McPhail*, 502.

4. In a suit, of the subject-matter of which a court has jurisdiction, appearance by counsel gives jurisdiction of the parties thus appearing, though counsel have no authority to appear, and an innocent purchaser under a judgment rendered therein will be protected. *Hackett v. McMillan*, 513.

5. Except in the case of a fugitive surrendered by a foreign government under treaty stipulations, when a person is within the jurisdiction of

JURISDICTION—*Continued.*

a court and there properly charged with crime, the court may hold him and try him, no matter how he was brought within such jurisdiction. *S. v. Glover*, 896.

6. Upon a fugitive's surrender to a State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for any other offense than that specified in the requisition for his rendition, and in so trying him against his objection, no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied. *Ib.*

JURY.

1. It is not the province of a jury to compare handwriting to determine whether an alteration has been made in an instrument of record. *Forbes v. Wiggins*, 122.

2. Where the jury found an issue and then separated, and the judge found as a fact that they had not been influenced by what had been said to them after their separation, it was not error to permit them to reassemble and put their finding in writing. *Luttrell v. Martin*, 593.

JURY, FINDINGS OF.

1. A finding by a jury that defendant in ejectment did not purchase from another in good faith and without knowledge of plaintiff, is not inconsistent with another finding that plaintiff advised or induced the defendant to buy the land before he purchased it. *Bishop v. Minton*, 524.

2. Where, in an action by the purchaser at a mortgage sale to recover the land from the mortgagor, the mortgagee was joined as plaintiff, and no demurrer was filed, on the ground that the two causes of action were improperly joined, the defendant cannot complain of the inconsistency of two findings of the jury by which they found in answer to one issue that the purchaser was the owner of the land, and in answer to another that the mortgagee was owner, for the only result of the error in submitting the issue as to the ownership of the mortgagee, and an affirmative response thereto, would be a judgment in favor of the purchaser, *non obstante* the finding in favor of the mortgagee. *McMillan v. Baxley*, 578.

3. Where, on issues raised by the allegations in two causes of action—one on a special contract and the other on a *quantum meruit*—with the corresponding denials in the answer, the jury found that plaintiffs had not complied with the terms of the written contract, and defendant was not indebted to them thereon, but that defendant was indebted to them for work and labor done for the amount claimed: *Held*, that the findings were not inconsistent or contradictory. *Simpson v. R. R.*, 703.

LABORER'S LIEN.

1. A laborer who seeks to subject a railroad company to the payment of wages due him by a contractor in the construction of such company's road, as provided in section 1942 of The Code, must show a substantial compliance with the requirements of such section as to notice, etc. *Moore v. R. R.*, 236.

LABORER'S LIEN—*Continued.*

2. After complying with the requirements of section 1942 of The Code, a laborer can assign his claim as a debt, either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor; but where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account: *Held*, that a demurrer to the complaint was properly sustained. *Ib.*

3. The privilege conferred by the statute (section 1942 of The Code) is restricted to laborers and for work done for thirty days or less in constructing a road, and the company can in no event be held liable for the payment of accounts due by the contractors for materials. *Ib.*

4. Courthouse not subject to. *Snow v. Comrs.*, 335.

LANDLORD AND TENANT.

1. Where the occupant of land is a vendee or mortgagor in default, he is not a lessor whose crop is vested in the landlord.. *Taylor v. Taylor*, 27.

2. When defendant tenant, in an action of claim and delivery by the landlord for the possession of the crop, denies that the title is vested in the landlord, such denial avoids the necessity of proving a demand before the commencement of the action. *Rich v. Hobson*, 79.

LIEN.

1. OF JUDGMENT, 192.

No act of the judgment debtor can change or impair the rights of the judgment creditor under his lien on land outside of the homestead boundaries. *Vanstory v. Thornton*, 196.

2. Of laborer in construction of railroad, 236.

3. Courthouse not subject to lien of laborer or for materials. *Snow v. Comrs.*, 335.

LIFE ESTATE, 769, 791.

Present value of, in fund, 769.

LIMITATIONS, STATUTE OF.

1. The statute of limitations does not run in favor of a partner borrowing from the firm or association of which he is a member until a demand for payment and refusal. *Faison v. Stewart*, 332.

2. A mere acknowledgment of a debt barred by the statute of limitations, though implying a promise to pay, will not repel the statute; to have that effect, the acknowledgment, as provided by section 172 of The Code, must not only be in writing, but must be accompanied by an unconditional promise to pay the debt. *Helm Co. v. Griffin*, 356.

LIMITATIONS, STATUTE OF—*Continued.*

3. Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future: *Held*, that as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. *Ib.*

4. Part payment of a note by the payee who has endorsed it will not repel the bar of the statute of limitations as against the maker, the statute (The Code, sec. 171) confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note. *LeDuc v. Butler*, 458.

5. Where defendants in ejectment, alleging as a defense a parol trust by the plaintiff for the benefit of their ancestor, under whom they claim, plead the statute of limitations, but fail to establish the trust or to show any other title, the defendants and their ancestor, under whom they claim and for whose benefit the alleged trust was made, must be regarded as tenants at sufferance, whose possession cannot be deemed to have been adverse to the purchaser at the execution sale, or to those who claim under him. *Hamilton v. Buchanan*, 463.

6. Section 164 of The Code is an enabling and not a disabling statute; it applies only in those cases where, in regular course, but for the interposition of the section, a claim would become barred in less than one year from the grant of letters of administration, and is not a restriction on the statute of limitations, so that a claim should become barred by the lapse of a year from the grant of letters, where, but for the section, it would not be barred until a later date. *Benson v. Bennett*, 505.

7. Where right of action accrued 24 May, 1884, decedent debtor died 9 July, 1885, and letters of administration were granted 21 August, 1885, an action commenced 5 July, 1887, is not barred by the three-years statute of limitations, for, excluding the time between the death of debtor and the grant of administration, three years had not elapsed. *Ib.*

8. The Code (section 137) does not postpone the time when causes of action shall accrue, but merely extends the period of limitation or presumption after a cause of action has accrued, by omitting from the count the time between 20 May, 1861, and 1 January, 1870. *Thompson v. Nations*, 508.

9. Where a cause of action against an administrator arose in December, 1864, and he filed his account in April, 1891, and suit was brought against him and his sureties in June, 1891: *Held*, that the lapse of twenty years from 1 January, 1870, raised a presumption of settlement or abandonment, which was not rebutted, as to the sureties on the administration bond, by the filing of the administrator's account showing a balance due the distributees. *Ib.*

MAGISTRATE.

Duty of, as to cautioning prisoner in regard to his statement at preliminary examination, 874.

MANDAMUS.

Mandamus is a proper remedy to compel a municipal corporation to take the requisite proceedings for the assessment of damages for land taken for the use of the corporation. *McDowell v. Asheville*, 747.

MARRIAGE.

A marriage is not invalid because solemnized without a license or under an illegal license. *Maggett v. Roberts*, 71.

MARRIAGE LICENSE.

1. Failure of register of deeds to record substance of, 71.

2. A blank marriage license, though signed by the register of deeds, is not *issued* until filled up and handed to the person who is to be married, or to some one for him. *Maggett v. Roberts*, 71.

3. The presumption is that a marriage license signed by a register of deeds was issued during his term of office, and the burden of proving the contrary is on the party asserting it. *Ib.*

MARITAL RIGHTS, DEED IN FRAUD OF.

1. A voluntary conveyance by a woman in contemplation of marriage, which afterwards takes place, is a fraud upon her husband if he be not apprised of the existence of such deed. *Ferebee v. Pritchard*, 83.

2. Actual notice of a deed made after the marriage engagement, and without the prospective husband's consent, will not affect his rights; *a fortiori* constructive notice arising from the registration of such a deed fourteen days before the marriage will not have that effect. *Ib.*

3. The fact that such deed is made for the benefit of children of a former marriage, who were innocent of the fraud, does not change the rule. *Ib.*

MATERIALS FURNISHED TO RAILROAD IN CONSTRUCTION.

A railroad company cannot be held liable under section 1942 of The Code for payment of accounts due by the contractors for materials furnished them, the privileges of such section being confined to laborers. *Moore v. R. R.*, 236.

MERCHANDISE ORDERS.

The act of 1889 (chapter 280), forbidding the issuance of "nontransferable" tickets or scrip to laborers by their employers, and requiring such scrip to be paid to the person holding the same, *their face value*, does not authorize the assignee of tickets or scrip payable in merchandise to demand and receive payment in money instead of in merchandise. *Marriner v. Roper Co.*, 164.

MINING LEASE.

1. Where a mining lease provides for the payment to lessors of a part of the net proceeds of minerals taken from the lands, but contains no stipulation for a forfeiture through failure to open and work the mines, the law will construe the contract as if such a stipulation had

MINING LEASE—*Continued.*

been expressly written therein, and will adjudge such lease to be forfeited if, within a reasonable time, the lessee fails to carry out the purpose of the lease. *Maxwell v. Todd,* 677.

2. Where lessors of mining privileges were in possession of the land covered by the lease at the date thereof, and continued in possession, and the lease became forfeited by the nonuser and abandonment, according to the terms of the contract as construed by the law, no reëntry by lessors was practicable or necessary, and they or their grantees had a right, without demand or notice to the lessees, after such forfeiture, to resist the entry of the lessees for mining purposes. *Ib.*

MINUTES OF COURT.

Admissible as evidence to prove validity of burnt or lost records of a cause. *Smith v. Allen,* 223.

MISJOINDER OF PARTIES, 236.

1. Where, in an action to subject the land of a deceased surety on a guardian bond to the payment of the ward's debt, the amount of damages is alleged in the complaint and admitted in the demurrer, the joinder of the State as a party is a matter of surplusage and not a misjoinder of causes of action. *McNeill v. McBryde,* 408.

2. The misjoinder of unnecessary parties is mere surplusage, under The Code, and not a fatal objection. Advantage must be taken of it by demurrer and not by motion to strike out a party. *McMillan v. Baxley,* 578.

MITIGATION OR EXCUSE FOR HOMICIDE.

When killing with a deadly weapon is proved, or admitted, the burden is shifted upon the prisoner to show mitigation or excuse. *S. v. Miller,* 878.

MORTGAGE.

Effect of, on homestead. See Homestead.

Of crops, 283.

Action to redeem, 842.

Notices of sale, posting of, may be proved by parol, 578.

1. The effect of discharging a debt secured by a first mortgage by surrender of the mortgage deed is to make a second mortgage on the same land a first lien, and the immediate execution of a deed of bargain and sale to the one surrendering the first mortgage cannot operate to defeat the second mortgage. *Vaughn v. Parker,* 96.

2. Where, in an action to recover the possession of land, it appeared that C., intending, but not disclosing his purpose, to act as agent for his minor son, C., Jr., purchased the land from F., the defendant's grantor, under an agreement to reconvey the land by way of mortgage to secure the purchase-money, and F., supposing that he was

MORTGAGE—*Continued.*

dealing with C., executed the deed to him, and C. caused the abbreviation "Jr." to be added after his own name and had the deed so recorded, at the same time executing notes and mortgage in his own name to F., to secure the purchase-money: *Held*, that a conveyance by "C., Jr.," or his heirs to plaintiff, who had knowledge of all the facts, did not divest F.'s title to the lands. *Sawyer v. Northan*, 261.

3. B., while holding by purchase from the mortgagor the equity of redemption in the timber on the mortgaged land and by assignment from the mortgagee the mortgage on the land itself, conveyed to plaintiff the equity of redemption in the timber, which conveyance was registered subsequent to an assignment by him of the note and mortgage to C. with whom there was a verbal exception of the timber on the land. C. assigned the note and mortgage with like verbal exception of the timber to D., at whose instance the land was sold in a suit for foreclosure and the defendant became the purchaser, having no actual notice of the verbal agreement concerning the timber: *Held*, (1) that the purchaser was not fixed with constructive notice of an assignment of the equity of redemption in any of the mortgaged property by any of the successive holders of the mortgage, nor was he compelled to inquire further than to ascertain from the records, or the mortgagor, whether the debt had been paid or the mortgage released in whole or in part to him by any of the assignees of the mortgage; (2) that while the transfer of the note after maturity would have made it subject to equities as between the mortgagor and the assignees of the note, in this case none arises from that fact in favor of the plaintiff, who purchased the timber rights subject to the mortgage under which the defendant claims. *Lumber Co. v. Dail*, 350.

4. Where a wife, with her husband, executed a bond and mortgage upon her land to secure the same, and the instruments were entrusted to the husband for delivery, and he, without her knowledge or consent, and before delivery to, and without the knowledge of the obligee, altered the bond by "raising" the amount, and the mortgage by "raising" the consideration recited therein, but the description of the debt secured by the mortgage (as "a certain bond of even date herewith," etc.) was not altered: *Held*, that, though such alteration avoided the bond, it did not render the mortgage void, the alteration of the consideration being immaterial, and the mortgage may be enforced for the amount of the debt intended to be secured by the mortgage, notwithstanding the invalidity of the bond. *Cheek v. Nall*, 370.

MORTGAGE SALE.

1. Where, in an action by a purchaser at a mortgage sale to recover the land from the mortgagor (the mortgagee being joined as party plaintiff), the judge presiding at the trial charged the jury that the burden was on the plaintiff to prove everything fair and honest and no advantage taken of defendants, it was not error to refuse to charge the jury that the burden of proof was on the plaintiff to show that he was not the partner or agent of the mortgagee when he bought the land. *McMillan v. Baxley*, 578.

MORTGAGE SALE—*Continued.*

2. Where the prayer for an instruction was "that before a power of sale conferred in a mortgage can have any force it must be shown to the satisfaction of the jury" that the sale was regular and fairly conducted, it was not error for the presiding judge to substitute the words "by a preponderance of testimony" for the words "to the satisfaction of the jury." *Ib.*

3. In an action to recover land by the purchaser thereof at a sale under the power contained in a mortgage given by the defendant, the deed executed by the mortgagee reciting the sale in pursuance of the power, is *prima facie* evidence that all the terms of the power and all requirements as to notice have been complied with. *Lunsford v. Speaks*, 608.

4. Even if a sale under the power in a mortgage should be invalid by reason of a failure on the part of the mortgagee to comply with the directions of the power, yet, as the mortgagee held the legal title, his deed would convey it to the purchaser subject to the equities of the mortgage. *Ib.*

5. The acquiescence of a mortgagor in the conduct of a sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it. *Ib.*

MOTION TO DISMISS.

1. An appeal does not lie from a refusal of a motion to dismiss an action. *Mullen v. Canal Co.*, 109; *Joyner v. Roberts*, 111; *Kellogg v. Mfg. Co.*, 191, and *Luttrell v. Martin*, 593.

2. A motion to dismiss an action for want of jurisdiction or because the complaint does not state a cause of action, is not such a demurrer *ore tenus* as will permit an appeal from its refusal, for if such motion be frivolous the court cannot proceed to judgment as in the case of a frivolous demurrer. *Joyner v. Roberts*, 111.

MOTION TO QUASH.

A bill of indictment for a felony, though defective, should not be quashed, but the prisoner should be held until the solicitor can send a new bill curing the defect. *S. v. Caldwell*, 854.

MOTION TO VACATE ORDER OF ARREST.

1. May be heard by a judge out of court anywhere within the district to which he is assigned. *Parker v. McPhail*, 502.

2. The finding of a judge, on hearing a motion to vacate an order of arrest that the act upon which it was based was not committed, is final and cannot be reviewed. *Ib.*

MULTIPLICITY OF SUITS.

The fact that there are many creditors of a partnership whose assets are in the hands of a receiver and not sufficient to pay the debts, and that there may be a multiplicity of suits, cannot deprive a creditor of his right to enforce his claim against any one or several or all of the partners. *Hanstein v. Johnson*, 253.

MUNICIPAL CORPORATION, 359, 743, 759, 769.

1. Where a corporation, having the right of eminent domain, and whose charter imposes the duty of ascertaining, by a prescribed method, the damages or benefits resulting to the owner in case of disagreement, takes and occupies land without having taken any valid legal proceedings to have the damages, etc., assessed, and refuses on the demand of the owner to proceed to have such assessment made, such owner is entitled to a writ of *mandamus* compelling the performance of the duty imposed by the charter. *McDowell v. Asheville*, 747.

2. Where a corporation having alone the power to institute proceedings for the assessment of damages and benefits resulting from its exercise of eminent domain fails and refuses, on demand of the owner, to do so, the owner may treat the corporation as a trespasser and sue in ejectment, if he elect to do so; otherwise the appropriate remedy is by *mandamus* to compel the corporation to assess the damages as provided by its charter. *Ib.*

MURDER AND MANSLAUGHTER.

1. In a trial of F. for murder, the court gave an instruction as follows: "If you believe, from the evidence, that B. and the prisoner were standing in the store, by the fire, as detailed by the witnesses, and as soon as the difficulty between H. and the deceased commenced they both rushed upon the deceased, either of them having a deadly weapon in his hand, . . . and inflicted the wound upon him from which he died, the prisoner is guilty of murder, whether the deadly weapon was in his hands or those of B.: *Held*, that such instruction was erroneous in that it imputed the felonious act of one participant to the other without an inquiry or finding as to whether B. and the prisoner entered into the fight by preconcert or whether the prisoner had previous knowledge of the possession and consented to the use of the weapon by the other. *S. v. Howard*, 859.

2. On a trial of a defendant charged with murder, it appeared that while he and others were engaged in friendly conversation the deceased, a powerful man, came up on horseback in a gallop, halloing twice and applying an insulting epithet to his horse, which defendant misinterpreted as applicable to himself; a demand for explanation by the defendant was followed by an insult from the deceased, who advanced with threatening aspect and words upon the defendant, who retreated until overtaken and knocked or pushed down by deceased, and while upon the ground, and during the struggle, inflicted nine cuts or stabs with a pocketknife, from which deceased died: *Held*, that the repeated cutting of deceased with the knife during the fight, resulting in the death of deceased, was not murder, since there was no evidence of express malice or of a previous preparation for the fight by the defendant, or that he used the knife after deceased had been taken off his prostrate body, but such killing, being the result of passion produced by the fight, was manslaughter at the most. *S. v. Miller*, 878.

MURDER AND MANSLAUGHTER—*Continued.*

3. Although, when killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner to show mitigation or excuse, yet, when it appears that, in no aspect of the testimony, and under no inference fairly deducible from it, the prisoner is guilty of murder, it is error in the court to refuse the prayer for an instruction to the jury that they must not return a verdict for any higher offense than manslaughter. *Ib.*

4. On a trial for murder, it appeared that the prisoner, the deceased and others were together in a house; defendant went out and declared to a witness that he came near killing the deceased because he had cut him out of his (the prisoner's) girl; on reëntering the house he saw the girl sitting on the lap of the deceased, and after lying for awhile on a bed with a pistol in his hand he arose and approached the deceased and said with an oath, "I am going to kill you"; deceased then pulled his pistol and asked for peace, and the girl having left his lap, he arose and immediately the struggle began between him and the prisoner; bystanders grabbed the pistols of the men, the deceased saying he was willing to give up his—defendant refusing to surrender his; the men were then released and began pushing each other; defendant's foot went through the floor and his pistol was discharged; deceased then shot at, but missed, defendant, who thereupon fired again, fatally wounding the deceased, who again fired at but missed the defendant: *Held*, that the declarations of the defendant when he went out of the house and all his actions upon his return evinced a deadly purpose, and the evidence showed no such change of purpose and effort by him to avoid a conflict, and no notice to deceased of such change after he had declared his purpose to kill the deceased, as would warrant the jury in finding that the killing was done in self-defense, and the court properly refused to instruct the jury that defendant was not guilty if his pistol went off by accident the first time and deceased began to shoot at him and defendant shot to save his own life or to escape great bodily harm. *S. v. Edwards*, 901.

NEGLIGENCE, 720, 743.

Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing, whom he does not know at all or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured, the law imputes it to his own negligence and holds the railroad company blameless. *High v. R. R.*, 388.

NEGOTIABLE INSTRUMENTS.

A bond is nonnegotiable until after endorsement, and an assignee of an unendorsed bond takes it subject to any equities or other defenses existing in favor of the maker at the time of or before notice of the assignment. *Loan Assn. v. Merritt*, 243.

NEWLY DISCOVERED TESTIMONY.

In granting or refusing a new trial for newly discovered testimony the Court will not, in doing so, discuss the facts upon which the same is based. *Ferebee v. Pritchard*, 83.

NEW PROMISE.

1. A mere acknowledgment of a debt barred by the statute of limitations, though implying a promise to pay, will not repel the statute; to have that effect, the acknowledgment, as provided by section 172 of The Code, must not only be in writing, but must be accompanied by an unconditional promise to pay the debt. *Helm Co. v. Griffin*, 356.

2. Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future: *Held*, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. *Ib.*

NEW TRIAL.

In granting or refusing a motion for a new trial for newly discovered testimony the Court will not, in doing so, discuss the facts upon which the same is based. *Ferebee v. Pritchard*, 83.

NONSUIT OF UNNECESSARY PARTIES.

During the pendency of an action relating to land between P. and C., in which there was subsequently a decree directing P. to convey the land to C. upon the payment by the latter of the balance of the purchase-money, P. conveyed to other parties; thereafter C. brought suit for the land against P. and his grantees, who were in possession: *Held*, that P. was not a necessary party, and it was not error to allow plaintiff to enter a nonsuit as to P., the grantor of the other defendants. *Carr v. Alexander*, 783.

NOTICE.

Of assignment of bond, 243.

Of unregistered deed, 736.

Of sale under mortgage, posting of proved by parol, 578.

NUISANCE.

1. Where, in the trial of an indictment for creating a common nuisance by maintaining a slaughter-pen, there was no testimony showing that the community generally were annoyed or affected injuriously by the noxious odors complained of, the court properly declined to submit to the jury the question whether such an injury, to the residents of the neighborhood, as amounted to a public nuisance had been shown. *S. v. Wolf*, 889.

2. To sustain an indictment for keeping a slaughter-pen producing offensive odors, constituting a public nuisance to all citizens passing along the adjacent public road, it is necessary to prove that the road upon which the citizens were annoyed was a public highway. *Ib.*

NUISANCE—*Continued.*

3. Where, on the trial of an indictment for creating and maintaining a common nuisance to persons "passing along a common road and public highway," there was no evidence tending to show that any person while passing along the road was actually annoyed or that the public had acquired an easement in such road, the court erred in failing and refusing to instruct the jury that the defendant was not guilty in any aspect of the testimony. *Ib.*

OFFICIAL BOND.

1. An officer is liable upon his bond "for the faithful discharge of all the duties of his office," and an action for a penalty of $200 for failure in his duty is properly brought on such bond, and the Superior Court has jurisdiction. *Joyner v. Roberts*, 111.

2. In such action it is not necessary to allege that a judgment has been obtained against the officer, and that he has failed to pay it. *Ib.*

3. *Quære*, whether a party so suing the official bond should not make himself a relator in an action in the name of the State. *Ib.*

4. The sureties on the official bond of a clerk of the Superior Court are liable for any loss resulting from his failure to docket a judgment when he should do so. *Young v. Connelly*, 646.

PARAMOUR, declaration of, admissible as evidence in action for divorce, 152.

PAROL TESTIMONY.

1. When admissible to contradict or vary the absolute terms of a written contract. *Carrington v. Waff*, 115.

2. In an action to recover land sold under an execution, parol testimony is admissible, upon proof of the loss of the original papers, to show that the note was executed prior to 1868, when the homestead exemption was established. *Buie v. Scott*, 375.

3. When inadmissible to aid uncertain and vague description of land referred to in deed. *Lowe v. Harris*, 472.

4. Admissible to prove contents of destroyed record, when. *Varner v. Johnston*, 570.

5. Parol evidence as to the posting of notices of sale under a power in a mortgage is admissible, the production of the writing themselves not being necessary. *McMillan v. Baxley*, 578.

PAROL TRUST.

1. A parol agreement by a purchaser of land, made *after* the purchase, to hold the land in trust for another and to convey it to him upon the payment by him of the amount bid, is void under the statute of frauds. *Hamilton v. Buchanan*, 463.

2. In order to establish a parol trust in the purchaser of land for the benefit of another, the proof must not only be strong and convincing but must also disclose an agreement amounting to a trust existing at the time of the sale. *Ib.*

PAROL TRUST—*Continued.*

3. Where a brother of an execution debtor, who was alleged to be insane at the time of the sale, purchased the insane brother's land, and there is no evidence that the purchaser occupied a position of trust to his brother, or took any advantage of his infirmity: *Held,* that no trust grew out of the relationship of the parties, such relationship not being, in itself, a confidential relation to which the equitable doctrine of constructive trust applies. *Ib.*

PARTNERSHIP, 836, 840.

1. In an action by one member of a firm against the other, a receiver was appointed and he was directed to pay a judgment against the firm out of the partnership assets in his hands; he failed to do so: *Held,* that the judgment might be enforced against the individual property of the partner at whose instance the receiver was appointed, it not appearing that the failure of the receiver to satisfy the judgment was due to any act or default of the creditor. *Vanstory v. Thornton,* 196.

2. An unincorporated association of persons doing business as a joint stock company is a partnership. *Bain v. Loan Assn.,* 248.

3. Members of a partnership are jointly and severally bound for all its debts, and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts, and because of the several liability a creditor may, at will sue any one or more of the partners. *Hanstein v. Johnson,* 253.

4. The fact that the assets of a partnership are not sufficient to pay the partnership debts, or that a receiver has charge of the assets, or that, there being many creditors, a multiplicity of suits may ensue, cannot deprive a creditor of his right to enforce his claim against one or several or all of the parties. *Ib.*

5. One who shares in the profits of a business otherwise than as the profits are looked to as a means of ascertaining the compensation which, under the contract, is to be paid to an employee for his services, incurs the liability of a partner therein. *Cossack v. Burgwyn,* 304.

6. Where B. endorsed a note of, and made advances to, a firm to enable it to perform a contract of which, as estimated, the profits would be thirty nine thousand dollars, and took a bill of sale of the firm's property to secure such endorsement and advances, and the firm also executed to B. a note for $5,000, due one year from date, on which $500 was to be paid monthly "out of the estimated profits": *Held,* that the facts *prima facie* constituted B. a partner with the firm. *Ib.*

7. Where a member of an incorporated joint stock association (which is a partnership) borrows money from the association, he assumes toward the other members or parties the position of a trustee, and is bound to account with them whenever they may call upon him to do so, and hence the statute of limitations does not begin to run in his favor until such demand. The fact that the note, the evidence

PARTNERSHIP—*Continued.*

of the indebtedness, is made payable to the cashier of the association, does not change the relations of the parties. *Faison v. Stewart*, 332.

PART PAYMENT.

Part payment of a note by the payee who has endorsed it will not repel the bar of the statute of limitations as against the maker. *LeDuc v. Butler*, 458.

PENALTY.

In an action on an official bond of an officer, to recover a penalty for failure to discharge his duties, it is not necessary to allege that a judgment has been obtained against the officer and that he has failed to pay it. *Joyner v. Roberts*, 111.

PIGEONS, Shooting for sport, 887.

PLEADINGS, Admissions as in evidence. See Evidence.

POSSESSION.

Where a patent issued for land, reserving land within its limits as "previously granted," possession under such patent, but outside of the land previously granted, is not constructive possession of the excepted land. *Basnight v. Smith*, 229.

PRACTICE. See, also, Evidence and Trial, 71, 83, 96, 102, 109, 849, 857.

AS TO ANCILLARY PROCEEDINGS.

1. A party to an action by waiving objection to the time or place of making it may give validity to an order of court that would otherwise be void, provided the court has general jurisdiction of the controversy; therefore, where a defendant, after assenting to an order made by a judge in a county other than that in which the action was pending, but within the same judicial district, appeared before a commissioner, as directed by said order, it was then too late for him to withdraw his assent voluntarily given to every part of the order when first made. *Bradley Fertilizer Co. v. Taylor*, 141.

2. The power to commit to jail a person refusing to testify before a commissioner, as provided for in section 1362 of The Code, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defined. *Ib.*

3. In a proceeding for the examination of a party to an action, under sections 580 and 581 of The Code, the court has authority, without his consent to make an order in a county other than that in which the action is pending, but within the district, committing him for contempt. *Ib.*

4. Where the judge directed the sheriff to commit one refusing to answer questions propounded to him in such examination, to the common jail until he should be willing to answer: *Held*, to be error since it was an attempted delegation of judicial power to an executive officer,

PRACTICE—*Continued.*

and allowed the sheriff to determine how his prisoner should sufficiently demonstrate his willingness to testify or what was such a compliance with the order as to justify his release. *Ib.*

5. In such case the order should direct the issuing of a *capias*, or that defendant be arrested and brought before the court to answer as for contempt. *Ib.*

6. A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. *Parker v. McPhail*, 502.

7. The rule that, except by consent or in those cases specially permitted by statute, the Judge can make no order in a cause outside of the county where it is pending, applies only to judgments on the merits or to motions in the cause strictly so called, but does not apply to ancillary proceedings. *Ib.*

8. Where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and cannot be reviewed. *Ib.*

AS TO APPEALS.

1. A party cannot assign as error on appeal to the Supreme Court the refusal of a judgment for which he did not ask. *Mayo v. Farrar*, 66.

2. An appeal from an order of commitment of a party to jail, made in an ancillary proceeding before the trial of the main action, will not be dismissed as premature. *Bradley Fertilizer Co. v. Taylor*, 141.

3. Where a *certiorari* has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case on appeal, but the clerk of the Superior Court returns that appellant failed to perfect his appeal or to pay fees for transcript of record, though demanded, the appeal will be dismissed. *Broadwell v. Ray*, 191.

4. An appeal from a motion to dismiss an action is premature and will not be entertained. *Kellogg v. Mfg. Co.*, 191; *Mullen v. Canal Co.*, 109.

5. An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed by this Court on motion of the defendant, or *ex mero motu*, for failure of the complaint to state a cause of action. *Harper v. Pinkston*, 293.

6. The provision in section 876 of The Code for an appeal in fifteen days after notice of judgment in cases where "the process is not personally served," applies only in cases where the service is by publication, and has no application when the summons is personally served on the agent or officer of a corporation under section 217 (1) of The Code. *King v. R. R.*, 318.

7. A motion to reinstate an appeal dismissed for failure to print must be made at the same term (Rule 30 of the Court), and will only then be allowed for good cause shown. *Pipkin v. Green*, 355.

PRACTICE—*Continued.*

8. A motion to reinstate an appeal dismissed for failure to docket the record at the first term of this Court after the trial below, is fatally defective where it does not show that the delay was without laches on the part of the appellant. *Ib.*

9. An appeal from an adjudication upon an agreed state of facts is a sufficient assignment of error by the party against whom the ruling is made. *Greensboro v. McAdoo*, 359.

10. Where, after an appeal from the refusal of judgment for the restitution of personal property, the appellant has come in possession of the property or its equivalent, this Court will not hear the matter merely to adjudicate the costs, but will dismiss the appeal. *Russell v. Campbell*, 404.

11. Where, in the case on appeal, there is not a sufficient recital of the evidence or of the facts admitted or proven, to point the exceptions or to enable the Court to ascertain what errors of law are complained of, the judgment below will be affirmed. *Falkner v. Thompson*, 455.

12. An appeal, not filed by appellant as a pauper, when dismissed for failure to print the record, will not be reinstated on affidavit of appellant that before he could raise the money to print, the case was reached and dismissed. *Turner v. Tate*, 457.

13. When a prayer for instruction does not appear in the record, an exception to the refusal of judge to give it, will not be considered in this Court. *McMillan v. Baxley*, 578.

14. Failure to settle or furnish a case on appeal is not good ground for a motion to dismiss, but for motion to affirm, since there may be errors on the face of the record, which the Court will inspect of its own motion, and which may entitle the appellant to a reversal. *Ib.*

15. No formal "case on appeal" is required on an appeal from an order granting an injunction until the hearing. *Ib.*

16. Although an appeal from the refusal of a motion to dismiss an action is premature, the exception, having been noted, will be reviewed on appeal from the final judgment. *Luttrell v. Martin*, 593.

17. Recitals of fact set out by an appellant as grounds for his motion for a new trial, will not be considered, when they neither appear in the record nor are found as facts by the judge. *Ib.*

18. The statutory requisites as to appeals cannot be dispensed with, except with the assent of counsel entered in the record or evidenced by writing. Rule 39 of Supreme Court. *Sondley v. Asheville*, 694.

19. Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal it will be deemed to have been waived, and will not be passed on by this Court. *Marshall v. Stine*, 697.

20. Where no exception of any kind appears in case on appeal, and no error appears on the record proper, the judgment below will be affirmed. *Ib.*

PRACTICE—*Continued.*

21. Where no exception is set out in the case on appeal other than "To the whole of this charge the plaintiff excepted," and it does not affirmatively appear that there was not more than one proposition of law laid down in the charge, and no error appears on the face of the record proper, the judgment of the court below will be affirmed. *Hemphill v. Morrison*, 756.

22. While the refusal of the trial judge to give instructions for, will be deemed to have been excepted to, yet, if it is not assigned as error in case on appeal, it will be deemed to have been waived. *Davis v. Duval*, 833.

23. An assignment of error, such as "for error in the charge," or "excepted to," is too general, and will not be considered by this Court. *Ib.*

24. Where, in an appeal, there is neither statement of case, assignment of error, nor any error apparent on the record, the judgment below will be affirmed. *S. v. Whitmire*, 895.

25. Where exceptions are not taken to a refusal to submit issues tendered, or to those submitted, until after verdict on a motion for new trial, such exceptions are too late to be considered on appeal. *Carr v. Alexander*, 783.

26. Failure to enter exception to a judgment within ten days from the expiration of the term of the court, forfeits the right of appeal. *Tucker v. Life Assn.*, 796.

AS TO EXCEPTIONS.

1. Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question, immediately taken and noted and assigned as error for the case on appeal, is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel before the close of the evidence, as provided by section 415 of The Code. *Lee v. Williams*, 510.

2. Failure to grant an instruction not asked for in writing is not ground for exception. *Marshall v. Stine*, 697.

3. Exceptions to the judge's charge, filed in the clerk's office after the settlement of the case on appeal, are not properly a part of the transcript on appeal, and should not be sent up. *Hemphill v. Morrison*, 756.

4. The purpose of requiring exceptions to be made specifically in appellant's statement of case is, that the judge, in settling the case, may send up such parts of the testimony as are pertinent to the parts of the charge excepted to, and that the appellee may be apprised at the "settlement" of the case, and before argument here, of the true grounds upon which the appeal is based. *Ib.*

5. The judge below has no authority, without the consent of the appellee, to extend the time fixed by the statute for filing exceptions, and no agreement of counsel, when denied and not entered upon the record in writing, will be considered in this Court. *Ib.*

PRACTICE—*Continued.*

AS TO INJUNCTIONS AND RESTRAINING ORDERS.

1. A restraining order can be issued in any cause by any judge of the Superior Court anywhere in the State, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned or holding by exchange the courts within the district in which the county where the cause is pending is situated. *Hamilton v. Icard*, 589.

2. A perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. *Ib.*

3. The jurisdiction to grant an injunction till the hearing, is restricted to the resident judge of the district, or the judge assigned thereto or holding by exchange the courts of the district within which the county, wherein the case is pending, is situated. *Ib.*

4. If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days notice to the parties interested. *Ib.*

5. By stipulation in writing, duly signed by the parties or by their attorneys, they may, under section 337, designate any other judge than those indicated by section 336 of The Code to hear the application. *Ib.*

6. No formal "case on appeal" is required on an appeal from an order granting an injunction till the hearing. *Ib.*

AS TO INSTRUCTIONS TO JURY.

1. Requests for special instructions to the jury, as well as that the trial judge shall put his charge in writing, should be made at or before the close of the testimony. *Ward v. R. R.*, 168.

2. A general exception to a "charge as given" by the trial judge will not be considered on appeal. *Buffkins v. Eason*, 162.

3. A request to charge the jury is properly refused where there is nothing in the pleadings or evidence upon which to base it. *McMillan v. Baxley*, 578.

4. Where a prayer for an instruction does not appear in the record, an exception to the refusal of the judge to give it will not be considered in this Court. *Ib.*

5. An instruction which assumed as proved certain facts upon which the testimony was conflicting was properly refused. *Ib.*

6. Failure to grant an instruction not asked for in writing is not ground for exception. *Marshall v. Stine*, 697.

7. Where the substance of an instruction prayed for has already been given in response to another request, it is unnecessary to repeat it. *Alexander v. R. R.*, 720.

PRACTICE—*Continued.*

8. A prayer for instruction embracing a general proposition fully covered in instructions already given was properly refused. *Ib.*

AS TO PLEADING.

1. The denial, by answer, of the title to property, for the possession of which claim and delivery is brought, dispenses with the necessity of proving a demand before action brought. *Rich v. Hobson*, 79; *Buffkins v. Eason*, 162.

2. Where, in an action to subject the land of a deceased surety on a guardian bond to the payment of ward's debt, the amount of damages arising from a breach of the bond is alleged in the complaint and admitted in the demurrer, an objection that judgment has not first been obtained on the guardian bond is untenable. *McNeill v. McBryde*, 408.

3. In such a case a ward can maintain the action in his own name, and the joinder of the State is a mere matter of surplusage, and not a misjoinder of different causes of action. *Ib.*

4. A petition to subject lands to sale, under section 1437 of The Code, is defective where it fails to set forth "the value of the personal estate of the intestate and the application thereof," and for such defect it is demurrable. *Ib.*

5. Misjoinder of parties must be taken advantage of by demurrer, and not by motion to strike out a party. *McMillan v. Baxley*, 578.

6. The misjoinder of unnecessary parties is mere surplusage, under The Code, and not a fatal objection. *Ib.*

7. It is within the discretion of the presiding judge, under The Code, sec. 274, to permit a plaintiff to file a reply, though by reason of laches he may not be entitled to do so. *Ib.*

8. Where an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, since the infant may repudiate the judgment if rendered before his majority, but such objection must be interposed in apt time and in the prescribed mode, which is by plea in abatement or by defense set up in the answer and before the trial on the merits. *Hicks v. Beam*, 642.

9. A material amendment, unverified, to a verified complaint renders it necessary to treat the complaint as unverified. *Brown v. Rhinehart*, 772.

10. The term of court at which a complaint is filed before the third day thereof is practically the return term, and if defendant does not answer, judgment by default final may be taken at such term in cases falling within the provisions of section 385 of The Code, and by default and inquiry in other cases. *Ib.*

11. Where, in an action begun by summons, returnable to Fall Term, 1891, of a Superior Court, at which term the complaint was filed, and an

PRACTICE—*Continued.*

alias summons returnable to Spring Term, 1892, was served in due time on one of the defendants, such defendant was properly ruled to answer at that term. *Luttrell v. Martin*, 593.

AS TO RECORDARI.

1. The writ of *recordari* is authorized by statute (section 545 of The Code) and recognized by the decisions of this Court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. *King v. R. R.*, 318.

2. Where a judgment was rendered by a justice of the peace against the defendant, who alleged that no service of the summons was made, he had his election to move before the justice, or his successor in office, to set aside the judgment or to apply for a writ of *recordari* as a writ of false judgment; and it was error for the judge below to dismiss the petition for such writ, without inquiring into the facts, upon the ground that the petitioner had mistaken his remedy and could only proceed by a motion in the cause before the justice of the peace to vacate the judgment. *Ib.*

3. Relief against a final judgment rendered by a justice of the peace, and alleged to have been obtained by fraud and collusion between him and others, cannot be had by means of a writ of *recordari*, but must be sought by an independent action. *Ib.*

AS TO REHEARING OF APPEALS.

1. Where a point was fully argued, considered and passed on at a former hearing, and no new authority has been cited and no authority or material fact overlooked, the point will not be considered on a rehearing. *Moore v. Beaman*, 558.

2. The fact that all the authorities cited in the argument were not noticed and discussed in the opinion handed down by the Court is no ground for a rehearing of the case. *Ib.*

3. Where this Court has in a former appeal in the same cause fully discussed the law applicable to the action, and the principles announced in the decision therein seem to have been carefully applied by the judge below in a subsequent trial, and upon an inspection of the whole record no error appears to have been committed on the second trial, this Court will not go over again the legal principles discussed in the former opinion, but, as authorized by chapter 379, Laws 1893, and section 957 of The Code, will not write out its reasons at length, but simply announce its decision. *Bradsher v. Cheek*, 838.

AS TO TRIALS.

1. Error in admitting incompetent testimony is cured when the judge withdraws it from the jury and enjoins them not to consider it in making up the verdict. *Toole v. Toole*, 152.

2. It is not error on the part of the judge below to refuse to submit an issue offered by a party upon whom the burden rests, when there is no evidence to support it. *Vanstory v. Thornton*, 196.

PRACTICE—*Continued.*

3. Where an issue distinctly raised by the pleadings is submitted to the jury without objection, a motion by plaintiff, after verdict for the defendant, for judgment on the pleadings cannot be entertained. *Lewis v. Foard*, 402.

4. In such case a *certiorari* to correct the case on appeal by having it to state that the motion for judgment after verdict was made on admissions in the testimony of the defendants on the trial, as well as on the pleadings, will be denied where it appears that plaintiff did not ask for instructions on that aspect of the case, nor file any exceptions to the judge's charge. *Ib.*

5. A motion for judgment *non obstante veredicto* can only be made on the face of the pleadings. *Ib.*

6. Where presumptions of fraud arise from dealings between father and son, the jury must, under proper instructions, find the fraudulent intent, unless it is rebutted by proof. *Clement v. Cozart*, 412.

7. Where an issue submitted by the court is in entire conformity with the answer and broad enough to comprehend an alleged parol trust set up by the answer as having been made with the defendant or with another in his behalf, and is substantially the same as the issue tendered by the defendant, it is not error to refuse to submit the latter. *Hamilton v. Buchanan*, 463.

8. Where, by consent of the parties, the judge frames the issues at the close of the testimony, and no exception is made on the trial to such issues or to the evidence or charge, objection cannot be raised on appeal that the issues submitted were not such as arose on the pleadings. Exception to the issues should be made on the trial, so that the judge may, if he thinks proper, revise and correct them. *Wills v. Fisher*, 529.

9. An inquiry as to damages cannot be executed at the same term as that at which judgment by default is rendered, unless it is expressly allowed by statute. *Brown v. Rhinehart*, 772.

10. Where an action, not within the provisions of section 385 of The Code, was brought to August Term, 1891, of a Superior Court, but complaint was not filed until December Term following, and at March Term, 1892, the case was put on the trial docket, and, when called, an amended complaint, unverified, was filed, and, the defendant not having appeared, certain issues were submitted to the jury, and, upon the findings, a judgment final was rendered, no judgment by default and inquiry having been obtained: *Held*, (1) that the case was properly placed on the trial docket, since not only issues of fact joined on the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put thereon; (2) that it was irregular and not according to the course of practice to submit the case to a jury at March Term, 1892, without judgment by default and inquiry, and to enter a judgment on the verdict. *Ib.*

11. A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the

PRACTICE—*Continued.*

verification of the answer was attested only by a person signing his name, with the letters "N. P." added thereto, but without an official seal. *Tucker v. Life Assn.*, 796.

PRESUMPTIONS, STATUTE OF.

1. The Code (sec. 137) does not postpone the time when causes of action shall accrue, but merely extends the period of limitation or presumption after a cause of action has accrued by omitting from the count the time between 1 May, 1861, and 1 January, 1870. *Thompson v. Nations*, 508.

2. A cause of action against an administrator arose, December, 1864, and he filed his account in April, 1891, and suit was brought against him and his sureties in June, 1891: *Held*, that the lapse of twenty years from 1 January, 1870, raised a presumption of abandonment or settlement which was not rebutted, as to the sureties on the administration bond, by the filing of the administrator's account showing a balance due the distributees. *Ib.*

3. Presumption of payment not having arisen on a judgment *quando acciderint* taken against an administrator of a deceased principal in an action commenced before The Code, the fact that an action is barred on the judgment absolute and final taken at the same time against the surety raises no presumption of payment of the judgment *quando*, for, as the statute of presumptions does not apply to the judgment absolute, the rule that a presumption of payment as to one is a presumption as to all, has no application. *Dickson v. Crawley*, 629.

PRINCIPAL AND AGENT.

Where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either may sue upon it, but if the action be by the latter, the defendant is entitled to be placed in the same position, at the time of the disclosure of the real principal, as he would be if the agent had been the real contracting party. *Barham v. Bell*, 131.

PRINCIPAL AND SURETY, 458, 754.

1. A contract made by a creditor with a principal debtor for forbearance to sue for a fixed and limited period, founded on a sufficient consideration, without reserving the right to proceed against the surety, and made without his assent, releases the surety. *Chemical Co. v. Pegram*, 614.

2. Where an agency contract, to which defendants were sureties, provided that the agent of plaintiff (the principal debtor) would give his promissory notes for goods sold by him, payable at the times fixed in said contract, defendant sureties being liable therefor, and said notes were executed, and the creditor at their maturity had a settlement with the agent (the principal debtor) and surrendered the old notes to him, accepting notes due at future dates in renewal of and substitution for the same, without reserving any rights against the sureties

PRINCIPAL AND SURETY—*Continued.*

or obtaining their consent to the extension: *Held*, that such acceptance of new notes constituted a contract on the part of the creditor to postpone action against the principal debtor until they matured, and hence discharged the sureties. *Ib.*

PROBATE OF DEED, 223.

It is the province of the judge presiding at a trial, and not of the jury, to pass upon the sufficiency of a certificate of probate of a mortgage deed. *McMillan v. Baxley*, 578.

PROCEEDINGS FOR CONDEMNATION OF LAND.

1. Where the owner of land appealed from a report of a jury appointed by a corporation to assess damages or benefits resulting to his land by opening a street thereon, on the ground that no damages were given, and in the appellate court a judgment was entered with the consent of the appellant therein, declaring that the proceedings subsequent to the condemnation of the land, and in reference to the assessment of damages and benefits, were irregular and void, and dismissing the appeal at cost of appellant: *Held*, that the effect of such judgment was to leave the parties in exactly the same position they occupied before the proceedings were instituted, and the owner is not estopped thereby from insisting, in another suit, that the corporation shall be compelled to have damages, etc., assessed. *McDowell v. Asheville*, 747.

2. Where land had been condemned in 1887 for widening a street, and the house thereon was torn down in 1890, and in the meantime rented by the owners, it was proper, on the trial of a suit relating to the damages for such condemnation, to instruct the jury that they should allow interest on such sum as they might assess as damages from the time of the condemnation, but should take into consideration the use made of and benefit received by the plaintiffs from the land after such date, against the damages. *Miller v. Asheville*, 759.

3. After proceedings for the condemnation of land by the city of Asheville were begun, but before the trial and verdict assessing damages therefor, chapter 135, Private Acts of 1891, was passed, sec. 16 of which provided that in condemnation proceedings all benefits to the owner shall be considered: *Held*, that such act was merely a change of remedy and is valid, and it was error in the court below to instruct the jury that the benefits assessed must be only "those which are special to the owner and not such as he shares in common with other persons." *Ib.*

4. Where land, limited by a will to one for life and by contingent remainder to others, was condemned by a city for widening streets, the damages awarded stand in the same plight and condition as the realty, and it was proper to adjudge that the balance of the recovery, after deducting the present value of the life estate of the life tenant, should be invested by the clerk until the termination of the life estate so as then to be divided among the parties then entitled in the manner provided by the will as to the realty for which it had been substituted. *Miller v. Asheville*, 769.

PROCEEDINGS FOR CONDEMNATION OF LAND—*Continued.*

5. In ascertaining damages for the condemnation of land, where the amount of damages and benefits have both been found by the jury, it is immaterial whether the mathematical operation of deducting one from the other is made by the court or the jury. *Ib.*

PUBLIC HIGHWAY.

The mere use of a way for twenty years by persons generally, for vehicles or traveling on foot, does not constitute it a public highway, nor in the absence of evidence of condemnation or actual dedication does the fact that the public have exerted control over it for any period less than twenty years tend to show that an easement has been acquired by user, which raises the presumption of a grant. *S. v. Wolf*, 889.

PUBLIC SCHOOL SYSTEM.

Where a controversy without action is submitted for the sole purpose of obtaining the opinion of the court upon a question, the effect of which might be to derange for a time the administration of the public school system, this Court will decline to entertain the controversy. *Board of Education v. Kenan*, 566.

PUBLICATION OF SUMMONS.

Where an affidavit for publication of summons is defective it is proper for the judge to permit an amendment and to grant an alias order of publication instead of dismissing the action. *Mullen v. Canal Co.*, 109.

PURCHASER.

Without notice of fraud, 424.

At mortgage sale, 608. See also Mortgage.

AT EXECUTION SALE.

The proviso to section 1, chapter 147, Acts of 1885 ("Connor's Act"), that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." *Cowen v. Withrow*, 736.

RAILROADS.

1. Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing whom he does not know at all or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured, the law imputes it to his own negligence and holds the railroad company blameless. *High v. R. R.*, 385.

2. The conductor of a railroad train is authorized to expel without using violence or force, one who refuses to pay regular fare at any point where he may safely get off, provided it be (as required by the

RAILROADS—*Continued.*

statute, section 1962 of The Code) "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train"; and provided, further, that the ejected person is not willfully or wantonly exposed to danger of life or limb. *Roseman v. R. R.*, 709.

3. A conductor requiring an intoxicated man to leave the train for nonpayment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. *Ib.*

4. A somewhat intoxicated passenger who gets off safely without assistance, when told that he must pay his fare or leave the train, and whom the conductor has seen a few minutes before in an eating-house demanding food and acting somewhat boisterously, may be reasonably supposed to be capable of reaching a place of safety where he is left in the evening, when it is neither raining nor freezing, within 200 yards from a dwelling-house, and not far from the railroad station. *Ib.*

5. A conductor is not bound to act upon the volunteered opinion of a passenger as to the physical or mental state of a drunken man who has been expelled from the train, where he has no reasonable ground to believe that the man is unable to find a place where he will be safe. *Ib.*

6. Where, in an action for damages for an injury received at a railroad crossing, plaintiff testified that she "held up very slow" as she was driving across, and, hearing no bell, which she had heard the day before while at the crossing, notwithstanding the noise of the factories on each side of the street, concluded that no engine was approaching, and drove on: *Held*, that it was not necessary for her to get out of the buggy and go beyond the cars to look up and down the track, or to stop and listen for an approaching engine when no signal was given of its approach. *Alexander v. R. R.*, 720.

7. Where, in an action against a railroad for injuries received by plaintiff at a railroad crossing, an instruction asked for by defendant was, "That if plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it was negligence on her part, and the answer to the issue (as to contributory negligence) should be 'Yes'": *Held*, that while it would have been proper to give the conclusion, "the answer should be 'Yes,'" yet the refusal to give it was not error, since the failure to do so could not mislead the jury or prejudice the defendant.

8. In an action against a railroad for injuries received by plaintiff at a railroad crossing, it appeared that there were in the neighborhood of the crossing a factory and a foundry, both making a noise like a running train. Defendant asked the court to instruct the jury, on an issue as to contributory negligence, "That if the cars on the track cut off plaintiff's vision, and the noise of the factory and machine shop drowned other noises, it was the duty of plaintiff to use her sense of hearing all the more cautiously, and if she failed to use greater than

RAILROADS—*Continued.*

ordinary caution, the answer should be 'Yes.'" It was not error to substitute for the words "the answer to the second issue should be 'Yes'" the words "it would be negligence." *Ib.*

9. Where a railroad company kept cars standing on side tracks, near a street crossing, where plaintiff was injured, an instruction to the jury, in an action for damages, that "defendant had the right to leave its cars standing on the track, provided it kept open a sufficient passway," was as favorable to defendant as it was entitled to. *Ib.*

RAILROAD COMMISSION.

1. The Railroad Commission Act (chapter 320, Laws 1891) confers upon the Commission no power to prescribe rules or regulations for telegraph companies other than those directed by section 26 of said act, which requires it to fix rates, etc. *Mayo v. Tel. Co.*, 343.

2. For a violation of the rules prescribed by the commission fixing rates for messages, the commission may serve notice of such violation on the offender, and may, on hearing, direct full compensation to the injured party, enforceable by civil action under section 10. *Ib.*

3. Where a complaint against a telegraph company charges defendant with specific instances of unnecessary delay in transmitting and delivering messages, but alleges no violation of the regulations of the commission prescribing the rates of charges for messages, it states no cause of action under the act. *Ib.*

RECEIVER.

1. The sureties on the official bond of a clerk of the Superior Court who was afterwards appointed receiver of an infant's estate, under section 22, chapter 53 of Battle's Revisal, are liable for any breach of his duties as receiver. *Waters v. Melson*, 89.

2. The burden is upon such clerk and his sureties to show that he used due diligence in investing the money in his hands. *Ib.*

RECORDS OF COURT.

1. CANNOT BE COLLATERALLY ATTACKED.

The records of a court, professing to state judicial transactions of the court itself, cannot be collaterally attacked, but must stand until attacked in a proper proceeding for the purpose and reformed by the court which made them. *Forbes v. Wiggins*, 122.

2. WHEN ADMISSIBLE AS EVIDENCE.

Where the original papers in a cause have been burned or lost, the minutes of the court in which they were filed are admissible in evidence to establish the validity of the proceedings. *Smith v. Allen*, 223.

3. CONTENTS OF.

Parol testimony is admissible to prove contents of lost, burnt or destroyed records. *Varner v. Johnston*, 570.

RECORD ON APPEAL.

A record on appeal which does not show that a Superior Court was opened and held at all in the county from which the appeal comes is fatally defective. *High v. R. R.*, 385.

RECORDS FROM ANOTHER STATE, Authentication of, 798.

RE-ENTRY.

Where lessors of mining privileges remain in possession of the land covered by the lease, and the lease becomes forfeited by nonuser, no reëntry by them is practicable or necessary, and they or their grantees have a right, without demand or notice to the lessees after the forfeiture, to resist the entry of the lessees for mining purposes. *Maxwell v. Todd*, 677.

REFERENCE, 759, 836.

1. In an action to recover land, brought by one who purchased at a mortgage sale, and who, the defendant claimed, was a partner of the mortgagee and knew that the whole amount was not due, as claimed by the mortgagee, a reference to state an account would not be proper until the issues as to the partnership, *bona fides* of the purchaser, and his knowledge of the state of accounts between mortgagee and mortgagor could be determined. *McMillan v. Baxley*, 578.

2. The compensation of a referee is a part of the costs of an action in which a reference has been ordered and was fixed by statute (C. C. P., sec. 533), unless otherwise agreed upon by the parties; and it is the duty of the clerk to tax such costs, subject, of course, to the revision of the judge. *Young v. Connelly*, 646.

REGISTER OF DEEDS.

The trust being personal to himself, a register of deeds cannot excuse himself from liability for failing to make proper inquiry as to the age of a party to a marriage license, upon the ground that his deputy agent made such inquiry. *Maggett v. Roberts*, 71.

REHEARING.

1. Where a point was fully argued, considered, and passed on at a former hearing, and no new authority has been cited and no authority or material fact overlooked, the point will not be considered on a rehearing. *Moore v. Beaman*, 558.

2. The fact that all the authorities cited in the argument were not noticed and discussed in the opinion handed down by the Court is no ground for a rehearing of the case. *Ib.*

REMEDIAL STATUTES.

Power of Legislature to enact remedial statutes giving effect to contracts relating to land. *Lowe v. Harris*, 472.

REMOVAL OF CAUSES.

1. The act of Congress of 1887 as amended by that of 1888, which provides that "where a suit is pending or may hereafter be brought in any

REMOVAL OF CAUSES—*Continued.*

State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court," does not authorize the removal of a cause pending in a Superior Court of this State between a citizen of another State, as plaintiff, and a resident corporation and a foreign corporation, doing business and having property in this State, as defendants. *Lawson v. R. R.*, 390.

2. Where the prerequisites for removal under the act of Congress do not exist, the Federal tribunal has no jurisdiction to remove or try a case, and where such court makes an order that the case be certified thereto, the State court may decline to permit the removal. *Ib.*

3. The mere filing of a petition for removal of a suit from the State to the Federal court does not work a transfer, but the suit must be one that may be removed, and the petition must show the petitioner's right to demand a removal. Until these prerequisites appear, the State court is not ousted of its jurisdiction, and its orders and proceedings must be respected. *Ib.*

4. Where it appears upon the face of a petition to remove a cause pending in a State court to the Federal court that the former had exclusive original jurisdiction, it is the right and the duty of the State court to insist upon its exclusive authority and to retain jurisdiction. *Tucker v. Life Assn.*, 796.

RENTS AND PROFITS.

Where P., as executor, holding a debt against C., and also holding the legal title to land in trust to convey it to C., upon the payment of the debt, conveyed the land to others, P. and his grantees having been in possession and receiving the rents and profits of the land, it was proper, in a suit by C. to recover the land and rents, profits and damages, to adjudge, upon proper findings by the jury, that such rents, profits and damages were chargeable against P. to the extent of extinguishing the debt held by him as executor against C. *Carr v. Alexander*, 783.

RETROACTIVE LEGISLATION.

1. While the Legislature has power to modify or repeal the whole of the statute of frauds, in so far as it relates to future contracts for the sale of land, it has no authority to give the repealing statute a retroactive effect, so as to affect or destroy vested rights. *Lowe v. Harris*, 472.

2. There is a general presumption against the retroactive operation of statutes where it would impair vested rights. *Ib.*

RIGHT OF WAY, conflicting claims of railroads to, 661.

RIGHTS, VESTED.

Vested rights may not be affected or destroyed by retroactive legislation. *Lowe v. Harris*, 472.

RULE IN SHELLEY'S CASE.

Not abolished by section 5, chapter 43 of the Revised Code. *Starnes v. Hill*, 1.

SALE.

Under fraudulent judgment. See Fraudulent Judgment.

OF LAND FOR ASSETS.

1. In proceedings by an administrator for leave to sell land for assets to pay decedent's debts, the heir has a right to show that judgments taken against the administrator after the commencement of the proceedings were wrongfully suffered to be entered against him. In such case the judgment creditors should be made parties. *Tilley v. Bivins*, 348.

2. A petition to sell land for assets is defective where it fails to set forth "the value of the personal estate of the intestate and the application thereof," and for such defect it is demurrable. *McNeill v. McBryde*, 408.

UNDER MORTGAGE.

1. Even if a sale under the power in a mortgage should be invalid by reason of a failure on the part of the mortgagee to comply with the directions of the power, yet, as the mortgagee held the legal title, his deed would convey it to the purchaser, subject to the equities of the mortgage. *Lunsford v. Speaks*, 608.

2. The acquiescence of a mortgagor in the conduct of a sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it. *Ib.*

BY EXECUTOR OR ADMINISTRATOR.

1. A private sale of a *chose in action* by an executor or administrator, if made in good faith, is valid. *Dickson v. Crawley*, 629.

2. A sale by one of several executors will pass title to the purchaser. *Ib.*

SCHOOL TAX.

The school tax raised in a county, under chapter 517, Laws 1891 (amending section 2589 of The Code), is payable to the board of education of said county, and the sheriff who has collected it cannot defeat a recovery thereof by such board of education by attacking the constitutionality of the statute and alleging that the fund is payable to some one else, when the fund is claimed only by such board of education. *Board of Education v. Kenan*, 566.

SCOPE OF AUTHORITY OF AGENT.

The scope of the authority of one officer of a corporation, as to a past transaction at least, cannot be proved by the unsworn declarations of another officer or agent. *Rumbough v. Improvement Co.*, 751.

SECOND APPEAL, Affirmance without review, 838.

SECONDARY EVIDENCE.

Evidence of the contents of a letter to prove a contract is inadmissible when the letter itself is not produced nor its loss satisfactorily accounted for. *Rumbough v. Improvement Co.*, 751.

SHERIFF'S RETURN.

Where process has been served, but the sheriff's return is unsigned, the judge may permit it to be signed *nunc pro tunc* during a trial where it is in evidence. *Luttrell v. Martin*, 593.

SHELLEY'S CASE.

Rule in, has not been abolished by section 5, chapter 43 of Revised Code. *Starnes v. Hill*, 1.

STATUTES.

REPEAL OF, BY IMPLICATION, 862.

Repeals of statutes by implication are not favored, and in order to give an act, not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing an irreconcilable repugnancy between its provisions and those of the earlier law. *Greensboro v. McAdoo*, 359.

DISABLING OR RESTRICTIVE.

Statutes disabling or restricting persons capable of contracting in the making of contracts, being in derogation of common right, must be strictly construed. *Marriner & Bro. v. Roper Co.*, 164.

REMEDIAL.

Power of Legislature to enact. *Lowe v. Harris*, 472.

OF LIMITATIONS. See Limitations.

STOCKHOLDERS.

The stockholders of an unincorporated joint-stock association are partners, and each liable for all of the debts of the concern. *Bain v. Clinton Loan Assn.*, 248.

SUBORDINATE OFFICER OF STATE GOVERNMENT.

It is not the province or right of a subordinate officer of the State government to assume an act of the General Assembly to be unconstitutional and to refuse to act under it, except only, if at all, in cases of plain and palpable violation of the Constitution, or where irreparable harm will follow the action. *Board of Education v. Kenan*, 566.

SUBCONTRACTOR, 236, 335.

1. Where, in an action against the owner of a building and the contractor by a subcontractor to enforce his lien, the contractor admits his lia-

SUBCONTRACTOR—*Continued.*

bility to plaintiff, and the owner of the building does not resist the judgment adjudicating the lien and ordering its enforcement, the defendant contractor has no right to object to the judgment because the satisfaction of the debt which he admits he owes to the subcontractor is imposed upon his codefendant, the owner of the building. *Lumber Co. v. Sanford*, 655.

2. The fact that a subcontractor sought in one action to enforce his lien against the owner of the building without joining the contractor, cannot estop the plaintiff from recovering a judgment against the contractor in another action in which the latter and the owner of the building are parties. *Ib.*

SUMMONS, SERVICE OF.

1. To make service of process on a corporation, a copy of same must be left with the officer of the company to whom it is delivered, or read, as provided by sections 217 and 840 of The Code. *Aaron v. Lumber Co.*, 189.

2. Where a summons was properly served, and the sheriff's return was unsigned, though endorsed in proper form, the judge at the trial did not exceed his powers in permitting the sheriff to sign the return *nunc pro tunc*. *Luttrell v. Martin*, 593.

By publication, 109.

SURETY. See, also, Principal and Surety, 458.

1. On arbitration bond, 405.

2. On Administration Bond.

After a presumption of abandonment or settlement of a claim against an administrator has arisen, it cannot be rebutted as to the sureties on an administrator's bond by the filing of an account by the administrator, showing a balance due the distributees. *Thompson v. Nations*, 508.

3. For Insolvent Corporation.

Where the maker of a note, in an action thereon, claims that it was given as security for a loan made by plaintiff to a corporation, his liability is fixed by a showing that the corporation was insolvent at the commencement of the action, and it would be a vain thing to require plaintiff to seek to recover from an insolvent corporation before demanding of defendant the fulfilment of his contract of suretyship. *Barnard v. Martin*, 754.

4. Equity of, for exoneration. *Davis v. Lassiter*, 128.

SURVEY.

The priority of a survey is of no moment where a junior grant under a junior entry is good against a senior grant under a lapsed entry, nor is vagueness in junior grantee's entry, if cured by his survey and grant. *Kimsey v. Munday*, 816.

TAXES AND TAXATION.

1. The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude the State from seeking the aid of the Superior Court through a creditor's suit. *State and Guilford v. Georgia Company*, 34.

2. Where taxes have been assessed upon the property of a corporation and the tax list placed in the hands of the sheriff, who cannot find any property to satisfy the same, a proceeding may be brought by the State and county, either or both, in the nature of a creditor's bill, against the corporation for the collection of the taxes, either with or without proceedings for its dissolution. *Ib.*

3. The term "excessive valuation," as used in section 78, chapter 326, Laws 1891, relating to the valuation of real estate for taxation, means a valuation exceeding that which was adjudged to be proper by the boards authorized by the act to finally determine such valuation. *Pickens v. Comrs.*, 698.

4. The term "excessive tax," as used in the said section, means a tax exceeding what the tax would be if correctly calculated at the legal rate on the adjudged valuation as determined or approved by the board of county commissioners. *Ib.*

5. In an action by a taxpayer against the county commissioners to recover the amount of an alleged excessive tax paid by him, he is not entitled to recover unless he can show that the valuation of his property upon the tax books is greater than that fixed by the proper authorities, or that the tax which he has been forced to pay was greater than it would have been if correctly computed at the legal rate on the adjudged valuation. *Ib.*

TAXES, PUBLIC SCHOOL, To whom payable, 566.

TAXPAYER, Action by, to recover taxes paid, 698.

TAX TITLE.

Where, in an action to compel the sheriff to make a deed to plaintiff for lands sold for taxes, as the lands of C. H. and J. H., and bought by plaintiff, former title was shown in C. H. and J. H., but no evidence was offered that C. H. and J. H. were the same men from whom the taxes were due, except that the tax list showed land listed and taxes due therefor from parties of the same name: *Held*, that the certificate of tax sale issued to plaintiff as purchaser is, under section 62, chapter 137, Laws 1887, and section 63, chapter 218, Laws 1889, "presumptive evidence of the regularity of all prior proceedings," and such presumption was not rebutted. *Basnight v. Smith*, 229.

TENANCY BY THE CURTESY INITIATE.

Neither the act of 1848 (section 1840 of The Code) nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since said act such tenancy confers no rights which the husband can assert against the wife as respects her real estate acquired after the act took effect, the intention and effect thereof being to provide for the wife a home, which she cannot be deprived of, either by her husband or his creditors. *Taylor v. Taylor*, 134.

TENANTS IN COMMON.

1. While one tenant in common, suing a trespasser in ejectment, and proving title to an undivided interest, is entitled to judgment for the possession of the whole land, if the evidence establishing his right demonstrates that others than the defendant hold as cotenants the other undivided interests, and that the action inures to their benefit, yet, when the defendant is a cotenant, the plaintiff should have judgment only for the recovery of the interest to which he shows title. *Foster v. Hackett*, 546.

2. Where, in an action to recover the possession of land, the plaintiff's testimony demonstrates incidentally the fact that a person, other than the defendant, holds as tenant in common with plaintiff all of the undivided interest not held by the latter, the action inures to the benefit of such cotenant as against a trespasser claiming sole seizin in himself and relying on an invalid tax deed with possession to show title under adverse right, and entitled the nominal plaintiff to recover possession of the whole for himself and his cotenant. *Moody v. Johnson*, 804.

TESTIMONY. See, also, Evidence.

1. The admission of incompetent testimony is cured when the judge withdraws it from the jury and enjoins them not to consider it in making up their verdict. *Toole v. Toole*, 152.

2. The testimony of experts as to the usages and customs of trade is admissible to explain the doubtful language of a written contract. *Simpson v. Pegram*, 541.

TESTAMENTARY CAPACITY.

Where a will has been admitted to probate, a party claiming property disposed of by it to another cannot, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded, under section 2150 of The Code. *Varner v. Johnston*, 570.

TRIAL.

1. Where a motion to dismiss an ancillary remedy, as an attachment, is improperly refused, it will not affect the validity of a trial and judgment on the merits. *Luttrell v. Martin*, 593.

2. Prayers for instructions to the jury, although in writing, not made at or before the close of the evidence, but after argument was begun on the trial, were not in apt time, and it was not error to refuse them. *Ib.*

3. Where the jury found an issue and then separated, and the judge found as a fact that they had not been influenced by what had been said to them after their separation, it was not error to permit them to reassemble and put their finding in writing. *Ib.*

4. Where, in an action by an infant in his own name against defendant for services rendered, the defendant relied upon a general denial of the indebtedness as his sole defense, thereby waiving objection to

TRIAL—*Continued.*

plaintiff's disability to sue: *Held*, that a motion to dismiss the action after the testimony was all in was made too late to be entertained. *Hicks v. Beam*, 642.

5. Where, on issues raised by the allegations in two causes of action—one on a special contract, and the other on a *quantum meruit*—with the corresponding denials in the answer, the jury found that plaintiffs had not complied with the terms of the written contract and defendant was not indebted to them thereon, but was indebted for work and labor done for the amount claimed: *Held*, that the findings were not inconsistent or contradictory. *Simpson v. R. R.*, 703.

6. Requests for instructions that "the evidence shows that plaintiff's injury was caused by her own negligence," and that if the jury believe the evidence, plaintiff "did not use reasonable care in crossing the railroad, and thereby contributed by her own negligence to her injury," were properly refused. *Alexander v. R. R.*, 720.

7. Where the jury had been instructed as to the duty of a plaintiff, in a suit for damages for an injury, to use reasonable and proper care for her recovery, in such manner as to indicate that otherwise she could not recover damages at all, the defendant cannot complain of a refusal of an instruction that, if she did not use such care, she could only recover for such loss of time and medical bills as would reasonably result under proper treatment. *Ib.*

8. Where, in an action for injuries caused by negligence of defendant, it appeared that plaintiff was herself a practicing physician, and, immediately after the accident, went to see a patient; that she had not been kept at home nor carried her arm in a sling, but continued to practice her profession as a physician and to drive with her injured hand, it was not error to refuse a special instruction "that plaintiff did not use the proper means for restoring herself to health," and could not recover for the injury caused by her own neglect, when the question of such neglect had already been left to the jury, under a proper charge. *Ib.*

9. Where, upon an issue as to whether an injury complained of was caused by the negligence of the defendant, the plaintiff made a *prima facie* case, the judge ought to have instructed the jury to find the issue in her favor if they believed her testimony, and it was error to blend his instructions on that issue with those on an issue relating to contributory negligence. *Jordan v. Asheville*, 743.

10. Where, in the trial of an appeal from an assessment of damages in condemnation proceedings instituted by a city for widening a street, a map of the plan of the city had been introduced at the beginning of the trial, without objection, and used by other witnesses in explaining their testimony, it was not error to permit a subsequent witness to testify in regard to such map. *Miller v. Asheville*, 759.

11. In a trial of an action wherein plaintiff sought damages for land condemned by a defendant city, the defendant, having admitted that plaintiff's ancestor died seized in fee simple of the land condemned; that his will, which was in evidence without objection, had been con-

TRIAL—*Continued.*

strued by the Supreme Court as devising the land in question for life to one of the plaintiffs, and that the other plaintiffs were her children, and, having itself instituted the proceedings against the plaintiffs for condemnation of the land, was estopped to deny that the title to the land was in the plaintiffs or some of them. *Ib.*

12. Where, in the trial of a suit relating to damages for land condemned by defendant city and belonging to one of the plaintiffs for life and to the others by way of contingent remainder, the jury assessed the totality of damages due by the defendant to the plaintiffs, the defendant has no concern as to the division of the fund and cannot object to an order of reference to ascertain how, and in what proportions, the plaintiffs are entitled thereto. *Ib.*

13. Where, in an action on a promise to pay a sum of money, the jury found the same to be due the plaintiff, "with interest from maturity," which was fixed by the judgment at the date thereof, the defendant cannot complain that the court did not instruct the jury when, upon the face of the writing, the sum became due. *Penniman v. Alexander*, 778.

14. Where defendant resisted recovery on his acceptance of an order given to plaintiffs by a builder, on the ground that the builder had quit work before the day fixed for the payment, and the judge instructed the jury that, if there was fraud or collusion between the builder and the defendant to defraud the plaintiff, the defendant could not avoid his liability, and the burden of proving such fraud and collusion was on the plaintiff: *Held*, that such instruction was not erroneous and could not have the effect of prejudicing the defendant's cause. *Ib.*

15. It is not error to refuse to submit issues tendered by a party in an action of ejectment when it appears that every pertinent inquiry can be presented in the three issues ordinarily submitted in such actions. *Kimsey v. Munday*, 816.

16. Where plaintiff claims under grants issued under lapsed entries, he cannot fall back on a subsequent entry made a short time before such grants were issued. *Ib.*

17. Where, in an action by plaintiff to recover from the administrator compensation for services rendered the intestate, the defendant relied as a defense upon the fact that in a suit brought by him and his wife and other heirs at law of the intestate to set aside, for undue influence, a deed made by the intestate to plaintiff for services rendered, the deed was declared void, and it was in evidence that no compensation had been allowed the plaintiff by said settlement, and that there were assets in defendant administrator's hands and no debts against the estate: *Held*, that while there is no privity between the administrator and the heirs, yet, as the estate goes to the heirs and next of kin, all of whom (with the defendant) were parties to the compromise decree setting aside the deed, such decree is admissible to show that the plaintiff's claim for services had not been paid or provided for. *Davis v. Duval*, 833.

18. On the trial of one charged with larceny of pigs, there was some evidence that they were not the property of S., as charged in the bill,

TRIAL—*Continued.*

and the court charged, at the request of defendant, that the jury must be satisfied beyond a reasonable doubt that the pigs belonged to S., and in that connection the court said, among other things, "The solicitor has proved by the testimony of S. and J. that the pigs were the property of S.": *Held,* that the latter part of the charge, if construed in connection with the whole case, meant only that it was "in proof for the State by the testimony" of such witnesses, etc., and was not likely to be misunderstood by the jury as a declaration by the court that the State had proved the ownership to be in S. *S. v. Jackson,* 851.

19. During the argument of a motion for continuance of a case in the presence, but prior to the impaneling, of the jury, a bystander remarked in open court that the prisoner's wife said she would not come to the trial, because she would only help to get her husband in jail: *Held,* that this was not ground for exception, as it did not occur on the trial, and if it had, the remark was not admitted as evidence, and, being an unsworn statement, it could not have been deemed to bias the jury against the sworn testimony placed before them. *Ib.*

20. Where, on appeal, a new trial was granted in a criminal case, on the ground that the judge below erred in submitting the case to the jury when there was not sufficient evidence to warrant it, defendant cannot on the new trial plead former acquittal, for he was convicted in the court below, and the granting of a new trial was not an acquittal; nor can he plead former conviction, for it was set aside and a new trial granted. *S. v. Rhodes,* 857.

TRIAL FOR MURDER, 859, 874, 878, 901.

1. Where, on a trial for murder, it did not appear that the prisoner asked and was denied time and opportunity to advise with counsel prior to making his statement before a committing magistrate, the confessions of the prisoner will not be excluded as evidence on the ground that he did not have such time and opportunity. *S. v. Rogers,* 874.

2. While the practice, if it exists, of keeping a prisoner tied or manacled during the preliminary examination before a committing magistrate, is not to be commended, yet the fact that a prisoner charged with murder was so tied during such examination would not, in itself, constitute a valid objection to the admission, as evidence, of confessions then made, unless it appeared that he was tied in such manner as to produce pain or to tend to induce or extort from him a confession. *Ib.*

3. On the trial of a prisoner charged with poisoning his wife, the court properly refused to allow counsel for defendant, while addressing the jury, to read to them from a treatise on toxicology, which could not have been admitted as evidence, and concerning which no witness had been examined. *Ib.*

4. The declarations of a prisoner, made immediately after and not during the transaction, constituting the offense with which he is charged, are not admissible in evidence, except as corroborative of his evidence, if he has availed himself of the privilege of testifying in his own behalf. *S. v. Edwards,* 901.

TRIAL FOR MURDER—*Continued.*

5. On a trial for murder, the defendant cannot complain of the exclusion of his declarations, made after the struggle and shooting which resulted in the death of his antagonist, if, in a subsequent period of the trial, all of such declarations were admitted after the State had called out a part of them. *Ib.*

6. On a trial for murder, the solicitor was permitted to ask a female witness (for whose favor the deceased and the prisoner were rivals, and who was sitting in the lap of the deceased just before the fatal struggle) whether the prisoner, when he came towards her and the deceased, appeared to be mad or in fun, the reply being that he seemed to be mad: *Held*, that such question being only a simpler form of an inquiry as to what the manner of defendant was when he approached deceased, was not improperly admitted. *Ib.*

TRUSTS AND TRUSTEES, 66, 223, 278, 463, 791.

1. Where land had been conveyed to a trustee for the sole use and benefit of a married woman and her heirs, subject to her own control, with full power to convey the same by will or deed (and if by the latter, with the joinder of her husband and trustee), she to occupy and use the land as the full beneficial owner thereof, a mortgage given by her and her husband without the joinder of the trustee is inoperative and void. *Mayo v. Farrar*, 66.

2. Where property has been placed in the hands of a trustee for the sole and separate use of a married woman, she has no power of disposition over it, except such as is clearly given in the instrument creating the trust and in the manner therein prescribed. *Monroe v. Trenholm*, 634.

3. If a trustee wrongfully withholds from the *cestui que trust* the benefits of the trust estate, relief will be granted at the request of such *cestui que trust*, but not at the instance of a stranger who volunteers to ask redress, or if the trustee becomes incompetent for any reason to execute the trust, it is the right of the beneficiary, but not of a stranger, to have such trustee removed and another substituted. *Ib.*

4. Where a husband, in order to secure to his wife and children a portion of his real property, conveyed land to his son, S. D. T. and his heirs, in trust for the sole use and benefit of E. B. T. (the grantor's wife), and authorized and empowered the trustee at any time to dispose of any or all of the property "when so required by the said E. B. T., and to invest the proceeds as she may direct": *Held*, that a conveyance of such land by the wife, E. B. T., to a third person in trust for her, the said E. B. T.'s daughter, vested no title or interest in the grantee and did not entitle him and the daughter to recover possession of the land from S. D. T., the trustee named in the husband's deed, since the latter gave the wife no power to convey the land. *Ib.*

UNREGISTERED DEED.

1. Equitable interest created by, how extinguished. *Miller v. Church*, 626.

2. The proviso to section 1, chapter 147, Laws 1885 ("Connor's Act"), that no purchase of land from a donor, bargainor, or lessor shall avail to

UNREGISTERED DEED—*Continued.*

pass title as against any unregistered deed executed prior to 1 December, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." *Cowen v. Withrow*, 736.

USURY.

1. Under the act of 1866 (chapter 24), which is essentially the same as the present usury law (section 3836 of The Code), the taking, receiving, charging, etc., a greater rate of interest than the legal rate prescribed by the act, is a forfeiture of the entire interest. *Moore v. Beaman*, 558.

2. A loan of money at a greater rate of interest than that allowed by the law (chapter 24, Laws 1866) is, usury being pleaded, simply a loan which, in law, bears no interest, and, payments being made, the law applies them to the only legal indebtedness—the principal sum. *Ib.*

3. Under Laws 1866, ch. 24, which declares that "no interest shall be recoverable at law or in equity," when more than the legal rate has been contracted for, it is immaterial whether the creditor seeks his relief by a proceeding which formerly would have been termed a suit in equity, or by an action at law, or whether the creditor be plaintiff or defendant. *Ib.*

4. A contract, if made payable in another State to avoid the usury laws in this State, will be adjudged usurious, whatever may be the law of that State. *Meroney v. Loan Assn.*, 842.

VALUE AND FACE VALUE.

The "value" of a thing is its general power of purchasing—the command which its possession gives over purchasable commodities in general; and "face value" is the value expressed on the face of the writing in the commodity in which it is payable. *Marriner v. Roper Co.*, 164.

VENDOR AND VENDEE.

1. While a vendee may, by parol agreement with the vendor, in consideration of the rescission of the contract of purchase, become the latter's tenant without surrendering possession of the land, yet in order to avoid the contract on this ground, the vendor or those claiming under him must show an unconditional surrender by the vendee of his rights. *Taylor v. Taylor*, 27.

2. Where the vendee refused to surrender the vendor's bond for title, and the notes given for the purchase-money remained in the possession of the vendor, or one claiming under him, proof that the vendee had at various times agreed to pay rent was not of itself evidence to show abandonment of the contract of purchase. *Ib.*

VERIFICATION OF PLEADINGS.

A verification of an answer, attested only by a person signing his name with the letters "N. P." added thereto, but without official seal, is insufficient, and will be treated as no verification. *Tucker v. Life Assn.*, 796.

WIDOW'S ALLOWANCE.

The purpose of sections 2116 and 2117 of The Code is to provide for the dependent family of the deceased residing with the widow at the death of her husband, and not at the date of her application. *In re Hayes*, 76.

WILL.

1. A testatrix bequeathed all her personal property to her husband, except such as was otherwise specifically disposed of, and after giving specific articles of silverware, etc., to certain persons, bequeathed to M. R. all the furniture in her homestead, and other furniture, wherever it might be at her death: *Held*, that the "furniture" given to M. R. did not include *silverware* remaining after the specific bequests, nor books, portraits, china or glassware, but did include carpets, cook stoves and utensils. *Ruffin v. Ruffin*, 102.

2. Where a testatrix provided for the sale of a slave and the distribution of proceeds among her grandchildren when the youngest should arrive at a certain age, the fact that such grandchild died before attaining the designated age does not change the time at which the sale and distribution should be made. *Varner v. Johnston*, 570.

3. Where a will provided that at a certain time a slave "shall be put to public sale and the proceeds equally divided between my surviving grandchildren, and in case any of my grandchildren shall die and leave children, their children shall receive the portion which would have been coming to them, provided they had lived until the distribution": *Held*, that the intention of the testatrix was that the fund should be divided among her grandchildren living at the time of the sale, and the children of such as were dead, leaving children. *Ib.*

4. Where a will has been admitted to probate, a party claiming property disposed of by it to another cannot, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded, under section 2150 of The Code. *Ib.*

5. The limitation of five years, prescribed in section 67 of The Code, as the time in which burnt records may be restored after destruction, as provided in section 59 of The Code, applies to a proceeding begun in 1886 to restore the record of a will destroyed in 1875, notwithstanding the act of 1893 (chapter 295), which amends section 67 by abolishing the limitation. *Ib.*

6. The statutory method of establishing the contents of a lost or destroyed record, as prescribed in section 55 *et seq.* of The Code, does not have the effect to exclude parol evidence to prove such contents; therefore, where, in an action to recover property alleged to have been disposed of by such will, a referee found that the will had been duly probated and the record of it destroyed, and that no copies were extant, but refused to admit testimony as to its contents, the court below should, on the exception of the one offering such evidence, have remanded the case to the referee for his findings as to the contents. *Ib.*

7. Where a testator devised lands and other property to his wife, and in the devising clause provided as follows: "All the above named arti-

WILL—*Continued.*

cles she is to have the undisturbed possession of, during her natural life. At her death they shall descend to and become the property of my three blind sons, to wit, Edward, Elias, and Jason, to be equally divided between them for their support; to be managed for them by my executor. In case one of them should die, then said property, with its increase, shall descend to and become the property of the other two. In case two of them die, then the aforesaid property shall inure to and become the property of the remaining one; at his death all the property that remains I will to be sold by my executor to the best advantage, and the moneys arising from said sale shall be equally divided among all my grandchildren, of whatever name": *Held*, that the plain intention of the testator was that upon the death of the last survivor of the three blind sons, all the property committed by him to the management of his executor for their support—the land and so much of the personal property as remained—should be sold for division, as stated in his will. *Smathers v. Moody*, 791.

8. Where a will relating to land was admitted to probate in another State before the enactment of Revised Code, ch. 119, sec. 17, requiring two of the subscribing witnesses to be actually examined, and the order of the court admitting the same to probate recited that there were two attesting witnesses and that the will was duly proved by them, the presumption arises that each of them was examined and testified to everything essential to show that the will was executed in accordance with the requirements of sections 1 and 6 of chapter 122, Revised Statutes. *Moody v. Johnson*, 798.

WITNESS. See Evidence, Practice, and Trial.

A defendant, whose wife is dead, and who seeks to avoid a deed made by her in fraud of his marital rights, is a competent witness to prove that the signature to a letter, in which she promised to marry him, was in her own handwriting, it not being a "transaction" with a deceased person, within the meaning of section 590 of The Code. *Ferebee v. Pritchard*, 83.

WORKING ON PUBLIC ROADS, EXEMPTION.

1. Section 25 of chapter 147 of Laws of 1852, which exempts the officers, servants and employees of the Fayetteville and Western Railroad Company (now the Cape Fear and Yadkin Valley Railway Company), incorporated thereby, from working on the public roads, is constitutional. *S. v. Womble*, 862.

2. Such exemption, being contained in a private act, is not repealed by section 2017 of The Code, which requires all able-bodied male persons between the ages of 18 and 45 to work on the public roads, since by section 3873 of The Code it is provided that "No act of a private or local nature shall be construed to be repealed by any section of this Code." *Ib.*